The Transfer of Property Act

(IV of 1882)

D. V. CHITALEY
&
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G. N. Dir
Jammu & Kashmir
Srinagar

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P. N. Dar
Advocate High Court
Jammu & Kashmir
Srinagar.

THE

TRANSFER OF PROPERTY ACT

(IV OF 1882)

WITH EXHAUSTIVE, ANALYTICAL AND CRITICAL COMMENTARIES

4th (1968) Edition

By

D. V. CHITALEY, B.A., LL.B. *Advocate.*

AND

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Chief Editor, "The All India Reporter."

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2ND AND 3RD EDITIONS

BY

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Assisted by D. V. CHITALEY, B.A., LL.B., Advocate.

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Nagpur

PREFACE TO THE FOURTH EDITION

We have great pleasure in bringing out this, the 4th Edition of the A. I. R. Commentary on the Transfer of Property Act. The last edition was brought out in 1950 and, undoubtedly, a long time has elapsed since then. But owing to other preoccupations of a more pressing nature, we were compelled to put off the fresh edition of the publication in spite of there being a growing demand in the market for the same. We express our regrets and apologies for this long delay. We hope that our readers will find this edition as being of sufficient merit to justify their waiting. Although the centre of gravity in litigation and in the output of case-law has been shifting in recent years after the coming into force of the Constitution, as a result of new trends in the development of law and the shifting of emphasis to new problems, the law of property still continues to be a fundamental branch of our legal system and an up-to-date edition of a text book which has been recognised as a standard authority on the subject will, we are sure, be welcomed by the profession although it makes its appearance after rather a great delay. It need not be said that the book has been made up-to-date by inclusion of all the subsequent changes in Law and by the inclusion of the entirety of the case-law on the subject reported after the last edition.

Before concluding we wish to place on record our sense of gratitude to all our colleagues on the staff of All India Reporter who have collaborated with us in the preparation of this edition.

D. V. C.
S. A. R.

PREFACE TO THE THIRD EDITION

No prefatory note is required for this edition beyond the statement that copies of the second edition were exhausted quickly and the book has been out of stock for some time now. The subject yields to none in importance and there have been hundreds of decisions reported since the previous edition. All these have been incorporated in their proper places in this edition. A considerable amount of new matter has been added to the book which has also been revised thoroughly in the light of later decisions. The profession is quite familiar with the method of treatment in the A. I. R. Commentaries and it is not necessary here to explain it at any length. As in the second edition, the provisions of Order 34 of the Civil Procedure Code (relating to suits on mortgages) have been given along with commentaries in the Appendix. Mention may also be made of the glossary of words and phrases and also of the conveyancing forms given at the end of the third volume, along with other useful appendices.

The Authors have great pleasure in expressing their deep sense of obligation to the members of the Editorial Staff of the All India Reporter for their able and unstinting co-operation in the preparation of this edition.

V. V. C.
S. A. R

PUBLISHERS' NOTE

TO THE SECOND EDITION

THE fact that within a little more than a year from the last edition of this work, copies have run out of stock and there is a demand for a fresh edition testifies that this book has met with the appreciation of the legal profession in a remarkable measure and the Publishers feel highly grateful to the profession for this encouragement. In this edition not only have the text and case-law been brought up to date by the incorporation of later amendments to the statute and the decisions reported after the last edition, but also the Commentary has been revised to a considerable extent. Several new "Notes" have been added and the Commentary has been amplified and clarified in many places. The following instances may be mentioned here :- The question of priority of a mortgage in respect of a contingent liability has been considered more fully in Note 7 on Section 48. A new Note on the distinction between S. 53, Trans'er of Property Act and S. 23, Contract Act, has been added under S. 53. In Note 13 on S. 5-A the position as to the transferee's right to bring a *suit* to protect and safeguard his possession has been further clarified. A new Note as to the execution and attestation of sale deeds has been added under S. 54. The real nature of a mortgage as being the transfer of an interest in the *fee simple* has been explained in the Notes on S. 58. The real nature of the right of redemption has been further clarified in the Notes on S. 60. Some new topics have been considered under S. 105.

Attention may be drawn to the following further improvements each one of which is of an important character adding considerably to the usefulness of the publication —

1. All the references in the foot-notes have been checked up and verified again with reference to the propositions for which the cases are cited as authorities.

2. The foot-note remarks bringing out the peculiarities of individual cases cited as authorities, which are a special feature of the A. I. R. Commentaries, have been revised and made fuller and more complete.

3. Decisions of a leading nature with reference to the proposition in question have been distinguished by special marks.

4. The Appendices have been made still fuller.

5. The provisions of Order 34, Civil Procedure Code, with the Commentary thereon have been given as an Appendix. The specially intimate connection between the substantive law and the procedural law as to mortgages

and charges is shown by the fact that prior to the Code of Civil Procedure of 1908, the provisions as to suits on mortgages were contained in the Transfer of Property Act itself. No justification is, therefore, necessary for the inclusion of Order 34, Civil Procedure Code, in this book.

6. Model forms for transfers of immovable property have been given towards the end of the third volume.

7. A glossary of legal terms relating to the subjects dealt with in the book has been given. This glossary includes also terms used in deeds written in Indian languages.

The inclusion of additional matter has necessitated a change in the division of the subject allotted for each volume. The first volume now ends with S. 53A; the second, with S. 104 and the remaining Sections, Appendices, Forms, Glossary, Table of Cases, Index etc., make up the third volume.

The Publishers thank Messrs. V. S. Balkundi, B.A. LL B., V. B. Bakhle, M.A., LL.B., and K. S. Bakre, B.SC., LL.B , for their valuable help in bringing out this edition.

It is earnestly hoped that the Bench and the Bar will appreciate the several improvements introduced in this edition and extend to it the same encouragement as they have shown to the First Edition. The Publishers take this opportunity of stating that they will gratefully receive and consider all suggestions for the further improvement of the book.

PREFACE TO THE FIRST EDITION

The Transfer of Property Act was placed on the Statute Book of this country in 1882, 60 years ago, and was based largely on the principles of the English Law of Real Property. Although it codified most of the leading rules on the subject, it was not exhaustive of the whole law relating to the transfer of property. Important changes were effected in the English Law in 1925 by the enactment, in England, of the Law of Property Act, (15 Geo. V. Ch. 20), and this was followed in this country by the Transfer of Property (Amendment) Act of 1929, introducing extensive changes in the Transfer of Property Act, 1882. The case law has grown enormously on this subject which is one of the most important and the most difficult branches of the law.

In bringing out this work the Authors have felt greatly encouraged by the appreciation, by the public, of the method of treatment of the subjects dealt with by them in their previous Commentaries on the Civil Procedure Code, the Criminal Procedure Code and the Limitation Act. The aim of the Authors has been, as in the words referred to above, to ascertain all the important questions that have arisen for consideration under the various sections of the Act, to collect all the decisions of the Privy Council and of the Superior Courts in India, on such questions, and to set out the principles underlying them with a view to the application thereof to new sets of circumstances that may arise for solution in daily practice. Where there have been conflicts of decisions on any question the Authors have attempted to discuss the question in the light of first principles and offer a definite opinion thereon. Foot-note remarks have been, wherever necessary, given to show the applicability to the principle stated in the commentary to the facts of the particular case cited. The object of this is to enable the practitioner to pick out the particular ruling applicable to the case on hand without much difficulty. The page of the decision, where the point referred to in the commentary occurs, has been indicated in brackets, after the citation. References to Official Reports, wherever a case has been so reported, have invariably been given. An Appendix has been given containing several enactments which have a bearing upon this Act. An exhaustive General Index has been added.

The Authors trust and hope that this work will receive the same generous support as their other works.

* * * * *

V.V.C.
K.N.A.

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CORRECTION

In the fcotnotes under the text of S. 1—

1. Footnote 'h' on page 151 should be *read* as part of footnote 'e' on page 150 after item (n).
2. In footnote 'j' *for* the date '31-3-1968' in the last but one line *read* '31-3-1970.'

ABBREVIATIONS

A. O. ... Government of India (Adaptation of Indian Laws) Order, 1937, as modified by the Government of India, (Adaptation of Indian Laws) Supplementary Order, 1937.

A.I.R. 1914 All., Bom, etc ... All India Reporter, Allahabad, Bombay, etc., sections of the respective years.

A. L. O. ... Adaptation of Laws Order.

All. or I L R All. ... Indian Law Reports, Allahabad Series.

Agra ... Agra High Court Reports.

All. L. Jour. ... Allahabad Law Journal.

All. W. N. ... Allahabad Weekly Notes.

All. W. R. ... Allahabad Weekly Reporter.

Beng. L. R ... Bengal Law Reports.

B. R ... Bihar Reports.

Bom. or. I. L. R. Bom. ... Indian Law Reports, Bombay Series.

Bom. H. C. R. ... Bombay High Court Reports.

Bom. L. R. ... Bombay Law Reporter.

Bom. P. J. ... Bombay Printed Judgments.

Bourke ... Bourke's Reports

Bur L. Jour. ... Burma Law Journal.

Bur. L. R. Burma Law Reports.

Bur. L. Tim. Burma Law Times.

Cal. or I. L. R. Cal. ... Indian Law Reports, Calcutta Series.

Cal. L. Jour. ... Calcutta Law Journal.

Cal L. Rep. ... Calcutta Law Reports.

Cal. W. N. ... Calcutta Weekly Notes.

C. P. L. R. ... Central Provinces Law Reports.

Cor. ... Coryton's Reports.

Cri L Jour. ... Criminal Law Journal.

Hay. ... Hay's Reports.

Hyde. ... Hyde's Reports.

Ind App ... Law Reports, Indian Appeals.

Ind. Cas. ... Indian Cases.

Ind. Jur. (N. S.) ... Indian Jurist (New Series).

Ind. Jur (O. S.) ... Indian Jurist (Old Series).

Kar. (I. L. R) ... Indian Law Reports, Karachi Series.

Knapp. ... Knapp's Reports.

Lah. or I. L. R. Lah. ... Indian Law Reports, Lahore Series.

Lah. L. Jour. ... Lahore Law Journal.

L R. A. ... Law Reporter, Allahabad.

Low. Bur. Rul ... Lower Burma Rulings.

Luck. or I. L. R. Luck. ... Indian Law Reports, Lucknow Series.

Mad. or I. L. R. Mad. ... Indian Law Reports, Madras Series.

Mad. H. C. R. ... Madras High Court Reports.

Mad. Jur. ... Madras Jurist.

Mad. L. Jour. ... Madras Law Journal.

Mad. L. Tim. ... Madras Law Times.

Mad L. W. ... Madras Law Weekly.

Mad W. N. ... Madras Weekly Notes.

Marsh. ... Marshall's Reports.

Moo. Ind. App. ... Moore's Indian Appeals.

Moo. P. C. C. ... Moore's Privy Council Cases.

Nag. (I. L. R.) ... Indian Law Reports, Nagpur Series.

Nag. L. Jour. ... Nagpur Law Journal.

Nag. L R ... Nagpur Law Reports.

N. W. P. H. C. R. ... North West Provinces High Court Reports.

Oudh Cas. ... Oudh Cases.

Oudh L. Jour. ... Oudh Law Journal.

Oudh L. R. ... Oudh Law Reports.

Oudh S. C. ... Oudh Select Cases.

Oudh W. N. ... Oudh Weekly Notes.

Pat. or I. L. R. Pat. ... Indian Law Reports, Patna Series.

Pat. H. C. C. ... Patna High Court Cases.

Pat L. Jour. ... Patna Law Journal.

Pat. L. Tim. ... Patna Law Times.

Pat. L. R. ... Patna Law Reporter.

Pat. L. W. ... Patna Law Weekly.

Pat. W. N. ... Patna Weekly Notes.

Pun. L. R. ... Punjab Law Reporter.

Pun. Re. ... Punjab Records.

Pun. W. R. ... Punjab Weekly Reporter.

R. & J.s' ... Rafique and Jackson's Oudh Privy Council Decisions.

Rang. ... Indian Law Reports, Rangoon Series.

Rang. L. R. ... Rangoon Law Reports.

R. D. ... Revenue Decisions.

Sar ... Saraswati's Privy Council Judgments.

Shome L. R. ... Shome's Law Reports

Sind L. R. ... Sind Law Reporter.

Suther ... Sutherland's Privy Council Judgments.
Suth. W. R. ... Sutherland's Weekly Reporter.
U. P. L. R. ... United Provinces Law Reports.
Upp. Bur. Rul. ... Upper Burma Rulings.
Weir. ... Weir's Criminal Rulings.

ENGLISH, IRISH AND SCOTTISH LAW REPORTS

A. C. ... (Law Reports) Appeal Cases (1891 onwards).
Amb. ... Ambler [Chancery].
App. Cas. ... (Law Reports) Appeal Cases (1876-1890).
Atk. ... Atkyns [Chancery].
B. & B. ... Ball and Beaty [Chancery, Ireland].
Beav. ... Beavan [Rolls Court].
Bligh ... Bligh [House of Lords].
Bligh (N. S.) ... Bligh New Series [House of Lords].
Bro. C. C. ... Brown's Reports of Cases in Chancery.
Bro. Parl. Cas. ... Brown's Reports of Cases in Parliament [House of Lords].
Bunb. ... Bunbury [Exchequer].
Burr. ... Burrow's Reports [King's Bench].
Cas. T. Talb. ... Cases in the time of Lord Talbot [Chancery].
Ch. D. ... (Law Reports) Chancery Division (1876-1890)
Ch. App. ... Chancery Appeals.
Cl. & Fin. ... Clark and Finnelly [House of Lords].
Co. Rep. ... Coke (Sir Edward) (Common Law).
Cox. ... Cox [Chancery].
De G. and J. ... De Gex and Jones [Chancery & Bankruptcy Appeals].
De G. M. and G. ... De Gex, Macnaghten and Gordon [Chancery and Bankruptcy Appeals].
De G. & Sm. ... De Gex and Smale [Chancery].
Dick. ... Dickens [Chancery].
Dow ... Dow [House of Lords].
Dow. & Cl. ... Dow and Clark [House of Lords].
Drew. ... Drewry [Chancery].
East ... East [King's Bench].
Eden ... Eden (Hon. Robert Henry) [Chancery].
E. R. ... English Reports.
Eq. ... (Law Reports) Equity (1866-1875).
Eq. R. ... Equity Reports (1853-1855).
Eq. Cas. Abr. ... Equity Cases Abridged [Chancery].
H. & N. ... Hurlstone and Norman [Exchequer].
H. & Tw. ... Hall and Twells [Chancery].
Hare ... Hare [Vice-Chancellor's Courts].
H. L. ... (Law Reports) House of Lords.
H. L. C. ... House of Lords Cases (Continuation of Clark and Finnelly).
Jac. ... Jacob [Chancery].
Jac. & W. ... Jacob and Walker [Chancery].
J. & H. ... Johnson and Hemming [Chancery].
J. P. ... Justice of the Peace.
Jur. (N. S.) ... Jurist Reports (New Series).
K. & J. ... Kay and Johnson [Chancery].
K. B. ... (Law Reports) King's Bench.
Keen ... Keen [Rolls Court]
L. J. Ch. ... Law Journal Reports Chancery:
L. J. (N. S.) Ch. ... Law Journal Reports (New Series) Chancery.
L. J. (N. S.) Ex. ... Law Journal Reports (New Series) Exchequer.
L. J. K. B. ... Law Journal Reports, King's Bench.
L. J. P. C. ... Law Journal Reports, Privy Council.
L. J. Q. B. ... Law Journal Reports, Queen's Bench.
L. R. C. P. ... Law Reports, Common Pleas.
L. R. Eq. ... Law Reports, Equity.
L. R. Ex. ... Law Reports, Exchequer.
L. R. H. L. ... Law Reports, House of Lords.
L. R. C. P. ... Law Reports Privy Council.
L. T. ... Law Times Reports.
L. T. (N. S.) ... Law Times Reports (New Series).
Mac. & G. ... Macnaghten and Gordon [Chancery].
Madd. ... Maddock [Chancery].

M. B. R. ... Morrell Bankruptcy Reports.
M'Cle....M'Cleland [Exchequer & Equity].
Meg. ... Megone [Companies, Cases].
Mer. ... Merivale [Chancery].
My. & Cr. ... Mylne and Craig [Chancery Appeals].
My. & K. ... Mylne and Keen [Chancery Appeals].
M. & W. ... Meeson and Welsby [Exchequer].
Prec. Ch. ... Precedents in Chancery.
Price ... Price [Exchequer].
P. Wms. ... Peere Williams [Chancery].
Q. B. ... (Law Reports) Queen's Bench (1891 onwards) or Queen's Bench Reports (1841 to 1852).
Q. B. D. ... (Law Reports) Queen's Bench Division (1876-1-90).
R. ... Reports [All The Courts].
R. R. ... Revised Reports.
R. S. C. ... Rules of the Supreme Court of England.
Sch. & Lefr. ... Schoales and Lefroy [Chancery, Ireland]
Sim. ... Simons [Chancery].
Sim. & St. ... Simons and Stuart [Chancery].
Smith ... J. P. Smith's Reports [King's Bench]
S. J. ... Solicitors' Journal.
Swanst. ... Swanston [Chancery].
T. L. R. ... Times Law Reports.
Vern. ... Vernon [Chancery].
Ves. & B. ... Vesey and Beames [Chancery].
Ves. (Jun.) ... Vesey, Junior (After the first two Volumes, Ves simply) [Chancery].
Ves. Sen. ... Vesey, Senior [Chancery].
Wils Ch. ... Wilson John [Chancery].
W. R. (Eng.) ... Weekly Reporter (England).
Y. & C. C. C. ... Young and Collyer Chancery Cases.

Other Abbreviations

A ... Superior A placed above the word or words in square brackets indicates that the word or words is or are the last in the series of general adaptations directed to be made by one or more of the Adaptation Orders.
Art. ... Article.
B. R. ... Board of Revenue.
Civ. ... Civil.
C. A. ... Court of Appeal.
Cl. ... Clause.
Cr. ... Criminal.
D. B. ... Division Bench.
F. B. ... Full Bench.
F. C. ... Federal Court.
F. N. ... Foot-Note.
G. I. ... Government of India Act, 1935.
Jour. ... Journal.
L. P. ... Letters Patent
N. ... Note
O. ... Order.
P. ... Page.
P. C. ... Privy Council.
Pre. ... Preamble.
Rev. ... Revenue.
R. ... Rule
S. ... Section.
S. B. ... Special Bench.
U. P. B. R. ... United Provinces Board of Revenue.

IN THE FOOT-NOTES TO THE COMMENTARY —

(a) ('66) means (1866); ('04) means (1904); ('27) means (1927); ('39) means (1939).
(b) Full year reference is given prior to 1866, like (1818) and *not* ('18); (1865) and *not* ('65) and so on, and to all English cases.
(c) The method of citation of A. I. R. is slightly changed. It is, for example, thus: 1949 Cal. 583 (584) [AIR V 36 C 160]. In the square brackets V stands for Volume, the figure 36 denotes the 36th Volume of the All India Reporter, '1914' being the first Volume, and C stands for case.
(d) ✠ Indicates either a leading case or a case giving fuller reasons.
(e) † Indicates a case which is most appropriate for the proposition.
(f) **References to Official Reports are invariably given in all cases found in the Official Reports.**

Year.	No. of Act.	Short title.	How affected.
1882	IV	**Transfer of Property Act**	
1885	III	Transfer of Property (Amendment) Act.	Amending Ss. 1, 4, 6 and 69
1895	XV	Crown Grants Act.	Saving of Crown grants from the application of the Transfer of Property Act, 1882.
1900	II	Transfer of Property Act.	Amending Ss. 3 and 6 substituting new chapter for the old Chapter VIII.
1904	VI	Transfer of Property (Amendment) Act.	Amending Ss. 1, 59, 69, 107 and 117.
1908	V	Code of Civil Procedure.	Repealing Ss. 85 to 90 inclusive, 92 to 94 inclusive, 96, 97, 99 and certain words in S. 100.
1915	XI	Repealing and Amending Act.	Amending Ss. 59 and 69.
1917	XXVI	Transfer of Property (Validating) Act.	Validating certain transfers made prior to the 1st January, 1915.
1920	XXXVIII	Devolution Act.	Amending Ss. 1 and 117.
1925	XXXVIII	Transfer of Property (Amendment) Act.	Amending S. 130.
1926	XXVII	Transfer of Property (Amendment) Act.	Amending S. 3.
1927	X	Repealing and Amending Act.	Amending Ss. 3 and 6.
1929	XX	Transfer of Property (Amendment) Act.	Amending Ss. 1, 2, 3, 4, 5, 6, 11, 15, 39, 40, 43, 52, 55, 58, 59, 60, 62, 63, 64, 65, 67, 69, 71, 72, 76, 82, 83, 84, 98, 100, 102, 103, 106, 107, 108, 111, 128, 129 and 130. Substituting new sections for old Ss. 16, 17, 18, 53, 56, 61, 68, 73, 81, 91, 95, 96, 101 and 119. Inserting new Ss. 53A, 59A, 60A, 60B, 63A, 65A, 67A, 69A, 92, 93, 94 and 114A. Omitting Ss. 74, 75 and 80.
1930	V	Transfer of Property (Amendment) Act.	Amending S. 3.
1934	XXXV	Amending Act.	Amending S. 6.
1937	...	Government of India (Adaptation of Indian Laws) Order, 1937.	Amending Ss. 1, 6, 37, 52, 57, 58, 69, 107 and 117.
1938	IV	Insurance Act	Amending S. 130.
1944	VI	Transfer of Property (Amendment) Act.	Inserting new Ss. 130A and 135A. Substituting new S. 135 for old.

Year.	No. of Act.	Short title.	How affected.
1947	...	India (Adaptation of Existing Indian Laws) Order.	x x x x
1948	...	Indian Independence (Adaptation of Central Acts and Ordinances) Order.	Amending Ss. 1, 3, 52, 58 and 69.
1950	...	The Adaptation of Laws Order, 1950.	Amending Ss. 1, 3 and 52.
1951	III	The Part B States (Laws) Act, 1951.	Amends Ss. 1, 3 and 52.
1952	XLVIII	The Repealing and Amending Act, 1952,	Amending S. 69.
1956	...	The Adaptation of Laws (No. 2) Order, 1956.	Amending Ss. 1 and 3.
1963	XI	The Marine Insurance Act, 1963.	Repealing Ss. 130A and 135A.
		———	
1922	III	Madras City Tenant's Protection Act, 1921 (as amended by Mad. Act XIX of 1955).	Restricts application of T. P. Act in Madras City and Municipal Towns and Villages to which the said Act is extended.
1939	XIV	The Transfer of Property and The Indian Registration (Bombay Amendment) Act, 1939 (Ext. to whole State of Bombay by Bom. Act LVII of 1959.)	Amends S. 52.
1954	XXIV	The U. P. Civil Laws (Reforms and Amendments) Act, 1954.	Amends S. 106.
1959	LVII	Transfer of Property (Bombay Provision for Uniformity and Amendment) Act, 1959	Inserts S. 1A.
1963	XI	Marine Insurance Act, 1963.	Repeals Ss. 130A and 135A w. e. f. 1-8-1963.
1963	XLV	Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 (as amended by Maha. Act 1 of 1968). (Act to expire on 31-3-1970.)	Supplements provisions of the Act in regard to ownership flats.
1964	I	The Mizo District (Transfer of Land) Act, 1963.	Controls and regulates transfer of land, which includes buildings or other structures, in the Mizo District [20-5-1964].

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"The two leading maxims relative to the transfer of property are *firstly*, that alienation is favoured by the law; and *Secondly*, that an assignee holds property subject to the same rights and liabilities as attached to it whilst in the possession of the grantor." — BROOM, *A Selection of Legal Maxims.*

"Every man is restricted against using his property to the prejudice of others." — LORD TRURO in *Egerton* v. *Earl of Brownlow*, (1853) 23 L. J. Ch. 348 (400).

Adv
Jamm
Srinagar.

THE TRANSFER OF PROPERTY ACT

(IV OF 1882)

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THE TRANSFER OF PROPERTY ACT, 1882

ACT NO. IV OF 1882

(17th February, 1882)

AN ACT TO AMEND THE LAW RELATING TO THE TRANSFER OF PROPERTY BY ACT OF PARTIES.

Preamble.

WHEREAS it is expedient to define and amend certain parts of the law relating to the transfer of property by act of parties; It is hereby enacted as follows :—

CHAPTER I.

PRELIMINARY.

1. Short title.

This Act may be called the Transfer of Property Act, 1882.

Commencement.

It shall come into force on the first day of July, 1882.

Extent.

It extends in the first instance to the whole of India except the territories which immediately before the 1st November, 1956, were comprised in Part B States or in the States of Bombay, Punjab and Delhi.

But this Act or any part thereof may by notification in the Official Gazette be extended to the whole or any part of the said territories by the State Government concerned.

And any State Government may, from time to time, by notification in the Official Gazette, exempt, either retrospectively or prospectively, any part of the territories administered by such State Government from all or any of the following provisions, namely :—

Sections 54, paragraphs 2 and 3, 59, 107 and 123.

Notwithstanding anything in the foregoing part of this section, sections 54, paragraphs 2 and 3, 59, 107 and 123 shall not extend or be extended to any district or tract of country for the time being excluded from the operation of the Indian Registration Act, 1908, under the power conferred by the first section of that Act or otherwise.

2. Repeal of Acts. Saving of certain enactments, incidents, rights, liabilities, etc.

In the territories to which this Act extends for the time being the enactments specified in the schedule hereto annexed shall be repealed

to the extent therein mentioned. But nothing herein contained shall be deemed to affect—

(a) the provisions of any enactment not hereby expressly repealed :

(b) any terms or incidents of any contract or constitution of property which are consistent with the provisions of this Act, and are allowed by the law for the time being in force :

(c) any right or liability arising out of a legal relation constituted before this Act comes into force, or any relief in respect of any such right or liability : or

(d) save as provided by section 57 and Chapter IV of this Act, any transfer by operation of law or by, or in execution of, a decree or order of a Court of competent jurisdiction :

and nothing in the second chapter of this Act shall be deemed to affect any rule of Muhammadan law.

3. Interpretation clause.

In this Act, unless there is something repugnant in the subject or context,—

"immoveable property" does not include standing timber, growing crops or grass :

"instrument" means a non-testamentary instrument :

"attested," in relation to an instrument, means and shall be deemed always to have meant attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgment of his signature or mark, or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant; but it shall not be necessary that more than one of such witnesses shall have been present at the same time, and no particular form of attestation shall be necessary :

"registered" means registered in any part of the territories to which this Act extends under the law for the time being in force regulating the registration of documents :

"attached to the earth" means—

(a) rooted in the earth, as in the case of trees and shrubs ;

(b) imbedded in the earth, as in the case of walls or buildings; or

(c) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached :

"actionable claim" means a claim to any debt, other than a debt secured by mortgage of immoveable property or by hypothecation or pledge of moveable property, or to any beneficial interest in moveable property not in the possession, either actual or constructive, of the claimant, which the

Civil Courts recognize as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional or contingent :

"a person is said to have notice" of a fact when he actually knows that fact, or when, but for wilful abstention from an inquiry or search which he ought to have made, or gross negligence, he would have known it.

Explanation I. — Where any transaction relating to immoveable property is required by law to be and has been effected by a registered instrument, any person acquiring such property or any part of, or share or interest in, such property shall be deemed to have notice of such instrument as from the date of registration or, where the property is not all situated in one sub-district. or where the registered instrument has been registered under sub-section (2) of section 30 of the Indian Registration Act, 1908, from the earliest date on which any memorandum of such registered instrument has been filed by any Sub-Registrar within whose sub-district any part of the property which is being acquired, or of the property wherein a share or interest is being acquired, is situated :

Provided that—

(1) the instrument has been registered and its registration completed in the manner prescribed by the Indian Registration Act, 1908, and the rules made thereunder,

(2) the instrument or memorandum has been duly entered or filed, as the case may be, in books kept under section 51 of that Act, and

(3) the particulars regarding the transaction to which the instrument relates have been correctly entered in the indexes kept under section 55 of that Act.

Explanation II. — Any person acquiring any immoveable property or any share or interest in any such property shall be deemed to have notice of the title, if any, of any person who is for the time being in actual possession thereof.

Explanation III. — A person shall be deemed to have had notice of any fact if his agent acquires notice thereof whilst acting on his behalf in the course of business to which that fact is material :

Provided that, if the agent fraudulently conceals the fact, the principal shall not be charged with notice thereof as against any person who was a party to or otherwise cognizant of the fraud.

[4.] Enactments relating to contracts to be taken as part of Contract Act.

The chapters and sections of this Act which relate to contracts shall be taken as part of the Indian Contract Act, 1872.

And sections 54, paragraphs 2 and 3, 59, 107 and 123 shall be read as supplemental to the Indian Registration Act, 1908.

CHAPTER II.

OF TRANSFERS OF PROPERTY BY ACT OF PARTIES.

(A) Transfer of Property, whether moveable or immoveable.

5. "Transfer of Property" defined.

In the following sections "transfer of property" means an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself, or to himself and one or more other living persons; and "to transfer property" is to perform such act.

In this section "living person" includes a company or association or body of individuals, whether incorporated or not, but nothing herein contained shall affect any law for the time being in force relating to transfer of property to or by companies, associations or bodies of individuals.

6. What may be transferred.

Property of any kind may be transferred, except as otherwise provided by this Act or by any other law for the time being in force.

(a) The chance of an heir-apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman, or any other mere possibility of a like nature, cannot be transferred.

(*b*) A mere right of re-entry for breach of a condition subsequent cannot be transferred to any one except the owner of the property affected thereby.

(*c*) An easement cannot be transferred apart from the dominant heritage.

(*d*) An interest in property restricted in its enjoyment to the owner personally cannot be transferred by him.

(*dd*) A right to future maintenance, in whatsoever manner arising, secured or determined, cannot be transferred.

(*e*) A mere right to sue cannot be transferred.

(*f*) A public office cannot be transferred, nor can the salary of a public officer, whether before or after it has become payable.

(*g*) Stipends allowed to military, naval, air-force and civil pensioners of the Government and political pensions cannot be transferred.

(*h*) No transfer can be made (1) in so far as it is opposed to the nature of the interest affected thereby, or (2) for an unlawful object or consideration within the meaning of section 23 of the Indian Contract Act, 1872, or (3) to a person legally disqualified to be transferee.

(*i*) Nothing in this section shall be deemed to authorize a tenant having an untransferable right of occupancy, the farmer of an estate in respect of which default has been made in paying revenue, or the lessee of an estate under the management of a

Court of Wards, to assign his interest as such tenant, farmer or lessee.

7. Persons competent to transfer.

Every person competent to contract and entitled to transferable property, or authorized to dispose of transferable property not his own, is competent to transfer such property either wholly or in part, and either absolutely or conditionally, in the circumstances, to the extent and in the manner, allowed and prescribed by any law for the time being in force.

8. Operation of transfer.

Unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property, and in the legal incidents thereof.

Such incidents include, where the property is land, the easements annexed thereto, the rents and profits thereof accruing after the transfer, and all things attached to the earth;

and, where the property is machinery attached to the earth, the moveable parts thereof;

and, where the property is a house, the easements annexed thereto, the rent thereof accruing after the transfer, and the locks, keys, bars, doors, windows, and all other things provided for permanent use therewith;

and, where the property is a debt or other actionable claim, the securities therefor (except where they are also for other debts or claims not transferred to the transferee), but not arrears of interest accrued before the transfer;

and, where the property is money or other property yielding income, the interest or income thereof accruing after the transfer takes effect.

9. Oral transfer.

A transfer of property may be made without writing in every case in which a writing is not expressly required by law.

10. Condition restraining alienation.

Where property is transferred subject to a condition or limitation absolutely restraining the transferee or any person claiming under him from parting with or disposing of his interest in the property, the condition or limitation is void, except in the case of a lease where the condition is for the benefit of the lessor or those claiming under him: Provided that property may be transferred to or for the benefit of a woman (not being a Hindu, Muhammadan or Buddhist), so that she shall not have power during her marriage to transfer or charge the same or her beneficial interest therein.

11. Restriction repugnant to interest created.

Where, on a transfer of property, an interest therein is created absolutely in favour of any person, but the terms of the transfer direct that such interest shall be applied or enjoyed by him in a particular manner, he shall be entitled to receive and dispose of such interest as if there were no such direction.

Where any such direction has been made in respect of one piece of immoveable property for the purpose of securing the beneficial enjoyment of another piece of such property, nothing in this section shall be deemed to affect any right which the transferor may have to enforce such direction or any remedy which he may have in respect of a breach thereof.

12. Condition making interest determinable on insolvency or attempted alienation.

Where property is transferred subject to a condition or limitation making any interest therein, reserved or given to or for the benefit of any person, to cease on his becoming insolvent or endeavouring to transfer or dispose of the same, such condition or limitation is void.

Nothing in this section applies to a condition in a lease for the benefit of the lessor or those claiming under him.

13. Transfer for benefit of unborn person.

Where, on a transfer of property, an interest therein is created for the benefit of a person not in existence at the date of the transfer, subject to a prior interest created by the same transfer, the interest created for the benefit of such person shall not take effect, unless it extends to the whole of the remaining interest of the transferor in the property.

Illustration.

A transfers property of which he is the owner to *B* in trust for *A* and his intended wife successively for their lives, and, after the death of the survivor, for the eldest son of the intended marriage for life, and after his death for *A's* second son. The interest so created for the benefit of the eldest son does not take effect, because it does not extend to the whole of *A's* remaining interest in the property.

14. Rule against perpetuity.

No transfer of property can operate to create an interest which is to take effect after the life-time of one or more persons living at the date of such transfer, and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the interest created is to belong.

15. Transfer to class some of whom come under sections 13 and 14.

If, on a transfer of property, an interest therein is created for the benefit of a class of persons with regard to some of whom such interest fails by reason of any of the rules contained in sections 13 and 14, such interest fails in regard to those persons only and not in regard to the whole class.

16. Transfer to take effect on failure of prior interest.

Where, by reason of any of the rules contained in sections 13 and 14, an interest created for the benefit of a person or of a class of persons fails in regard to such person or the whole of such class, any interest created in the same transaction and intended to take effect after or upon failure of such prior interest also fails.

17. Direction for accumulation.

(*1*) Where the terms of a transfer of property direct that the income arising from the property shall be accumulated either wholly or in part during a period longer than—

(*a*) the life of the transferor, or

(*b*) a period of eighteen years from the date of the transfer,

such direction shall, save as hereinafter provided, be void to the extent to which the period during which the accumulation is directed exceeds the longer of the aforesaid periods, and at the end of such last-mentioned period the property and the income thereof shall be disposed of as if the period during which the accumulation has been directed to be made had elapsed.

(2) This section shall not affect any direction for accumulation for the purpose of —

(*i*) the payment of the debts of the transferor or any other person taking any interest under the transfer, or

(*ii*) the provision of portions for children or remoter issue of the transferor or of any other person taking any interest under the transfer, or

(*iii*) the preservation or maintenance of the property transferred; and such direction may be made accordingly.

18. Transfer in perpetuity for benefit of public.

The restrictions in sections 14, 16 and 17 shall not apply in the case of a transfer of property for the benefit of the public in the advancement of religion, knowledge, commerce, health, safety, or any other object beneficial to mankind.

19. Vested interest.

Where, on a transfer of property, an interest therein is created in favour of a person without specifying the time when it is to take effect, or in terms specifying that it is to take effect forthwith or on the happening of an event which must happen, such interest is vested, unless a contrary intention appears from the terms of the transfer.

A vested interest is not defeated by the death of the transferee before he obtains possession.

Explanation.— An intention that an interest shall not be vested is not to be inferred merely from a provision whereby the enjoyment thereof is postponed, or whereby a prior interest in the same property is given or reserved to some other person, or whereby income arising from the property is directed to be accumulated until the time of enjoyment arrives, or from a provision that if a particular event shall happen the interest shall pass to another person.

20. When unborn person acquires vested interest on transfer for his benefit.

Where, on a transfer of property, an interest therein is created for the benefit of a person not then living, he acquires upon his birth, unless a contrary intention appears from the terms of the transfer, a vested interest, although he may not be entitled to the enjoyment thereof immediately on his birth.

21. Contingent interest.

Where, on a transfer of property, an interest therein is created in favour of a person to take effect only on the happening of a specified uncertain event, or if a specified uncertain event shall not happen, such person thereby acquires a contingent interest in the property Such interest becomes a vested interest, in the former case, on the happening of the event, in the latter, when the happening of the event becomes impossible.

Exception.— Where, under a transfer of property, a person becomes entitled to an interest therein upon attaining a particular age, and the transferor also gives to him absolutely the income to arise from such interest before he reaches that age, or directs the income or so much thereof as may be necessary to be applied for his benefit, such interest is not contingent.

22. Transfer to members of a class who attain a particular age.

Where on a transfer of property, an interest therein is created in favour of such members only of a class as shall attain a particular age, such interest does not vest in any member of the class who has not attained that age.

23. Transfer contingent on happening of specified uncertain event.

Where, on a transfer of property, an interest therein is to accrue to a specified person if a specified uncertain event shall happen, and no time is mentioned for the occurrence of that event, the interest fails unless such event happens before, or at the same time as, the intermediate or precedent interest ceases to exist.

24. Transfer to such of certain persons as survive at some period not specified.

Where, on a transfer of property, an interest therein is to accrue to such of certain persons as shall be surviving at some period, but the exact period is not specified, the interest shall go to such of them as shall be alive when the intermediate or precedent interest ceases to exist, unless a contrary intention appears from the terms of the transfer.

Illustration.

A transfers property to *B* for life, and after his death to *C* and *D*, equally to be divided between them, or to the survivor of them. *C* dies during the life of *B*. *D* survives *B*. At *B*'s death the property passes to *D*.

25. Conditional transfer.

An interest created on a transfer of property and dependent upon a condition fails if the fulfilment of the condition is impossible, or is forbidden by law, or is of such a nature that, if permitted, it would defeat the provisions of any law, or is fraudulent, or involves or implies injury to the person or property of another, or the Court regards it as immoral or opposed to public policy.

Illustrations.

(a) *A* lets a farm to *B* on condition that he shall walk a hundred miles in an hour. The lease is void.

(b) *A* gives Rs. 500 to *B* on condition that he shall marry *A*'s daughter *C*. At the date of the transfer *C* was dead. The transfer is void.

(c) *A* transfers Rs. 500 to *B* on condition that she shall murder *C*. The transfer is void.

(d) *A* transfers Rs. 500 to his niece *C* if she will desert her husband. The transfer is void.

26. Fulfilment of condition precedent.

Where the terms of a transfer of property impose a condition to be fulfilled before a person can take an interest in the property, the condition shall be deemed to have been fulfilled if it has been substantially complied with.

Illustrations.

(a) *A* transfers Rs. 5,000 to *B* on condition that he shall marry with the consent of *C*, *D* and *E*. *E* dies. *B* marries with the consent of *C* and *D*. *B* is deemed to have fulfilled the condition.

(b) *A* transfers Rs. 5,000 to *B* on condition that he shall marry with the consent of *C*, *D* and *E*, but obtains their consent after the marriage. *B* has not fulfilled the condition.

27. Conditional transfer to one person coupled with transfer to another on failure of prior disposition.

Where, on a transfer of property, an interest therein is created in favour of one person, and by the same transaction an ulterior disposition of the same interest is made in favour of another, if the prior disposition under the transfer shall fail, the ulterior disposition shall take effect upon the failure of the prior disposition, although the failure may not have occurred in the manner contemplated by the transferor.

But, where the intention of the parties to the transaction is that the ulterior disposition shall take effect only in the event of the prior disposition failing in a particular manner, the ulterior disposition shall not take effect unless the prior disposition fails in that manner.

Illustrations.

(a) *A* transfers Rs. 500 to *B* on condition that he shall execute a certain lease within three months after *A*'s death, and, if he should neglect to do so, to *C*. *B* dies in *A*'s life-time. The disposition in favour of *C* takes effect.

(b) A transfers property to his wife ; but, in case she should die in his life-time, transfers to *B* that which he had transferred to her. *A* and his wife perish together, under circumstances which make it impossible to prove that she died before him. The disposition in favour of *B* does not take effect.

28. Ulterior transfer conditional on happening or not happening of specified event.

On a transfer of property an interest therein may be created to accrue to any person with the condition superadded that in case a specified uncertain event shall happen such interest shall pass to another person, or that in case a specified uncertain event shall not happen such interest shall pass to another person. In each case the dispositions are subject to the rules contained in sections 10, 12, 21, 22, 23, 24, 25 and 27.

29. Fulfilment of condition subsequent.

An ulterior disposition of the kind contemplated by the last preceding section cannot take effect unless the condition is strictly fulfilled.

Illustration.

A transfers Rs. 500 to *B*, to be paid to him on his attaining his majority or marrying, with a proviso that, if *B* dies a minor or marries without *C's* consent, the Rs. 500 shall go to *D*. *B* marries when only 17 years of age, without *C's* consent. The transfer to *D* takes effect.

30. Prior disposition not affected by invalidity of ulterior disposition.

If the ulterior disposition is not valid, the prior disposition is not affected by it.

Illustration.

A transfers a farm to *B* for her life, and, if she do not desert her husband, to *C*. *B* is entitled to the farm during her life as if no condition had been inserted.

31. Condition that transfer shall cease to have effect in case specified uncertain event happens or does not happen.

Subject to the provisions of section 12, on a transfer of property an interest therein may be created with the condition superadded that it shall cease to exist in case a specified uncertain event shall happen, or in case a specified uncertain event shall not happen.

Illustrations.

(a) *A* transfers a farm to *B* for his life, with a proviso that, in case *B* cuts down a certain wood, the transfer shall cease to have any effect. *B* cuts down the wood. He loses his life-interest in the farm.

(b) *A* transfers a farm to *B*, provided that, if *B* shall not go to England within three years after the date of the transfer, his interest in the farm shall cease. *B* does not go to England within the term prescribed. His interest in the farm ceases.

32. Such condition must not be invalid.

In order that a condition that an interest shall cease to exist may be valid, it is necessary that the event to which it relates be one which could legally constitute the condition of the creation of an interest.

33. Transfer conditional on performance of act, no time being specified for performance.

Where, on a transfer of property, an interest therein is created subject to a condition that the person taking it shall perform a certain act, but no time is specified for the performance of the act, the condition is broken when he renders impossible, permanently or for an indefinite period, the performance of the act.

34. Transfer conditional on performance of act, time being specified.

Where an act is to be performed by a person either as a condition to be fulfilled before an interest created on a transfer of property is enjoyed by him, or as a condition on the non-fulfilment of which the interest is to pass from him to another person, and a time is specified for the performance of the act, if such performance within the specified time is prevented by the fraud of a person who would be directly benefited by non-fulfilment of the condition, such further time shall as against him be allowed for performing the act as shall be requisite to make up for the delay caused by such fraud. But if no time is specified for the performance of the act, then, if its performance is by the fraud of a person interested in the non-fulfilment of the condition rendered impossible or indefinitely postponed, the condition shall as against him be deemed to have been fulfilled.

Election.

35. Election when necessary.

Where a person professes to transfer property which he has no right to transfer, and as part of the same transaction confers any benefit on the owner of the property, such owner must elect either to confirm such transfer or to dissent from it; and in the latter case he shall relinquish the benefit so conferred, and the benefit so relinquished shall revert to the transferor or his representative as if it had not been disposed of,

subject nevertheless,

where the transfer is gratuitous, and the transferor has, before the election, died or otherwise become incapable of making a fresh transfer,

and in all cases where the transfer is for consideration,

to the charge of making good to the disappointed transferee the amount or value of the property attempted to be transferred to him.

Illustration.

The farm of Sultanpur is the property of *C* and worth Rs. 800. *A* by an instrument of gift professes to transfer it to *B*, giving by the same instrument Rs. 1,000 to *C*. *C* elects to retain the farm. He forfeits the gift of Rs. 1,000.

In the same case, *A* dies before the election. His representative must out of the Rs. 1,000 pay Rs. 800 to *B*.

The rule in the first paragraph of this section applies whether the transferor does or does not believe that which he professes to transfer to be his own.

A person taking no benefit directly under a transaction, but deriving a benefit under it indirectly, need not elect.

A person who in his one capacity takes a benefit under the transaction may in another dissent therefrom.

Exception to the last preceding four rules. — Where a particular benefit is expressed to be conferred on the owner of the property which the transferor professes to transfer, and such benefit is expressed to be in lieu of that property, if such owner claim the property, he must relinquish the particular benefit, but he is not bound to relinquish any other benefit conferred upon him by the same transaction.

Acceptance of the benefit by the person on whom it is conferred constitutes an election by him to confirm the transfer, if he is aware of his duty to elect and of those circumstances which would influence the judgment of a reasonable man in making an election, or if he waives enquiry into the circumstances.

Such knowledge or waiver shall, in the absence of evidence to the contrary, be presumed, if the person on whom the benefit has been conferred has enjoyed it for two years without doing any act to express dissent.

Such knowledge or waiver may be inferred from any act of his which renders it impossible to place the persons interested in the property professed to be transferred in the same condition as if such act had not been done.

Illustration.

A transfers to *B* an estate to which *C* is entitled, and as part of the same transaction gives *C* a coal-mine. *C* takes possession of the mine and exhausts it. He has thereby confirmed the transfer of the estate to *B*.

If he does not within one year after the date of the transfer signify to the transferor or his representatives his intention to confirm or to dissent from the transfer, the transferor or his representatives may, upon the expiration of that period, require him to make his election; and, if he does not comply with such requisition within a reasonable time after he has received it, he shall be deemed to have elected to confirm the transfer.

In case of disability, the election shall be postponed until the disability ceases, or until the election is made by some competent authority.

Apportionment.

36. Apportionment of periodical payments on determination of interest of person entitled.

In the absence of a contract or local usage to the contrary, all rents, annuities, pensions, dividends and other periodical payments in the nature of income shall, upon the transfer of the interest of the person entitled to receive such payments, be deemed, as between the transferor and the transferee, to accrue due from day to day, and to be apportionable accordingly, but to be payable on the days appointed for the payment thereof.

37. Apportionment of benefit of obligation on severance.

When, in consequence of a transfer, property is divided and held in several shares, and thereupon the benefit of any obligation relating to the property as a whole passes from one to several owners of the property, the corresponding duty shall, in the absence of a contract to the contrary amongst the owners, be performed in favour of each of such owners in proportion to the value of his share in the property, provided that the duty can be severed and that the severance does not substantially increase the burden of the obligation; but if the duty cannot be severed, or if the severance would substantially increase the burden of the obligation, the duty shall be performed for the benefit of such one of the several owners as they shall jointly designate for that purpose:

Provided that no person on whom the burden of the obligation lies shall be answerable for failure to discharge it in manner provided by this section, unless and until he has had reasonable notice of the severance.

Nothing in this section applies to leases for agricultural purposes unless and until the State Government by notification in the Official Gazette so directs.

Illustrations.

(a) *A* sells to *B*, *C* and *D* a house situate in a village and leased to *E* at an annual rent of Rs. 30 and delivery of one fat sheep, *B* having provided half the purchase-money and *C* and *D* one quarter each *E*, having notice of this, must pay Rs. 15 to *B*, Rs. 7½ to *C*, and Rs. 7½ to *D*, and must deliver the sheep according to the joint direction of *B*, *C* and *D*.

(b) In the same case, each house in the village being bound to provide ten days' labour each year on a dyke to prevent inundation, *E* had agreed as a term of his lease to perform this work for *A*. *B*, *C* and *D* severally require *E* to perform the ten days' work due on account of the house of each. *E* is not bound to do more than ten days' work in all, according to such directions as *B*, *C* and *D* may join in giving.

(B) Transfer of Immoveable Property.

38. Transfer by person authorized only under certain circumstances to transfer.

Where any person, authorized only under circumstances in their nature variable to dispose of immoveable property, transfers such property for consideration, alleging the existence of such circumstances, they shall, as between the transferee on the one part and the transferor and other persons (if any) affected by the transfer on the other part, be deemed to have existed, if the transferee, after using reasonable care to ascertain the existence of such circumstances, has acted in good faith.

Illustration.

A, a Hindu widow, whose husband has left collateral heirs, alleging that the property held by her as such is insufficient for her maintenance, agrees, for purposes neither religious nor charitable, to sell a field, part of such property, to *B*. *B* satisfies himself by reasonable enquiry that the income of the property is insufficient for *A*'s maintenance, and that the sale of the field is necessary, and, acting in good faith, buys the field from *A*. As between *B* on the one part and *A* and the collateral heirs on the other part, a necessity for the sale shall be deemed to have existed.

39. Transfer where third person is entitled to maintenance.

Where a third person has a right to receive maintenance, or a provision for advancement or marriage, from the profits of immoveable property, and such property is transferred, the right may be enforced against the transferee, if he has notice thereof or if the transfer is gratuitous; but not against a transferee for consideration and without notice of the right, nor against such property in his hands.

40. Burden of obligation imposing restriction on use of land.

Where, for the more beneficial enjoyment of his own immoveable property, a third person has, independently of any interest in the immoveable property of another or of any easement thereon, a right to restrain the enjoyment in a particular manner of the latter property, or

or of obligation annexed to ownership but not amounting to interest or easement.

where a third person is entitled to the benefit of an obligation arising out of contract and annexed to the ownership of immoveable property, but not amounting to an interest therein or easement thereon,

such right or obligation may be enforced against a transferee with notice thereof or a gratuitous transferee of the property affected thereby, but not against a transferee for consideration and without notice of the right or obligation, nor against such property in his hands.

Illustration.

A contracts to sell Sultanpur to *B*. While the contract is still in force he sells Sultanpur to *C*, who has notice of the contract. *B* may enforce the contract against *C* to the same extent as against *A*.

41. Transfer by ostensible owner.

Where, with the consent, express or implied, of the persons interested in immoveable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorized to make it : Provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith.

42. Transfer by person having authority to revoke former transfer.

Where a person transfers any immoveable property, reserving power to revoke the transfer, and subsequently transfers the property for consideration to another transferee, such transfer operates in favour of such transferee (subject to any condition attached to the exercise of the power) as a revocation of the former transfer to the extent of the power.

Illustration.

A lets a house to *B*, and reserves power to revoke the lease if, in the opinion of a specified surveyor, *B* should make a use of it detrimental to its value. Afterwards *A*, thinking that such a use has been made, lets the house to *C*. This operates as a revocation of *B's* lease subject to the opinion of the surveyor as to *B's* use of the house having been detrimental to its value.

43. Transfer by unauthorized person who subsequently acquires interest in property transferred.

Where a person fraudulently or erroneously represents that he is authorized to transfer certain immoveable property and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists.

Nothing in this section shall impair the right of transferees in good faith for consideration without notice of the existence of the said option.

Illustration.

A, a Hindu, who has separated from his father *B*, sells to *C* three fields, *X*, *Y* and *Z*, representing that *A* is authorized to transfer the same. Of these fields *Z* does not belong to *A*, it having been retained by *B* on the partition; but on *B*'s dying *A* as heir obtains *Z*. *C*, not having rescinded the contract of sale, may require *A* to deliver *Z* to him.

44. Transfer by one co-owner.

Where one of two or more co-owners of immoveable property legally competent in that behalf transfers his share of such property or any interest therein, the transferee acquires, as to such share or interest, and so far as is necessary to give effect to the transfer, the transferor's right to joint possession or other common or part enjoyment of the property, and to enforce a partition of the same, but subject to the conditions and liabilities affecting, at the date of the transfer, the share or interest so transferred.

Where the transferee of a share of a dwelling-house belonging to an undivided family is not a member of the family, nothing in this section shall be deemed to entitle him to joint possession or other common or part enjoyment of the house.

45. Joint transfer for consideration.

Where immoveable property is transferred for consideration to two or more persons, and such consideration is paid out of a fund belonging to them in common, they are, in the absence of a contract to the contrary, respectively entitled to interests in such property identical, as nearly as may be, with the interests to which they were respectively entitled in the fund; and, where such consideration is paid out of separate funds belonging to them respectively, they are, in the absence of a contract to the contrary, respectively entitled to interest in such property in proportion to the shares of the consideration which they respectively advanced.

In the absence of evidence as to the interests in the fund to which they were respectively entitled, or as to the shares which they respectively advanced, such persons shall be presumed to be equally interested in the property.

46. Transfer for consideration by persons having distinct interests.

Where immoveable property is transferred for consideration by persons having distinct interests therein, the transferors are, in the absence of a contract to the contrary, entitled to share in the consideration equally,

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where their interests in the property were of equal value, and, where such interests were of unequal value, proportionately to the value of their respective interests.

Illustrations.

(a) *A*, owning a moiety, and *B* and *C* each a quarter share, of mauza Sultanpur, exchange an eighth share of that mauza for a quarter share of mauza Lalpura. There being no agreement to the contrary, *A* is entitled to an eighth share in Lalpura, and *B* and *C* each to a sixteenth share in that mauza.

(b) *A*, being entitled to a life-interest in mauza Atrali and *B* and *C* to the reversion, sell the mauza for Rs. 1,000. *A*'s life-interest is ascertained to be worth Rs. 600, the reversion Rs. 400. *A* is entitled to receive Rs. 600 out of the purchase-money, *B* and *C* to receive Rs. 400.

47. Transfer by co-owners of share in common property.

Where several co-owners of immoveable property transfer a share therein without specifying that the transfer is to take effect on any particular share or shares of the transferors, the transfer, as among such transferors, takes effect on such shares equally where the shares were equal, and, where they were unequal, proportionately to the extent of such shares.

Illustration.

A, the owner of an eight-anna share, and *B* and *C*, each the owner of a four-anna share, in Mowza Sultanpur, transfer a two-anna share in the mouza to *D*, without specifying from which of their several shares the transfer is made. To give effect to the transfer one-anna share is taken from the share of *A*, and half an anna share from each of the shares of *B* and *C*.

48. Priority of rights created by transfer.

Where a person purports to create by transfer at different times rights in or over the same immoveable property, and such rights cannot all exist or be exercised to their full extent together, each later created right shall, in the absence of a special contract or reservation binding the earlier transferees, be subject to the rights previously created.

49. Transferee's right under policy.

Where immoveable property is transferred for consideration, and such property or any part thereof is at the date of the transfer insured against loss or damage by fire, the transferee, in case of such loss or damage, may, in the absence of a contract to the contrary, require any money which the transferor actually receives under the policy, or so much thereof as may be necessary, to be applied in reinstating the property.

50. Rent 'bona fide' paid to holder under defective title.

No person shall be chargeable with any rents or profits of any immoveable property, which he has in good faith paid or delivered to any person of whom he in good faith held such property, notwithstanding it may afterwards appear that the person to whom such payment or delivery was made had no right to receive such rents or profits.

Illustration.

A lets a field to *B* at a rent of Rs. 50, and then transfers the field to *C*. *B*, having no notice of the transfer, in good faith pays the rent to *A*. *B* is not chargeable with the rent so paid.

51. Improvements made by 'bona fide' holders under defective titles.

When the transferee of immoveable property makes any improvement on the property, believing in good faith that he is absolutely entitled thereto, and he is subsequently evicted therefrom by any person having a better title, the transferee has a right to require the person causing the eviction either to have the value of the improvement estimated and paid or secured to the transferee, or to sell his interest in the property to the transferee at the then market-value thereof, irrespective of the value of such improvement.

The amount to be paid or secured in respect of such improvement shall be the estimated value thereof at the time of the eviction.

When, under the circumstances aforesaid, the transferee has planted or sown on the property crops which are growing when he is evicted therefrom, he is entitled to such crops and to free ingress and egress to gather and carry them.

52. Transfer of property pending suit relating thereto.

During the pendency in any Court having authority within the limits of India excluding the State of Jammu and Kashmir or established beyond such limits by the Central Government, of any suit or proceeding which is not collusive and in which any right to immoveable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.

Explanation. — For the purposes of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceeding in a Court of competent jurisdiction, and to continue until the suit or proceeding has been disposed of by a final decree or order, and complete satisfaction or discharge of such decree or order has been obtained, or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force.

53. Fraudulent transfer.

(*1*) Every transfer of immoveable property made with intent to defeat or delay the creditors of the transferor shall be voidable at the option of any creditor so defeated or delayed.

Nothing in this sub-section shall impair the rights of a transferee in good faith and for consideration.

Nothing in this sub-section shall affect any law for the time being in force relating to insolvency.

A suit instituted by a creditor (which term includes a decree-holder whether he has or has not applied for execution of his decree) to avoid a

transfer on the ground that it has been made with intent to defeat or delay the creditors of the transferor, shall be instituted on behalf of, or for the benefit of, all the creditors.

(2) Every transfer of immoveable property made without consideration with intent to defraud a subsequent transferee shall be voidable at the option of such transferee.

For the purposes of this sub-section, no transfer made without consideration shall be deemed to have been made with intent to defraud by reason only that a subsequent transfer for consideration was made.

53A. Part performance.

Where any person contracts to transfer for consideration any immoveable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,

and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract,

and the transferee has performed or is willing to perform his part of the contract,

then, notwithstanding that the contract, though required to be registered, has not been registered, or, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract :

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof.

CHAPTER III

OF SALES OF IMMOVEABLE PROPERTY

54. "Sale" defined.

"Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.

Sale how made.

Such transfer, in the case of tangible immoveable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.

In the case of tangible immoveable property, of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.

Delivery of tangible immoveable property takes place when the seller places the buyer, or such person as he directs, in possession of the property.

Contract for sale.

A contract for the sale of immoveable property is a contract that a sale of such property shall take place on terms settled between the parties.

It does not, of itself, create any interest in or charge on such property.

55. Rights and liabilities of buyer and seller.

In the absence of a contract to the contrary, the buyer and the seller of immoveable property respectively are subject to the liabilities, and have the rights, mentioned in the rules next following, or such of them as are applicable to the property sold :

(*1*) The seller is bound—

(*a*) to disclose to the buyer any material defect in the property or in the seller's title thereto of which the seller is, and the buyer is not, aware, and which the buyer could not with ordinary care discover;

(*b*) to produce to the buyer on his request for examination all documents of title relating to the property which are in the seller's possession or power;

(*c*) to answer to the best of his information all relevant questions put to him by the buyer in respect to the property or the title thereto;

(*d*) on payment or tender of the amount due in respect of the price, to execute a proper conveyance of the property when the buyer tenders it to him for execution at a proper time and place;

(*e*) between the date of the contract of sale and the delivery of the property, to take as much care of the property and all documents of title relating thereto which are in his possession as an owner of ordinary prudence would take of such property and documents;

(*f*) to give, on being so required, the buyer, or such person as he directs, such possession of the property as its nature admits ;

(*g*) to pay all public charges and rent accrued due in respect of the property up to the date of the sale, the interest on all incumbrances on such property due on such date, and, except where the property is sold subject to incumbrances, to discharge all incumbrances on the property then existing.

(2) The seller shall be deemed to contract with the buyer that the interest which the seller professes to transfer to the buyer subsists and that he has power to transfer the same :

Provided that, where the sale is made by a person in a fiduciary character, he shall be deemed to contract with the buyer that the seller has done no act whereby the property is incumbered or whereby he is hindered from transferring it.

The benefit of the contract mentioned in this rule shall be annexed to, and shall go with, the interest of the transferee as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested.

(3) Where the whole of the purchase-money has been paid to the seller, he is also bound to deliver to the buyer all documents of title relating to the property which are in the seller's possession or power :

Provided that, (*a*) where the seller retains any part of the property comprised in such documents, he is entitled to retain them all, and, (*b*) where the whole of such property is sold to different buyers, the buyer of the lot of greatest value is entitled to such documents. But in case (*a*) the seller, and in case (*b*) the buyer, of the lot of greatest value, is bound, upon every reasonable request by the buyer, or by any of the other buyers, as the case may be, and at the cost of the person making the request, to produce the said documents and furnish such true copies thereof or extracts therefrom as he may require; and in the meantime, the seller, or the buyer of the lot of greatest value, as the case may be, shall keep the said documents safe, uncancelled and undefaced, unless prevented from so doing by fire or other inevitable accident.

(4) The seller is entitled—

(*a*) to the rents and profits of the property till the ownership thereof passes to the buyer;

(*b*) where the ownership of the property has passed to the buyer before payment of the whole of the purchase-money, to a charge upon the property in the hands of the buyer, any transferee without consideration or any transferee with notice of the non-payment, for the amount of the purchase-money, or any part thereof remaining unpaid, and for interest on such amount or part from the date on which possession has been delivered.

(5) The buyer is bound—

(*a*) to disclose to the seller any fact as to the nature or extent of the seller's interest in the property of which the buyer is aware but of which he has reason to believe that the seller is not aware, and which materially increases the value of such interest;

(*b*) to pay or tender, at the time and place of completing the sale, the purchase-money to the seller or such person as he directs :

provided that, where the property is sold free from incumbrances, the buyer may retain out of the purchase-money the amount of any incumbrances on the property existing at the date of the sale, and shall pay the amount so retained to the persons entitled thereto;

(c) where the ownership of the property has passed to the buyer, to bear any loss arising from the destruction, injury or decrease in value of the property not caused by the seller;

(d) where the ownership of the property has passed to the buyer, as between himself and the seller, to pay all public charges and rent which may become payable in respect of the property, the principal moneys due on any incumbrances subject to which the property is sold, and the interest thereon afterwards accruing due.

(6) The buyer is entitled—

(a) where the ownership of the property has passed to him, to the benefit of any improvement in, or increase in value of, the property, and to the rents and profits thereof;

(b) unless he has improperly declined to accept delivery of the property, to a charge on the property, as against the seller and all persons claiming under him, to the extent of the seller's interest in the property, for the amount of any purchase-money properly paid by the buyer in anticipation of the delivery and for interest on such amount; and, when he properly declines to accept the delivery, also for the earnest (if any) and for the costs (if any) awarded to him of a suit to compel specific performance of the contract or to obtain a decree for its rescission.

An omission to make such disclosures as are mentioned in this section, paragraph (1), clause *(a)*, and paragraph *(5)*, clause *(a)*, is fraudulent.

56. Marshalling by subsequent purchaser.

If the owner of two or more properties mortgages them to one person and then sells one or more of the properties to another person, the buyer is, in the absence of a contract to the contrary, entitled to have the mortgage-debt satisfied out of the property or properties not sold to him, so far as the same will extend, but not so as to prejudice the rights of the mortgagee or persons claiming under him or of any other person who has for consideration acquired an interest in any of the properties.

Discharge of Incumbrances on Sale.

57. Provision by Court for incumbrance and sale freed therefrom.

(a) Where immoveable property subject to any incumbrance, whether immediately payable or not, is sold by the Court or in execution of a decree, or out of Court, the Court may, if it thinks fit, on the application of any party to the sale, direct or allow payment into Court, —

(*l*) in case of an annual or monthly sum charged on the property, or of a capital sum charged on a determinable interest in the property—of such amount as, when invested in securities of the Central Government, the Court considers will be sufficient, by means of the interest thereof, to keep down or otherwise provide for that charge, and

(2) in any other case of a capital sum charged on the property—of the amount sufficient to meet the incumbrance and any interest due thereon.

But in either case there shall also be paid into Court such additional amount as the Court considers will be sufficient to meet the contingency of further costs, expenses and interest, and any other contingency, except depreciation of investments, not exceeding one-tenth part of the original amount to be paid in, unless the Court for special reasons (which it shall record) thinks fit to require a larger additional amount.

(*b*) Thereupon the Court may, if it thinks fit, and after notice to the incumbrancer, unless the Court, for reasons to be recorded in writing, thinks fit to dispense with such notice, declare the property to be freed from the incumbrance, and make any order for conveyance, or vesting order, proper for giving effect to the sale, and give directions for the retention and investment of the money in Court.

(*c*) After notice served on the persons interested in or entitled to the money or fund in Court, the Court may direct payment or transfer thereof to the persons entitled to receive or give a discharge for the same, and generally may give directions respecting the application or distribution of the capital or income thereof.

(*d*) An appeal shall lie from any declaration, order or direction under this section as if the same were a decree.

(*e*) In this section "Court" means (*l*) a High Court in the exercise of its ordinary or extraordinary original civil jurisdiction, (2) the Court of a District Judge within the local limits of whose jurisdiction the property or any part thereof is situate, (3) any other Court which the State Government may, from time to time, by notification in the Official Gazette, declare to be competent to exercise the jurisdiction conferred by this section.

CHAPTER IV.

OF MORTGAGES OF IMMOVEABLE PROPERTY AND CHARGES.

58. "Mortgage," "mortgagor," "mortgagee," "mortgage-money" and "mortgage-deed" defined.

(*a*) A mortgage is the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability.

The transferor is called a mortgagor, the transferee a mortgagee; the principal money and interest of which payment is secured for the time being are called the mortgage-money, and the instrument (if any) by which the transfer is effected is called a mortgage-deed.

Simple mortgage.

(*b*) Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage-money, and agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage-money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee.

Mortgage by conditional sale.

(*c*) Where the mortgagor ostensibly sells the mortgaged property—

on condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or

on condition that on such payment being made the sale shall become void, or

on condition that on such payment being made the buyer shall transfer the property to the seller,

the transaction is called a mortgage by conditional sale and the mortgagee a mortgagee by conditional sale:

Provided that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale.

Usufructuary mortgage.

(*d*) Where the mortgagor delivers possession or expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee, and authorizes him to retain such possession until payment of the mortgage-money, and to receive the rents and profits accruing from the property or any part of such rents and profits and to appropriate the same in lieu of interest, or in payment of the mortgage-money, or partly in lieu of interest or partly in payment of the mortgage-money, the transaction is called an usufructuary mortgage and the mortgagee an usufructuary mortgagee.

English mortgage.

(*e*) Where the mortgagor binds himself to re-pay the mortgage-money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will re-transfer it to the mortgagor upon payment of the mortgage-money as agreed, the transaction is called an English mortgage.

Mortgage by deposit of title-deeds.

(*f*) Where a person in any of the following towns, namely, the towns of Calcutta, Madras and Bombay and in any other town which the State

Government concerned may, by notification in the Official Gazette, specify in this behalf, delivers to a creditor or his agent documents of title to immoveable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title-deeds.

Anomalous mortgage.

(g) A mortgage which is not a simple mortgage, a mortgage by conditional sale, an usufructuary mortgage, an English mortgage or a mortgage by deposit of title-deeds within the meaning of this section is called an anomalous mortgage.

59. Mortgage when to be by assurance.

Where the principal money secured is one hundred rupees or upwards, a mortgage other than a mortgage by deposit of title-deeds can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses.

Where the principal money secured is less than one hundred rupees, a mortgage may be effected either by a registered instrument signed and attested as aforesaid, or (except in the case of a simple mortgage) by delivery of the property.

59A. References to mortgagors and mortgagees to include persons deriving title from them.

Unless otherwise expressly provided, reference in this Chapter to mortgagors and mortgagees shall be deemed to include references to persons deriving title from them respectively.

Rights and Liabilities of Mortgagor.

60. Right of mortgagor to redeem.

At any time after the principal money has become due, the mortgagor has a right, on payment or tender, at a proper time and place, of the mortgage-money, to require the mortgagee (a) to deliver to the mortgagor the mortgage-deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee, (b) where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor, and (c) at the cost of the mortgagor either to re-transfer the mortgaged property to him or to such third person as he may direct, or to execute and (where the mortgage has been effected by a registered instrument) to have registered an acknowledgment in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished:

Provided that the right conferred by this section has not been extinguished by the act of the parties or by decree of a Court.

The right conferred by this section is called a right to redeem and a suit to enforce it is called a suit for redemption.

Nothing in this section shall be deemed to render invalid any provision to the effect that, if the time fixed for payment of the principal money has been allowed to pass or no such time has been fixed, the mortgagee shall be entitled to reasonable notice before payment or tender of such money.

Redemption of portion of mortgaged property.

Nothing in this section shall entitle a person interested in a share only of the mortgaged property to redeem his own share only, on payment of a proportionate part of the amount remaining due on the mortgage, except only where a mortgagee, or, if there are more mortgagees than one, all such mortgagees, has or have acquired, in whole or in part, the share of a mortgagor.

60A. Obligation to transfer to third party instead of re-transference to mortgagor.

(1) Where a mortgagor is entitled to redemption, then, on the fulfilment of any conditions on the fulfilment of which he would be entitled to require a re-transfer, he may require the mortgagee, instead of re-transferring the property, to assign the mortgage-debt and transfer the mortgaged property to such third person as the mortgagor may direct; and the mortgagee shall be bound to assign and transfer accordingly.

(2) The rights conferred by this section belong to and may be enforced by the mortgagor or by any encumbrancer notwithstanding an intermediate encumbrance; but the requisition of any encumbrancer shall prevail over a requisition of the mortgagor and, as between encumbrancers, the requisition of a prior encumbrancer shall prevail over that of a subsequent encumbrancer.

(3) The provisions of this section do not apply in the case of a mortgagee who is or has been in possession.

60B. Right to inspection and production of documents.

A mortgagor, as long as his right of redemption subsists, shall be entitled at all reasonable times, at his request and at his own cost, and on payment of the mortgagee's costs and expenses in this behalf, to inspect and make copies or abstracts of, or extracts from, documents of title relating to the mortgaged property which are in the custody or power of the mortgagee.

61. Right to redeem separately or simultaneously.

A mortgagor who has executed two or more mortgages in favour of the same mortgagee shall, in the absence of a contract to the contrary, when the principal money of any two or more of the mortgages has become due, be entitled to redeem any one such mortgage separately, or any two or more of such mortgages together.

62. Right of usufructuary mortgagor to recover possession.

In the case of a usufructuary mortgage, the mortgagor has a right to recover possession of the property together with the mortgage-deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee,—

(a) where the mortgagee is authorised to pay himself the mortgage-money from the rents and profits of the property, — when such money is paid;

(b) where the mortgagee is authorised to pay himself from such rents and profits or any part thereof a part only of the mortgage-money—when the term, if any, prescribed for the payment of the mortgage-money has expired and the mortgagor pays or tenders to the mortgagee the mortgage-money or the balance thereof or deposits it in Court as hereinafter provided.

63. Accession to mortgaged property.

Where mortgaged property in possession of the mortgagee has, during the continuance of the mortgage, received any accession, the mortgagor, upon redemption, shall, in the absence of a contract to the contrary, be entitled as against the mortgagee to such accession.

Accession acquired in virtue of transferred ownership.

Where such accession has been acquired at the expense of the mortgagee, and is capable of separate possession or enjoyment without detriment to the principal property, the mortgagor desiring to take the accession must pay to the mortgagee the expense of acquiring it. If such separate possession or enjoyment is not possible, the accession must be delivered with the property; the mortgagor being liable, in the case of an acquisition necessary to preserve the property from destruction, forfeiture or sale, or made with his assent, to pay the proper cost thereof, as an addition to the principal money, with interest at the same rate as is payable on the principal, or, where no such rate is fixed, at the rate of nine per cent. per annum.

In the case last mentioned the profits, if any, arising from the accession shall be credited to the mortgagor.

Where the mortgage is usufructuary and the accession has been acquired at the expense of the mortgagee, the profits, if any, arising from the accession shall, in the absence of a contract to the contrary, be set off against interest, if any, payable on the money so expended.

63A. Improvements to mortgaged property.

(*1*) Where mortgaged property in possession of the mortgagee has, during the continuance of the mortgage, been improved, the mortgagor, upon redemption, shall, in the absence of a contract to the contrary, be entitled to the improvement; and the mortgagor shall not, save only in cases provided for in sub-section (2), be liable to pay the cost thereof.

(2) Where any such improvement was effected at the cost of the mortgagee and was necessary to preserve the property from destruction or deterioration or was necessary to prevent the security from becoming insufficient, or was made in compliance with the lawful order of any public servant or public authority, the mortgagor shall, in the absence of a contract to the contrary, be liable to pay the proper cost thereof as an addition to the principal money with interest at the same rate as is payable on the principal, or, where no such rate is fixed, at the rate of nine per cent. per annum, and the profits, if any, accruing by reason of the improvement shall be credited to the mortgagor.

64. Renewal of mortgaged lease.

Where the mortgaged property is a lease, and the mortgagee obtains a renewal of the lease, the mortgagor, upon redemption, shall, in the absence of a contract by him to the contrary, have the benefit of the new lease.

65. Implied contracts by mortgagor.

In the absence of a contract to the contrary, the mortgagor shall be deemed to contract with the mortgagee—

(a) that the interest which the mortgagor professes to transfer to the mortgagee subsists, and that the mortgagor has power to transfer the same;

(b) that the mortgagor will defend, or if the mortgagee be in possession of the mortgaged property, enable him to defend, the mortgagor's title thereto;

(c) that the mortgagor will, so long as the mortgagee is not in possession of the mortgaged property, pay all public charges accruing due in respect of the property;

(d) and, where the mortgaged property is a lease, that the rent payable under the lease, the conditions contained therein, and the contracts binding on the lessee have been paid, performed and observed down to the commencement of the mortgage; and that the mortgagor will, so long as the security exists and the mortgagee is not in possession of the mortgaged property, pay the rent reserved by the lease, or, if the lease be renewed, the renewed lease, perform the conditions contained therein and observe the contracts binding on the lessee, and indemnify the mortgagee against all claims sustained by reason of the non-payment of the said rent or the non-performance or non-observance of the said conditions and contracts;

(e) and, where the mortgage is a second or subsequent incumbrance on the property, that the mortgagor will pay the interest from time to time accruing due on each prior incumbrance as and when it becomes due, and will at the proper time discharge the principal money due on such prior incumbrance.

The benefit of the contracts mentioned in this section shall be annexed to and shall go with the interest of the mortgagee as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested.

65A. Mortgagor's power to lease.

(1) Subject to the provisions of sub-section (2), a mortgagor, while lawfully in possession of the mortgaged property, shall have power to make leases thereof which shall be binding on the mortgagee.

(2) (*a*) Every such lease shall be such as would be made in the ordinary course of management of the property concerned, and in accordance with any local law, custom or usage.

(*b*) Every such lease shall reserve the best rent that can reasonably be obtained, and no premium shall be paid or promised and no rent shall be payable in advance.

(*c*) No such lease shall contain a covenant for renewal.

(*d*) Every such lease shall take effect from a date not later than six months from the date on which it is made.

(*e*) In the case of a lease of buildings, whether leased with or without the land on which they stand, the duration of the lease shall in no case exceed three years, and the lease shall contain a covenant for payment of the rent and a condition of re-entry on the rent not being paid within a time therein specified.

(3) The provisions of sub-section (1) apply only if and as far as a contrary intention is not expressed in the mortgage-deed; and the provisions of sub-section (2) may be varied or extended by the mortgage-deed and, as so varied and extended, shall, as far as may be, operate in like manner and with all like incidents, effects and consequences, as if such variations or extensions were contained in that sub-section.

66. Waste by mortgagor in possession.

A mortgagor in possession of the mortgaged property is not liable to the mortgagee for allowing the property to deteriorate; but he must not commit any act which is destructive or permanently injurious thereto, if the security is insufficient or will be rendered insufficient by such act.

Explanation. — A security is insufficient within the meaning of this section unless the value of the mortgaged property exceeds by one-third, or, if consisting of buildings, exceeds by one-half, the amount for the time being due on the mortgage.

Rights and Liabilities of Mortgagee.

67. Right to foreclosure or sale.

In the absence of a contract to the contrary, the mortgagee has at any time after the mortgage-money has become due to him, and before a

decree has been made for the redemption of the mortgaged property, or the mortgage-money has been paid or deposited as hereinafter provided, a right to obtain from the Court a decree that the mortgagor shall be absolutely debarred of his right to redeem the property, or a decree that the property be sold.

A suit to obtain a decree that a mortgagor shall be absolutely debarred of his right to redeem the mortgaged property is called a suit for foreclosure.

Nothing in this section shall be deemed—

(*a*) to authorize any mortgagee other than a mortgagee by conditional sale or a mortgagee under an anomalous mortgage by the terms of which he is entitled to foreclose, to institute a suit for foreclosure, or an usufructuary mortgagee as such or a mortgagee by conditional sale as such to institute a suit for sale; or

(*b*) to authorize a mortgagor who holds the mortgagee's rights as his trustee or legal representative, and who may sue for a sale of the property, to institute a suit for foreclosure; or

(*c*) to authorize the mortgagee of a railway, canal or other work in the maintenance of which the public are interested, to institute a suit for foreclosure or sale; or

(*d*) to authorize a person interested in part only of the mortgage-money to institute a suit relating only to a corresponding part of the mortgaged property, unless the mortgagees have, with the consent of the mortgagor, severed their interests under the mortgage.

67A. Mortgagee when bound to bring one suit on several mortgages.

A mortgagee who holds two or more mortgages executed by the same mortgagor in respect of each of which he has a right to obtain the same kind of decree under section 67, and who sues to obtain such decree on any one of the mortgages, shall, in the absence of a contract to the contrary, be bound to sue on all the mortgages in respect of which the mortgage-money has become due.

68. Right to sue for mortgage-money.

(*1*) The mortgagee has a right to sue for the mortgage-money in the following cases and no others, namely: —

(*a*) where the mortgagor binds himself to repay the same;

(*b*) where, by any cause other than the wrongful act or default of the mortgagor or mortgagee, the mortgaged property is wholly or partially destroyed or the security is rendered insufficient within the meaning of section 66, and the mortgagee has given the mortgagor a reasonable opportunity of providing further security enough to render the whole security sufficient, and the mortgagor has failed to do so;

(c) where the mortgagee is deprived of the whole or part of his security by or in consequence of the wrongful act or default of the mortgagor;

(d) where, the mortgagee being entitled to possession of the mortgaged property, the mortgagor fails to deliver the same to him, or to secure the possession thereof to him without disturbance by the mortgagor or any person claiming under a title superior to that of the mortgagor:

Provided that, in the case referred to in clause (a), a transferee from the mortgagor or from his legal representative shall not be liable to be sued for the mortgage-money.

(2) Where a suit is brought under clause (a) or clause (b) of sub-section (1), the Court may, at its discretion, stay the suit and all proceedings therein notwithstanding any contract to the contrary, until the mortgagee has exhausted all his available remedies against the mortgaged property or what remains of it, unless the mortgagee abandons his security and, if necessary, re-transfers the mortgaged property.

69. Power of sale when valid.

(1) A mortgagee, or any person acting on his behalf, shall, subject to the provisions of this section, have power to sell or concur in selling the mortgaged property, or any part thereof, in default of payment of the mortgage-money, without the intervention of the Court, in the following cases and in no others, namely :—

(a) where the mortgage is an English mortgage, and neither the mortgagor nor the mortgagee is a Hindu, Muhammandan or Buddhist or a member of any other race, sect, tribe or class from time to time specified in this behalf by the State Government in the Official Gazette;

(b) where a power of sale without the intervention of the Court is expressly conferred on the mortgagee by the mortgage-deed and the mortgagee is Government;

(c) where a power of sale without the intervention of the Court is expressly conferred on the mortgagee by the mortgage-deed and the mortgaged property or any part thereof was, on the date of the execution of the mortgage-deed, situate within the towns of Calcutta, Madras, Bombay, or in any other town or area which the State Government may, by notification in the Official Gazette, specify in this behalf.

(2) No such power shall be exercised unless and until—

(a) notice in writing requiring payment of the principal money has been served on the mortgagor, or on one of several mortgagors, and default has been made in payment of the principal money, or of part thereof, for three months after such service; or

(*b*) some interest under the mortgage amounting at least to five hundred rupees is in arrear and unpaid for three months after becoming due.

(3) When a sale has been made in professed exercise of such a power, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorize the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised; but any person damnified by an unauthorized or improper or irregular exercise of the power shall have his remedy in damages against the person exercising the power.

(4) The money which is received by the mortgagee, arising from the sale, after discharge of prior incumbrances, if any, to which the sale is not made subject, or after payment into Court under section 57 of a sum to meet any prior incumbrance, shall, in the absence of a contract to the contrary, be held by him in trust to be applied by him, first, in payment of all costs, charges and expenses properly incurred by him as incident to the sale or any attempted sale; and, secondly, in discharge of the mortgage-money and costs and other money, if any, due under the mortgage; and the residue of the money so received shall be paid to the person entitled to the mortgaged property, or authorized to give receipts for the proceeds of the sale thereof.

(5) Nothing in this section or in section 69A applies to powers conferred before the first day of July, 1882.

69A. Appointment of receiver.

(1) A mortgagee having the right to exercise a power of sale under section 69 shall, subject to the provisions of sub-section (2), be entitled to appoint, by writing signed by him or on his behalf, a receiver of the income of the mortgaged property or any part thereof.

(2) Any person who has been named in the mortgage-deed and is willing and able to act as receiver may be appointed by the mortgagee.

If no person has been so named, or if all persons named are unable or unwilling to act, or are dead, the mortgagee may appoint any person to whose appointment the mortgagor agrees; failing such agreement, the mortgagee shall be entitled to apply to the Court for the appointment of a receiver, and any person appointed by the Court shall be deemed to have been duly appointed by the mortgagee.

A receiver may at any time be removed by writing signed by or on behalf of the mortgagee and the mortgagor, or by the Court on application made by either party and on due cause shown.

A vacancy in the office of receiver may be filled in accordance with the provisions of this sub-section.

(3) A receiver appointed under the powers conferred by this section shall be deemed to be the agent of the mortgagor; and the mortgagor shall

be solely responsible for the receiver's acts or defaults, unless the mortgage-deed otherwise provides or unless such acts or defaults are due to the improper intervention of the mortgagee.

(4) The receiver shall have power to demand and recover all the income of which he is appointed receiver, by suit, execution or otherwise, in the name either of the mortgagor or of the mortgagee to the full extent of the interest which the mortgagor could dispose of, and to give valid receipts accordingly for the same, and to exercise any powers which may have been delegated to him by the mortgagee in accordance with the provisions of this section.

(5) A person paying money to the receiver shall not be concerned to inquire if the appointment of the receiver was valid or not.

(6) The receiver shall be entitled to retain out of any money received by him, for his remuneration, and in satisfaction of all costs, charges and expenses incurred by him as receiver, a commission at such rate not exceeding five per cent. on the gross amount of all money received as is specified in his appointment, and, if no rate is so specified, then at the rate of five per cent. on that gross amount, or at such other rate as the Court thinks fit to allow, on application made by him for that purpose.

(7) The receiver shall, if so directed in writing by the mortgagee, insure to the extent, if any, to which the mortgagee might have insured, and keep insured against loss or damage by fire, out of the money received by him, the mortgaged property or any part thereof being of an insurable nature.

(8) Subject to the provisions of this Act as to the application of insurance money, the receiver shall apply all money received by him as follows, namely,—

(i) in discharge of all rents, taxes, land revenue, rates and outgoings whatever affecting the mortgaged property ;

(ii) in keeping down all annual sum or other payments, and the interest on all principal sums, having priority to the mortgage in right whereof he is receiver ;

(iii) in payment of his commission, and of the premiums on fire, life or other insurances, if any, properly payable under the mortgage-deed or under this Act, and the cost of executing necessary or proper repairs directed in writing by the mortgagee ;

(iv) in payment of the interest falling due under the mortgage ;

(v) in or towards discharge of the principal money, if so directed in writing by the mortgagee ;

and shall pay the residue, if any, of the money received by him to the person who, but for the possession of the receiver, would have been entitled to receive the income of which he is appointed receiver, or who is otherwise entitled to the mortgaged property.

(9) The provisions of sub-section (1) apply only if and as far as a contrary intention is not expressed in the mortgage-deed; and the provisions of sub-sections (3) to (8) inclusive may be varied or extended by the mortgage-deed, and, as so varied or extended, shall, as far as may be, operate in like manner and with all the like incidents, effects and consequences, as if such variations or extensions were contained in the said sub-sections.

(10) Application may be made, without the institution of a suit, to the Court for its opinion, advice or direction on any present question respecting the management or administration of the mortgaged property, other than questions of difficulty or importance not proper in the opinion of the Court for summary disposal. A copy of such application shall be served upon, and the hearing thereof may be attended by, such of the persons interested in the application as the Court may think fit.

The costs of every application under this sub-section shall be in the discretion of the Court.

(11) In this section, "the Court" means the Court which would have jurisdiction in a suit to enforce the mortgage.

70. Accession to mortgaged property.

If, after the date of a mortgage, any accession is made to the mortgaged property, the mortgagee, in the absence of a contract to the contrary, shall, for the purposes of the security, be entitled to such accession.

Illustrations

(a) *A* mortgages to *B* a certain field bordering on a river. The field is increased by alluvion. For the purpose of his security, *B* is entitled to the increase.

(b) *A* mortgages a certain plot of building land to *B* and afterwards erects a house on the plot. For the purposes of his security *B* is entitled to the house as well as the plot.

71. Renewal of mortgaged lease.

When the mortgaged property is a lease, and the mortgagor obtains a renewal of the lease, the mortgagee, in the absence of a contract to the contrary, shall, for the purposes of the security, be entitled to the new lease.

72. Rights of mortgagee in possession.

A mortgagee may spend such money as is necessary—

(a) * * * * * * *

(b) for the preservation of the mortgaged property from destruction, forfeiture or sale;

(c) for supporting the mortgagor's title to the property;

(d) for making his own title thereto good against the mortgagor; and

(e) when the mortgaged property is a renewable leasehold, for the renewal of the lease;

and may, in the absence of a contract to the contrary, add such money to the principal money, at the rate of interest payable on the principal, and where

no such rate is fixed, at the rate of nine per cent. per annum : provided that the expenditure of money by the mortgagee under clause (b) or clause (c) shall not be deemed to be necessary unless the mortgagor has been called upon and has failed to take proper and timely steps to preserve the property or to support the title.

Where the property is by its nature insurable, the mortgagee may also, in the absence of a contract to the contrary, insure and keep insured against loss or damage by fire the whole or any part of such property; and the premiums paid for any such insurance shall be added to the principal money with interest at the same rate as is payable on the principal money or, where no such rate is fixed, at the rate of nine per cent. per annum. But the amount of such insurance shall not exceed the amount specified in this behalf in the mortgage-deed or (if no such amount is therein specified) two-thirds of the amount that would be required in case of total destruction to reinstate the property insured.

Nothing in this section shall be deemed to authorize the mortgagee to insure when an insurance of the property is kept up by or on behalf of the mortgagor to the amount in which the mortgagee is hereby authorized to insure.

73. Right to proceeds of revenue sale or compensation on acquisition.

(1) Where the mortgaged property or any part thereof or any interest therein is sold owing to failure to pay arrears of revenue or other charges of a public nature or rent due in respect of such property, and such failure did not arise from any default of the mortgagee, the mortgagee shall be entitled to claim payment of the mortgage-money, in whole or in part, out of any surplus of the sale proceeds remaining after payment of the arrears and of all charges and deductions directed by law.

(2) Where the mortgaged property or any part thereof or any interest therein is acquired under the Land Acquisition Act, 1894, or any other enactment for the time being in force providing for the compulsory acquisition of immoveable property, the mortgagee shall be entitled to claim payment of the mortgage-money, in whole or in part, out of the amount due to the mortgagor as compensation.

(3) Such claims shall prevail against all other claims except those of prior encumbrancers, and may be enforced notwithstanding that the principal money on the mortgage has not become due.

74. Right of subsequent mortgagee to pay off prior mortgagee.

[Repealed by S. 39 of Act XX of 1929.]

75. Rights of mesne mortgagee against prior and subsequent mortgagees.

[Repealed by S. 39 of Act XX of 1929.]

76. Liabilities of mortgagee in possession.

When, during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property,—

(*a*) he must manage the property as a person of ordinary prudence would manage it if it were his own;

(*b*) he must use his best endeavours to collect the rents and profits thereof;

(*c*) he must, in the absence of a contract to the contrary, out of the income of the property, pay the Government revenue, all other charges of a public nature and all rent accruing due in respect thereof during such possession, and any arrears of rent in default of payment of which the property may be summarily sold;

(*d*) he must, in the absence of a contract to the contrary, make such necessary repairs of the property as he can pay for out of the rents and profits thereof after deducting from such rents and profits the payments mentioned in clause (*c*) and the interest on the principal money;

(*e*) he must not commit any act which is destructive or permanently injurious to the property;

(*f*) where he has insured the whole or any part of the property against loss or damage by fire, he must, in case of such loss or damage, apply any money which he actually receives under the policy or so much thereof as may be necessary, in reinstating the property, or, if the mortgagor so directs, in reduction or discharge of the mortgage-money;

(*g*) he must keep clear, full and accurate accounts of all sums received and spent by him as mortgagee, and, at any time during the continuance of the mortgage, give the mortgagor, at his request and cost, true copies of such accounts and of the vouchers by which they are supported;

(*h*) his receipts from the mortgaged property, or, where such property is personally occupied by him, a fair occupation-rent in respect thereof, shall, after deducting the expenses properly incurred for the management of the property and the collection of rents and profits and the other expenses mentioned in clauses (*c*) and (*d*), and interest thereon, be debited against him in reduction of the amount (if any) from time to time due to him on account of interest and, so far as such receipts exceed any interest due, in reduction or discharge of the mortgage-money; the surplus, if any, shall be paid to the mortgagor;

(*i*) when the mortgagor tenders, or deposits in manner hereinafter provided, the amount for the time being due on the mortgage, the mortgagee must, notwithstanding the provisions in the

other clauses of this section, account for his receipts from the mortgaged property from the date of the tender or from the earliest time when he could take such amount out of Court, as the case may be and shall not be entitled to deduct any amount therefrom on account of any expenses incurred after such date or time in connection with the mortgaged property.

Loss occasioned by his default.

If the mortgagee fail to perform any of the duties imposed upon him by this section, he may, when accounts are taken in pursuance of a decree made under this chapter, be debited with the loss, if any, occasioned by such failure.

77. Receipts in lieu of interest.

Nothing in section 76, clauses (*b*), (*d*), (*g*) and (*h*), applies to cases where there is a contract between the mortgagee and the mortgagor that the receipts from the mortgaged property shall, so long as the mortgagee is in possession of the property, be taken in lieu of interest on the principal money, or in lieu of such interest and defined portions of the principal.

Priority.

78. Postponement of prior mortgagee.

Where, through the fraud, misrepresentation or gross neglect of a prior mortgagee, another person has been induced to advance money on the security of the mortgaged property, the prior mortgagee shall be postponed to the subsequent mortgagee.

79. Mortgage to secure uncertain amount when maximum is expressed.

If a mortgage made to secure future advances, the performance of an engagement or the balance of a running account, expresses the maximum to be secured thereby, a subsequent mortgage of the same property shall, if made with notice of the prior mortgage, be postponed to the prior mortgage in respect of all advances or debits not exceeding the maximum, though made or allowed with notice of the subsequent mortgage.

Illustration.

A mortgages Sultanpur to his bankers, B. & Co., to secure the balance of his account with them to the extent of Rs. 10,000. *A* then mortgages Sultanpur to *C*, to secure Rs. 10,000, *C* having notice of the mortgage to B. & Co., and *C* gives notice to B. & Co., of the second mortgage. At the date of the second mortgage, the balance due to B. & Co., does not exceed Rs. 5,000. B. & Co., subsequently advance to *A* sums making the balance of the account against him exceed the sum of Rs. 10,000. B. & Co., are entitled, to the extent of Rs. 10,000, to priority over *C*.

80. Tacking abolished.

[Repealed by S. 41 of Act XX of 1929.]

Marshalling and Contribution.

81. Marshalling securities.

If the owner of two or more properties mortgages them to one person and then mortgages one or more of the properties to another person,

the subsequent mortgagee is, in the absence of a contract to the contrary, entitled to have the prior mortgage-debt satisfied out of the property or properties not mortgaged to him, so far as the same will extend, but not so as to prejudice the rights of the prior mortgagee or of any other person who has for consideration acquired an interest in any of the properties.

82. Contribution to mortgage-debt.

Where property subject to a mortgage belongs to two or more persons having distinct and separate rights of ownership therein, the different shares in or parts of such property owned by such persons are, in the absence of a contract to the contrary, liable to contribute rateably to the debt secured by the mortgage, and, for the purpose of determining the rate at which each such share or part shall contribute, the value thereof shall be deemed to be its value at the date of the mortgage after deduction of the amount of any other mortgage or charge to which it may have been subject on that date.

Where, of two properties belonging to the same owner, one is mortgaged to secure one debt and then both are mortgaged to secure another debt, and the former debt is paid out of the former property, each property is, in the absence of a contract to the contrary, liable to contribute rateably to the latter debt after deducting the amount of the former debt from the value of the property out of which it has been paid.

Nothing in this section applies to a property liable under section 81 to the claim of the subsequent mortgagee.

Deposit in Court

83. Power to deposit in Court money due on mortgage.

At any time after the principal money payable in respect of any mortgage has become due and before a suit for redemption of the mortgaged property is barred, the mortgagor, or any other person entitled to institute such suit, may deposit, in any Court in which he might have instituted such suit, to the account of the mortgagee, the amount remaining due on the mortgage.

Right to money deposited by mortgagor.

The Court shall thereupon cause written notice of the deposit to be served on the mortgagee, and the mortgagee may, on presenting a petition (verified in manner prescribed by law for the verification of plaints) stating the amount then due on the mortgage, and his willingness to accept the money so deposited in full discharge of such amount, and on depositing in the same Court the mortgage-deed and all documents in his possession or power relating to the mortgaged property, apply for and receive the money, and the mortgage-deed and all such other documents so deposited shall be delivered to the mortgagor or such other person as aforesaid.

Where the mortgagee is in possession of the mortgaged property, the Court shall, before paying to him the amount so deposited, direct him to deliver possession thereof to the mortgagor and at the cost of the mortgagor either to re-transfer the mortgaged property to the mortgagor or to such third person as the mortgagor may direct or to execute and (where the mortgage has been effected by a registered instrument) have registered an acknowledgment in writing that any right in derogation of the mortgagor's interest transferred to the mortgagee has been extinguished.

84. Cessation of interest.

When the mortgagor or such other person as aforesaid has tendered or deposited in Court under section 83 the amount remaining due on the mortgage, interest on the principal money shall cease from the date of the tender or in the case of a deposit, where no previous tender of such amount has been made as soon as the mortgagor or such other person as aforesaid has done all that has to be done by him to enable the mortgagee to take such amount out of Court, and the notice required by section 83 has been served on the mortgagee :

Provided that, where the mortgagor has deposited such amount without having made a previous tender thereof and has subsequently withdrawn the same or any part thereof, interest on the principal money shall be payable from the date of such withdrawal.

Nothing in this section or in section 83 shall be deemed to deprive the mortgagee of his right to interest when there exists a contract that he shall be entitled to reasonable notice before payment or tender of the mortgage-money and such notice has not been given before the making of the tender or deposit, as the case may be.

Suits for Foreclosure, Sale or Redemption.

85. Parties to suits for foreclosure, sale and redemption.

[Repealed by the Code of Civil Procedure, 1908 (Act V of 1908), S. 156 and Sch. V.]

Foreclosure and Sale.

86 to 90. *[Repealed by the Code of Civil Procedure, 1908 (Act V of 1908), S. 156 and Sch. V.]*

Redemption.

91. Persons who may sue for redemption.

Besides the mortgagor, any of the following persons may redeem, or institute a suit for redemption of, the mortgaged property, namely :—

(a) any person (other than the mortgagee of the interest sought to be redeemed) who has any interest in, or charge upon, the property mortgaged or in or upon the right to redeem the same ;

(b) any surety for the payment of the mortgage-debt or any part thereof; or

(c) any creditor of the mortgagor who has in a suit for the administration of his estate obtained a decree for sale of the mortgaged property.

92. Subrogation.

Any of the persons referred to in section 91 (other than the mortgagor) and any co-mortgagor shall, on redeeming property subject to the mortgage, have, so far as regards redemption, foreclosure or sale of such property, the same rights as the mortgagee whose mortgage he redeems may have against the mortgagor or any other mortgagee.

The right conferred by this section is called the right of subrogation and a person acquiring the same is said to be subrogated to the rights of the mortgagee whose mortgage he redeems.

A person who has advanced to a mortgagor money with which the mortgage has been redeemed shall be subrogated to the rights of the mortgagee whose mortgage has been redeemed, if the mortgagor has by a registered instrument agreed that such persons shall be so subrogated.

Nothing in this section shall be deemed to confer a right of subrogation on any person unless the mortgage in respect of which the right is claimed has been redeemed in full.

93. Prohibition of tacking.

No mortgagee paying off a prior mortgage, whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his original security; and, except in the case provided for by section 79, no mortgagee making a subsequent advance to the mortgagor, whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his security for such subsequent advance.

94. Rights of mesne mortgagee.

Where a property is mortgaged for successive debts to successive mortgagees, a mesne mortgagee has the same rights against mortgagees posterior to himself as he has against the mortgagor.

95. Right of redeeming co-mortgagor to expenses..

Where one of several mortgagors redeems the mortgaged property, he shall, in enforcing his right of subrogation under section 92 against his co-mortgagors, be entitled to add to the mortgage-money recoverable from them such proportion of the expenses properly incurred in such redemption as is attributable to their share in the property.

96. Mortgage by deposit of title-deeds.

The provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to a mortgage by deposit of title-deeds.

97. Application of proceeds.

[Repealed by the Code of Civil Procedure, 1908 (Act V of 1908), S. 156 and Sch. V.]

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Anomalous Mortgages.

98. Rights and liabilities of parties to anomalous mortgages.

In the case of an anomalous mortgage the rights and liabilities of the parties shall be determined by their contract as evidenced in the mortgage-deed, and so far as such contract does not extend, by local usage.

99. Attachment of mortgaged property.

[Repealed by the Code of Civil Procedure, 1908 (Act V of 1908), S. 156 and Sch. V.]

100. Charges.

Where immoveable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to such charge.

Nothing in this section applies to the charge of a trustee on the trust-property for expenses properly incurred in the execution of h s trus', and, save as otherwise expressly provided by any law for the time being in force, no charge shall be enforced against any property in the hands of a person to whom such property has been transferred for consideration and without notice of the charge.

101. No merger in case of subsequent encumbrance.

Any mortgagee of, or person having a charge upon, immoveable property, or any transferee from such mortgagee or charge-holder, may purchase or otherwise acquire the rights in the property of the mortgagor or owner, as the case may be, without thereby causing the mortgage or charge to be merged as between himself and any subsequent mortgagee of, or person having a subsequent charge upon, the same property; and no such subsequent mortgagee or charge-holder shall be entitled to foreclose or sell such property without redeeming the prior mortgage or charge, or otherwise than subject thereto.

Notice and Tender.

102. Service or tender on or to agent.

Where the person on or to whom any notice or tender is to be served or made under this Chapter does not reside in the district in which the mortgaged property or some part thereof is situate, service or tender on or to an agent holding a general power-of-attorney from such person or otherwise duly authorized to accept such service or tender shall be deemed sufficient.

Where no person or agent on whom such notice should be served can be found or is known to the person required to serve the notice, the latter person may apply to any Court in which a suit might be brought for redemp-

tion of the mortgaged property, and such Court shall direct in what manner such notice shall be served, and any notice served in compliance with such direction shall be deemed sufficient :

Provided that, in the case of a notice required by section 83, in the case of a deposit, the application shall be made to the Court in which the deposit has been made.

Where no person or agent to whom such tender should be made can be found or is known to the person desiring to make the tender, the latter person may deposit in any Court in which a suit might be brought for redemption of the mortgaged property the amount sought to be tendered, and such deposit shall have the effect of a tender of such amount.

103. Notice, etc., to or by person incompetent to contract.

Where, under the provisions of this Chapter, a notice is to be served on or by, or a tender or deposit made or accepted or taken out of Court by, any person incompetent to contract, such notice may be served on or by, or tender or deposit made, accepted or taken by, the legal curator of the property of such person; but where there is no such curator, and it is requisite or desirable in the interests of such person that a notice should be served or a tender or deposit made under the provisions of this Chapter, application may be made to any Court in which a suit might be brought for the redemption of the mortgage to appoint a guardian *ad litem* for the purpose of serving or receiving service of such notice, or making or accepting such tender, or making or taking out of Court such deposit, and for the performance of all consequential acts which could or ought to be done by such person if he were competent to contract; and the provisions of Order XXXII in the First Schedule to the Code of Civil Procedure, 1908, shall, so far as may be, apply to such application and to the parties thereto and to the guardian appointed thereunder.

104. Power to make rules.

The High Court may, from time to time, make rules consistent with this Act for carrying out, in itself and in the Courts of Civil Judicature subject to its superintendence, the provisions contained in this Chapter.

CHAPTER V.

OF LEASES OF IMMOVEABLE PROPERTY

105. Lease defined.

A lease of immoveable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered perio-

dically or on specified occasions, to the transferor by the transferee, who accepts the transfer on such terms.

Lessor, lessee, premium and rent defined.

The transferor is called the lessor, the transferee is called the lessee, the price is called the premium, and the money, share,e service or other thingto be so rendered is called the rent.

106. Duration of certain leases in absence of written contract or local usage.

In the absence of a contract or local law or usage to the contrary, a lease of immoveable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable, on the part of either lessor or lessee, by six months' notice expiring with the end of a year of the tenancy; and a lease of immoveable property for any other purpose shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by fifteen days' notice expiring with the end of a month of the tenancy.

Every notice under this section must be in writing, signed by or on behalf of the person giving it, and either be sent by post to the party who is intended to be bound by it or be tendered or delivered personally to such party, or to one of his family or servants at his residence, or (if such tender or delivery is not practicable) affixed to a conspicuous part of the property.

107. Leases how made.

A lease of immoveable property from year to year, or for any term exceeding one year, or reserving a yearly rent, can be made only by a registered instrument.

All other leases of immoveable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession.

Where a lease of immoveable property is made by a registered instrument, such instrument or, where there are more instruments than one, each such instrument shall be executed by both the lessor and the lessee :

Provided that the State Government may, from time to time, by notification in the Official Gazette, direct that leases of immoveable property, other than leases from year to year, or for any term exceeding one year, or reserving a yearly rent, or any class of such leases, may be made by unregistered instrument or by oral agreement without delivery of possession.

108. Rights and liabilities of lessor and lessee.

In the absence of a contract or local usage to the contrary, the lessor and the lessee of immoveable property, as against one another, respectively, possess the rights and are subject to the liabilities mentioned in

the rules next following, or such of them as are applicable to the property leased:—

(A) Rights and Liabilities of the Lessor.

(a) The lessor is bound to disclose to the lessee any material defect in the property, with reference to its intended use, of which the former is and the latter is not aware, and which the latter could not with ordinary care discover :

(b) the lessor is bound on the lessee's request to put him in possession of the property :

(c) the lessor shall be deemed to contract with the lessee that, if the latter pays the rent reserved by the lease and performs the contracts binding on the lessee, he may hold the property during the time limited by the lease without interruption.

The benefit of such contract shall be annexed to and go with the lessee's interest as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested.

(B) Rights and Liabilities of the Lessee.

(d) If during the continuance of the lease any accession is made to the property, such accession (subject to the law relating to alluvion for the time being in force) shall be deemed to be comprised in the lease:

(e) if by fire, tempest or flood, or violence of an army or of a mob or other irresistible force, any material part of the property be wholly destroyed or rendered substantially and permanently unfit for the purposes for which it was let, the lease shall, at the option of the lessee, be void :

Provided that, if the injury be occasioned by the wrongful act or default of the lessee, he shall not be entitled to avail himself of the benefit of this provision :

(f) if the lessor neglects to make, within a reasonable time after notice, any repairs which he is bound to make to the property, the lessee may make the same himself, and deduct the expense of such repairs with interest from the rent, or otherwise recover it from the lessor :

(g) if the lessor neglects to make any payment which he is bound to make, and which, if not made by him, is recoverable from the lessee or against the property, the lessee may make such payment himself, and deduct it with interest from the rent, or otherwise recover it from the lessor :

(h) the lessee may even after the determination of the lease remove, at any time whilst he is in possession of the property leased but not afterwards, all things which he has attached to the earth : provided he leaves the property in the state in which he received it:

(*i*) when a lease of uncertain duration determines by any means except the fault of the lessee, he or his legal representative is entitled to all the crops planted or sown by the lessee and growing upon the property when the lease determines, and to free ingress and egress to gather and carry them :

(*j*) the lessee may transfer absolutely or by way of mortgage or sub-lease the whole or any part of his interest in the property, and any transferee of such interest or part may again transfer it. The lessee shall not, by reason only of such transfer, cease to be subject to any of the liabilities attaching to the lease :

nothing in this clause shall be deemed to authorize a tenant having an untransferable right of occupancy, the farmer of an estate in respect of which default has been made in paying revenue, or the lessee of an estate under the management of a Court of Wards, to assign his interest as such tenant, farmer or lessee ;

(*k*) the lessee is bound to disclose to the lessor any fact as to the nature or extent of the interest which the lessee is about to take, of which the lessee is, and the lessor is not, aware, and which materially increases the value of such interest :

(*l*) the lessee is bound to pay or tender, at the proper time and place, the premium or rent to the lessor or his agent in this behalf ;

(*m*) the lessee is bound to keep, and on the termination of the lease to restore, the property in as good condition as it was in at the time when he was put in possession, subject only to the changes caused by reasonable wear and tear or irresistible force, and to allow the lessor and his agents, at all reasonable times during the term, to enter upon the property and inspect the condition; thereof and give or leave notice of any defect in such condition, and, when such defect has been caused by any act or default on the part of the lessee, his servants or agents, he is bound to make it good within three months after such notice has been given or left :

(*n*) if the lessee becomes aware of any proceeding to recover the property or any part thereof, or of any encroachment made upon, or any interference with, the lessor's rights concerning such property, he is bound to give, with reasonable diligence, notice thereof to the lessor :

(*o*) the lessee may use the property and its products (if any) as a person of ordinary prudence would use them if they were his own; but he must not use, or permit another to use, the property for a purpose other than that for which it was leased, or fell or sell timber, pull down or damage buildings belonging to the lessor, or work mines or quarries not open when the lease was

granted, or commit any other act which is destructive or permanently injurious thereto:

(p) he must not, without the lessor's consent, erect on the property any permanent structure, except for agricultural purposes:

(q) on the determination of the lease, the lessee is bound to put the lessor into possession of the property.

109. Rights of lessor's transferee.

If the lessor transfers the property leased, or any part thereof, or any part of his interest therein, the transferee, in the absence of a contract to the contrary, shall possess all the rights, and, if the lessee so elects, be subject to all the liabilities of the lessor as to the property or part transferred so long as he is the owner of it; but the lessor shall not, by reason only of such transfer, cease to be subject to any of the liabilities imposed upon him by the lease, unless the lessee elects to treat the transferee as the person liable to him:

Provided that the transferee is not entitled to arrears of rent due before the transfer, and that, if the lessee, not having reason to believe that such transfer has been made, pays rent to the lessor, the lessee shall not be liable to pay such rent over again to the transferee.

The lessor, the transferee and the lessee may determine what proportion of the premium or rent reserved by the lease is payable in respect of the part so transferred, and, in case they disagree, such determination may be made by any Court having jurisdiction to entertain a suit for the possession of the property leased.

110. Exclusion of day on which term commences.

Where the time limited by a lease of immoveable property is expressed as commencing from a particular day, in computing that time such day shall be excluded. Where no day of commencement is named, the time so limited begins from the making of the lease.

Duration of lease for a year.

Where the time so limited is a year or a number of years, in the absence of an express agreement to the contrary, the lease shall last during the whole anniversary of the day from which such time commences.

Option to determine lease.

Where the time so limited is expressed to be terminable before its expiration, and the lease omits to mention at whose option it is so terminable, the lessee, and not the lessor, shall have such option.

111. Determination of lease.

A lease of immoveable property determines—

(a) by efflux of the time limited thereby:

(b) where such time is limited conditionally on the happening of some event—by the happening of such event:

(c) where the interest of the lessor in the property terminates on or his power to dispose of the same extends only to, the happening of any event—by the happening of such event :

(d) in case the interests of the lessee and the lessor in the whole of the property become vested at the same time in one person in the same right :

(e) by express surrender; that is to say, in case the lessee yields up his interest under the lease to the lessor, by mutual agreement between them :

(f) by implied surrender :

(g) by forfeiture ; that is to say, (1) in case the lessee breaks an express condition which provides that on breach thereof the lessor may re-enter : or (2) in case the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself ; or (3) the lessee is adjudicated an insolvent and the lease provides that the lessor may re-enter on the happening of such event ; and in any of these cases the lessor or his transferee gives notice in writing to the lessee of his intention to determine the lease :

(h) on the expiration of a notice to determine the lease, or to quit, or of intention to quit, the property leased, duly given by one party to the other.

Illustration to clause (f).

A lessee accepts from his lessor a new lease of the property leased, to take effect during the continuance of the existing lease. This is an implied surrender of the former lease, and such lease determines thereupon.

112. Waiver of forfeiture.

A forfeiture under section 111, clause (g), is waived by acceptance of rent which has become due since the forfeiture, or by distress for such rent, or by any other act on the part of the lessor showing an intention to treat the lease as subsisting :

Provided that the lessor is aware that the forfeiture has been incurred:

Provided also that, where rent is accepted after the institution of a suit to eject the lessee on the ground of forfeiture, such acceptance is not a waiver.

113. Waiver of notice to quit.

A notice given under section 111, clause (h), is waived, with the express or implied consent of the person to whom it is given, by any act on the part of the person giving it showing an intention to treat the lease as subsisting.

Illustrations.

(a) *A*, the lessor, gives *B*, the lessee, notice to quit the property leased. The notice expires. *B* tenders, and *A* accepts, rent which has become due in respect of the property since the expiration of the notice. The notice is waived.

(b) *A*, the lessor, gives *B*, the lessee, notice to quit the property leased. The notice expires, and *B* remains in possession. *A* gives to *B* as lessee a second notice to quit. The first notice is waived.

114. Relief against forfeiture for non-payment of rent.

Where a lease of immoveable property has determined by forfeiture for non-payment of rent, and the lessor sues to eject the lessee, if, at the hearing of the suit, the lessee pays or tenders to the lessor the rent in arrear, together with interest thereon and his full costs of the suit, or gives such security as the Court thinks sufficient for making such payment within fifteen days, the Court may, in lieu of making a decree for ejectment, pass an order relieving the lessee against the forfeiture; and thereupon the lessee shall hold the property leased as if the forfeiture had not occurred.

114A. Relief against forfeiture in certain other cases.

Where a lease of immoveable property has determined by forfeiture for a breach of an express condition which provides that on breach thereof the lessor may re-enter, no suit for ejectment shall lie unless and until the lessor has served on the lessee a notice in writing —

(a) specifying the particular breach complained of; and

(*b*) if the breach is capable of remedy, requiring the lessee to remedy the breach;

and the lessee fails, within a reasonable time from the date of the service of the notice, to remedy the breach, if it is capable of remedy.

Nothing in this section shall apply to an express condition against the assigning, under-letting, parting with the possession, or disposing, of the property leased, or to an express condition relating to forfeiture in case of non-payment of rent.

115. Effect of surrender and forfeiture on under-leases.

The surrender, express or implied, of a lease of immoveable property does not prejudice an under-lease of the property or any part thereof previously granted by the lessee, on terms and conditions substantially the same (except as regards the amount of rent) as those of the original lease; but, unless the surrender is made for the purpose of obtaining a new lease, the rent payable by, and the contracts binding on, the under-lessee shall be respectively payable to and enforceable by the lessor.

The forfeiture of such a lease annuls all such under-leases except where such forfeiture has been procured by the lessor in fraud of the under-lessees, or relief against the forfeiture is granted under section 114.

116. Effect of holding over.

If a lessee or under-lessee of property remains in possession thereof after the determination of the lease granted to the lessee, and the lessor or his legal representative accepts rent from the lessee or under-lessee, or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year, or from month to month, according to the purpose for which the property is leased, as specified in section 106.

Illustrations.

(a) *A* lets a house to *B* for five years. *B* underlets the house to *C* at a monthly rent of Rs. 100. The five years expire, but *C* continues in possession of the house and pays the rent to *A*. *C's* lease is renewed from month to month.

(b) *A* lets a farm to *B* for the life of *C*. *C* dies, but *B* continues in possession with *A's* assent. *B's* lease is renewed from year to year.

117. Exemption of leases for agricultural purposes.

None of the provisions of this Chapter apply to leases for agricultural purposes, except in so far as the State Government may, by notification published in the Official Gazette, declare all or any of such provisions to be so applicable in the case of all or any of such leases, together with, or subject to, those of the local law, if any, for the time being in force.

Such notification shall not take effect until the expiry of six months from the date of its publication.

CHAPTER VI.

OF EXCHANGES.

118. "Exchange" defined.

When two persons mutually transfer the ownership of one thing for the ownership of another, neither thing or both things being money only, the transaction is called an "exchange."

A transfer of property in completion of an exchange can be made only in manner provided for the transfer of such property by sale.

119. Right of party deprived of thing received in exchange.

If any party to an exchange or any person claiming through or under such party is by reason of any defect in the title of the other party deprived of the thing or any part of the thing received by him in exchange, then, unless a contrary intention appears from the terms of the exchange, such other party is liable to him or any person claiming through or under him for loss caused thereby, or, at the option of the person so deprived, for the return of the thing transferred, if still in the possession of such other party or his legal representative or a transferee from him without consideration.

120. Rights and liabilities of parties.

Save as otherwise provided in this Chapter, each party has the rights and is subject to the liabilities of a seller as to that which he gives, and has the rights and is subject to the liabilities of a buyer as to that which he takes.

121. Exchange of money.

On an exchange of money, each party thereby warrants the genuineness of the money given by him.

CHAPTER VII.

OF GIFTS.

122. "Gift" defined.

"Gift" is the transfer of certain existing moveable or immoveable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee.

Acceptance when to be made.

Such acceptance must be made during the lifetime of the donor and while he is still capable of giving.

If the donee dies before acceptance, the gift is void.

123. Transfer how effected.

For the purpose of making a gift of immoveable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses.

For the purpose of making a gift of moveable property, the transfer may be effected either by a registered instrument signed as aforesaid or by delivery.

Such delivery may be made in the same way as goods sold may be delivered.

124. Gift of existing and future property.

A gift comprising both existing and future property is void as to the latter.

125. Gift to several, of whom one does not accept.

A gift of a thing to two or more donees, of whom one does not accept it, is void as to the interest which he would have taken had he accepted.

126. When gift may be suspended or revoked.

The donor and donee may agree that on the happening of any specified event which does not depend on the will of the donor a gift shall be suspended or revoked; but a gift which the parties agree shall be revocable wholly or in part, at the mere will of the donor, is void wholly or in part, as the case may be.

A gift may also be revoked in any of the cases (save want or failure of consideration) in which, if it were a contract, it might be rescinded.

Save as aforesaid, a gift cannot be revoked.

Nothing contained in this section shall be deemed to affect the rights of transferees for consideration without notice.

Illustrations.

(a) *A* gives a field to *B*, reserving to himself, with *B's* assent, the right to take back the field in case *B* and his descendants die before *A*. *B* dies without descendants in *A's* lifetime. *A* may take back the field.

(b) *A* gives a lakh of rupees to *B*, reserving to himself, with *B's* assent, the right to take back at pleasure Rs. 10,000 out of the lakh. The gift holds good as to Rs. 90,000, but is void as to Rs. 10,000 which continue to belong to *A*.

127. Onerous gift.

Where a gift is in the form of a single transfer to the same person of several things of which one is, and the others are not, burdened by an obligation, the donee can take nothing by the gift unless he accepts it fully.

Where a gift is in the form of two or more separate and independent transfers to the same person of several things, the donee is at liberty to accept one of them and refuse the others, although the former may be beneficial and the latter onerous.

Onerous gift to disqualified person.

A donee not competent to contract and accepting property burdened by any obligation is not bound by his acceptance. But if, after becoming competent to contract and being aware of the obligation, he retains the property given, he becomes so bound.

Illustrations.

(a) *A* has shares in *X*, a prosperous joint stock company, and also shares in *Y*, a joint stock company, in difficulties. Heavy calls are expected in respect of the shares in *Y*. *A* gives *B* all his shares in joint stock companies. *B* refuses to accept the shares in *Y*. He cannot take the shares in *X*.

(b) *A* having a lease for a term of years of a house at a rent which he and his representatives are bound to pay during the term, and which is more than the house can be let for, gives to *B* the lease, and also, as a separate and independent transaction, a sum of money. *B* refuses to accept the lease. He does not by this refusal forfeit the money.

128. Universal donee.

Subject to the provisions of section 127, where a gift consists of the donor's whole property, the donee is personally liable for all the debts due by and liabilities of the donor at the time of the gift to the extent of the property comprised therein.

129. Saving of donations *mortis causa* and Muhammadan law.

Nothing in this Chapter relates to gifts of moveable property made in contemplation of death, or shall be deemed to affect any rule of Muhammadan law.

CHAPTER VIII.

OF TRANSFERS OF ACTIONABLE CLAIMS.

130. Transfer of actionable claim.

(1) The transfer of an actionable claim whether with or without consideration shall be effected only by the execution of an instrument in writing signed by the transferor or his duly authorized agent, and shall be

complete and effectual upon the execution of such instrument, and thereupon all the rights and remedies of the transferor, whether by way of damages or otherwise, shall vest in the transferee, whether such notice of the transfer as is hereinafter provided be given or not :

Provided that every dealing with the debt or other actionable claim by the debtor or other person from or against whom the transferor would, but for such instrument of transfer as aforesaid, have been entitled to recover or enforce such debt or other actionable claim, shall (save where the debtor or other person is a party to the transfer or has received express notice thereof as hereinafter provided) be valid as against such transfer.

(2) The transferee of an actionable claim may, upon the execution of such instrument of transfer as aforesaid, sue or institute proceedings for the same in his own name without obtaining the transferor's consent to such suit or proceedings and without making him a party thereto.

Exception. — Nothing in this section applies to the transfer of a marine or fire policy of insurance, or affects the provisions of section 38 of the Insurance Act, 1938.

Illustrations.

(i) *A* owes money to *B*, who transfers the debt to *C*. *B* then demands the debt from *A*, who, not having received notice of the transfer, as prescribed in section 131, pays *B*. The payment is valid, and *C* cannot sue *A* for the debt.

(ii) *A* effects a policy on his own life with an Insurance Company and assigns it to a Bank for securing the payment of an existing or future debt. If *A* dies, the Bank is entitled to receive the amount of the policy and to sue on it without the concurrence of *A's* executor, subject to the proviso in sub-section (1) of section 130 and to the provisions of Section 132.

130A. Transfer of policy of marine insurance.

[Repealed by the Marine Insurance Act, 1963 (XI of 1963), S. 92 (1-8-1963).]

131. Notice to be in writing, signed.

Every notice of transfer of an actionable claim shall be in writing, signed by the transferor or his agent duly authorized in this behalf, or, in case the transferor refuses to sign, by the transferee or his agent, and shall state the name and address of the transferee.

132. Liability of transferee of actionable claim.

The transferee of an actionable claim shall take it subject to all the liabilities and equities to which the transferor was subject in respect thereof at the date of the transfer.

Illustrations.

(i) *A* transfers to *C* a debt due to him by *B*, *A* being then indebted to *B*. *C* sues *B* for the debt due by *B* to *A*. In such suit *B* is entitled to set off the debt due by *A* to him, although *C* was unaware of it at the date of such transfer.

(ii) *A* executed a bond in favour of *B* under circumstances entitling the former to have it delivered up and cancelled. *B* assigns the bond to *C* for value and without notice of such circumstances. *C* cannot enforce the bond against *A*.

133. Warranty of solvency of debtor.

Where the transferor of a debt warrants the solvency of the debtor, the warranty, in the absence of a contract to the contrary, applies only to his solvency at the time of the transfer, and is limited, where the transfer is made for consideration, to the amount or value of such consideration.

134. Mortgaged debt.

Where a debt is transferred for the purpose of securing an existing or future debt, the debt so transferred, if received by the transferor or recovered by the transferee, is applicable, first, in payment of the costs of such recovery : secondly, in or towards satisfaction of the amount for the time being secured by the transfer; and the residue, if any, belongs to the transferor or other person entitled to receive the same.

135. Assignment of rights under policy of insurance against fire.

Every assignee, by endorsement or other writing, of a policy of insurance against fire, in whom the property in the subject insured shall be absolutely vested at the date of the assignment, shall have transferred and vested in him all rights of suit as if the contract contained in the policy had been made with himself.

135A. Assignment of rights under policy of marine insurance.

[Repealed by the Marine Insurance Act, 1963 (XI of 1963), S. 92 (1-8-1963).]

136. Incapacity of officers connected with Courts of Justice.

No Judge, legal practitioner or officer connected with any Court of Justice shall buy or traffic in, or stipulate for, or agree to receive any share of, or interest in, any actionable claim, and no Court of Justice shall enforce, at his instance, or at the instance of any person claiming by or through him, any actionable claims, so dealt with by him as aforesaid.

137. Saving of negotiable instruments, etc.

Nothing in the foregoing sections of this Chapter applies to stocks, shares or debentures, or to instruments which are for the time being, by law or custom, negotiable, or to any mercantile document of title to goods.

Explanation.— The expression "mercantile document of title to goods" includes a bill of lading, dock-warrant, warehousekeeper's certificate, railway receipt, warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorise, either by endorsement

or by delivery, the possessor of the document to transfer or receive goods thereby represented.

THE SCHEDULE.

Year and chapter.	Subject.	Extent of repeal.
	(a) STATUTES.	
27 Hen. VIII, c. 10.	Uses	The whole.
13 Eliz., c. 5	Fraudulent conveyances	The whole.
27 Eliz., c. 4	Fraudulent conveyances	The whole.
4 Wm. and Mary, c. 16	Clandestine mortgages	The whole.
(b) ACTS OF THE GOVERNOR-GENERAL-IN-COUNCIL		
IX of 1842	Lease and release	The whole.
XXXI of 1854	Modes of conveying land	Section 17.
XI of 1855	Mesne profits and improvements	Section 1; in the title, the words "to mesne profits and," and in the preamble "to limit the liability for mesne profits and."
XXVII of 1866	Indian Trustee Act	Section 31.
IV of 1872	Punjab Laws Act	So far as it relates to Bengal Regulations I of 1798 and XVII of 1806.
XX of 1875	Central Provinces Laws Act	So far as it relates to Bengal Regulations I of 1798 and XVII of 1806.
XVIII of 1876	Oudh Laws Act	So far as it relates to Bengal Regulation XVII of 1806.
I of 1877	Specific Relief Act.	In sections 35 and 36, the words "in writing."
(c) REGULATIONS		
Bengal Regulation I of 1798.	Conditional sales	The whole Regulation.
Bengal Regulation XVII of 1806.	Redemption	The whole Regulation.
Bombay Regulation V of 1827.	Acknowledgment of debts; Interest; Mortgages in possession.	Section 15.

THE INDIAN TRANSFER OF PROPERTY BILL, 1877.

STATEMENT OF OBJECTS AND REASONS.*

This Bill embodies the bulk of the rules submitted in the sixth report of the late Indian Law Commission. One of its chief objects is to bring the rules which regulate the transmission of property between living persons into harmony with the rules affecting its devolution upon death, and thus to furnish the necessary complement of the work commenced in framing the Law of Succession, now Act X of 1865. Another is to render more simple and efficient the law relating to mortgages and conditional sales. The expediency of legislation on this subject was affirmed by the Judicial Committee of the Privy Council in the case of *Thumbuswamy Mudelley* v. *Mahomed Hossain*, L. R. 2 Indian Appeals 241. Rules are also laid down on the other subjects hereinafter mentioned.

The Bill is divided into fourteen chapters.

Preliminary.

Chapter I contains the usual preliminary matter. The repealing clause will get rid of several obsolete statutes relating to land which are still in force in the Presidency Towns and, in the case of Europeans, may possibly be in force elsewhere. The saving clause exempts from the operation of the proposed Act acquired rights and liabilities incurred before the Act comes into force, subsequently acquired rights of pre-emption, options of mortgagees to make further advances (such options exist in Malabar and possibly elsewhere), contracts of bottomry and respondentia, transfers of British ships, sales in execution of decrees or for arrears of rent or revenue.

Assurances of Immoveable Property.

Chapter II deals with assurances of immoveable property. It declares (section 4) that every person competent to contract may make an assurance of property of which he is the owner, or which he is entitled to transfer, or on which he is entitled to create a charge. It declares (sections 5, 6 and 7) that land may be conveyed (a) with the benefit of or subject to, an assent: (b) subject to an obligation for the benefit of the public or of the neighbouring owner, or (c) with the reservation of any right of user, severance and removal. It lays down rules (section 8) as to the mode in which the transfer *inter vivos* of immoveable property can alone be effected, and applies (section 9) to assurances the rules of construction contained in the Succession Act. It declares (section 10) that, unless a contrary intention appears by the assurance, a grant shall be deemed to pass to the grantee all the interest which the grantor is capable of passing in the subject, and a grant of land shall be deemed to comprise trees and fixtures. Covenants running with the land are dealt with by the same section.

Sales of Immoveable Property.

The Bill then enumerates (section 11) the rights and liabilities which, in the absence of any provision to the contrary, arise in the case of a sale of land. The

*Gazette of India, 1877, Part V, Page 171.

principal changes made in the law are as follows : The seller will be responsible for loss caused to the buyer, or any person claiming under him, through any invalidity of the seller's title not known to the buyer when the contract was entered into and the seller's lien for unpaid purchase-money will cease as soon as the assurance is registered. Section 12 declares that except so far as regards the vendor's lien, a contract for sale shall not of itself have the effect of creating any interest in the property sold. The Bill will thus get rid of much difficult law relating to the purchaser's equitable ownership, and the rights created by charging and assigning it. Lastly, section 13 declares that a person paying the purchase-money for any immoveable property, but having the transfer made to another, will not by reason of the payment be entitled to the property or to any interest therein. It will thus become the absolute property of the transferee, unless he is made a trustee in some way more definite than by the mere payment of the money by another person and it is hoped that this rule will tend to prevent the litigation which arises from the doctrine of equitable presumption.

MORTGAGES AND CHARGES.

Chapter 4 deals with the mortgages and charges. Mortgage is so defined and explained as to include, besides simple mortgages, usufructuary mortgages, mortgages by conditional sale, and their combinations. The Bill declares (section 15) in respective rights of mortgagor and mortgagee on completion of mortgage. It defines (sections 16, 17 and 18) the rights and duties of the mortgagee in possession. It shews when the mortgagor or mortgagee may obtain an injunction to stay waste committed or threatened by the other. It provides rules (sections 19-24) as to suits for foreclosure or sale. Powers of sale given by the mortgage-deed to the mortgagee have been held void in the muffassal : the Bill (section 24) declares them to be valid, but contains provisions for the protection of the mortgagor similar to those in 23 and 24 Vict., c. 145. Ss. 11.14. It provides rules (sections 25, 26 and 27) as to suits for redemption. It contains provisions as to interest (section 28) and costs (sections 29, 30). It declares (section 31) that a deposit by a debtor of his title-deeds shall be deemed to be only evidence of a contract for a mortgage and to entitle the creditor merely to sue for specific performance. Any person having an interest in the property charged may prevent a sale at the suit of a mortgagee (section 35) by paying off the mortgagee who requires it, and the registration of the mortgagee's receipt for the money will be sufficient without any further assurance. If the payment be made by a person having the whole interest in the property subject to the mortgage, the mortgage so paid off will (section 36) cease to exist : if the payment be made by a person not having the whole of such interest, he will acquire (section 37) the rights of the incumbrancer whom he has paid off.

The Bill abolishes the system of tacking, by declaring in sections 38 and 39 that no mortgagee paying off a prior mortgage shall thereby acquire any priority in respect of his original mortgage; that no mortgagee making a subsequent advance to the mortgagor shall thereby acquire any priority in respect of his security for such advance; and that, if the owner of two properties creates separate mortgages upon them by separate assurances, each property may be redeemed or dealt with irrespectively of the other, though the mortgages are created in favour of the same mortgagee.

It has been held that, where a mortgage extends to future advances, the mortgagee cannot safely make such advances, if he has notice of an intervening second mortgage. But the Bill (section 34) provides that, if a charge made to secure the balance of a running account expresses a maximum to be secured thereby, a second

charge shall be postponed to the first charge in respect of advances not exceeding the maximum, though made subsequently to the second charge with notice thereof.

LEASES.

Chapter V deals with leases of immoveable property. It lays down rules (section 43) as to the commencement and duration of leases. It states in some detail (section 44) the obligations which, in the absence of any stipulation to the contrary, are to arise out of the relationship of landlord and tenant. Special notice may be called to the provision enabling a lessee, where the lessor omits to make repairs which he is bound to make himself, to make them and deduct the expenses from the rent, and the similar provision for the case of failure on the part of the lessor to make payments, which, if not made, are recoverable against the thing leased; to the provisions binding tenants to inform their landlords of proceedings to eject, and of encroachments; and to the power of obtaining a decree for the rescission of lease, in a suit by either party, in case of misconduct by the other.

The rules as to the fixtures in section 44, clauses (g) and (r), are, it is thought, likely to prove useful. No distinction is made between ornamental trade and agricultural fixtures, save that the landlord is given a right (resembling that conferred by 15 Vic., chap. 25, section 23) to purchase agricultural fixtures.

The rest of this chapter saves (section 45) any right to distrain possessed under any local law : provides rules (section 46) as to the duration of leases in the absence of written agreement or of local law or usage; and treats (section 47) of the effect of holding over.

EXCHANGES.

Chapter 6 deals with exchange or barter. It is taken from the New York Civil Code, and merely declares that each party has the rights and obligations of a seller as to that which he gives, and those of a buyer as to that which he takes: and that, on an exchange of money, each party warrants the genuineness of the money given by him.

SETTLEMENTS.

Chapter 7 deals with settlements, which are defined so as to include endowments and absolute gifts to children and others, excluding, however, gifts by Natives. The Bill declares (section 50) that a settlement may be binding, though not made for a consideration. Settlements made in fraud of creditors will be voidable (section 51) at their option; but not as against persons who, without notice and for valuable consideration, have acquired interest thereunder. The English law, by which a voluntary settlor of land can by subsequent sale defeat the settlement he has made, is not perpetuated here. Conditions restraining any person from parting with his or her interest will be void (section 52), and when property is settled on a married woman, it will therefore no longer be possible to deprive her of the power of anticipation. Such power is the logical consequence of a married woman's capacity, under Act 9 of 1872, to enter into contracts. The Bill also contains provisions as to making interest under settlements or wills determinable on insolvency or attempted alienation (section 53), as to the vesting of gifts in general terms (Section 54), as to the vesting of a gift to an unborn person not entitled to possession immediately on birth (section 55). Various sections of the Indian Succession Act (100-104, 107, 108, 111-127, 167) are applied (section 56), so far as the nature of the case will admit, to gifts contained in settlements.

GIFTS FOR RELIGIOUS AND CHARITABLE PURPOSES.

In accordance with the Succession Act, the Bill prohibits (section 58) persons who have near relatives from giving property to religious or charitable uses unless by an instrument executed not less than twelve months before their death and duly registered. And while allowing property to be given in perpetuity for such uses, the Bill requires (section 59) that it shall be given with the sanction of some public authority to be designated by the Government. A mode of notifying the grant or refusal of such sanction is provided. Where the sanction is refused, the property will devolve as if the gift had not been made.

APPORTIONMENT.

Chapter IX consists of a single section (60) treating the apportionment of rents and other periodical payments.

RIGHTS AND LIABILITIES OF LIMITED OWNERS.

In chapter X, the Bill abolishes the distinction between limited owners with, and those without, impeachment of waste. Such persons (section 61) will not be entitled to do any act destructive or permanently injurious to the property; but it is explained that no act done in the reasonable enjoyment of property (such, for example, as working a mine) is 'destructive' or 'injurious,' though it may exhaust the substance of the property. The power of such persons and their representatives to remove fixtures will be the same as that given to tenants under a lease. Persons having limited interests in possession will be bound (section 62) to discharge periodical payments due under prior mortgages and also taxes and other public periodical charges. The right to increase in the value of property in which there are successive interests is declared (section 63); and a provision (resembling that made by 6 Anne. chapter 72, section 1) is made for the production of tenants for life, when the remainder man has reason to suspect fraud.

LEASES AND SALES OF SETTLED ESTATES.

Chapter XI is suggested by the English Statute 19 & 20 Vic., Chap. 20. It gives the Courts (here defined to mean only the High Courts and the District Courts) a power to deal with lands subject to a settlement or will, by lease or sale, or by appropriating any part of the property for the formation of streets, roads, gardens, tanks, etc. The various modes in which the proceeds of the sales or leases may be applied are specified.

POWERS.

Chapter XII treats of powers, i.e., rights to determine the disposition of property otherwise than by virtue of ownership. It reproduces the principal rules of the English law on the subject. But the Bill does not propose to give the Courts power to aid defective executions of powers. This jurisdiction does not rest on any sound principle, and is, indeed, hardly consistent with a strict system of registration. In the case of the exercise of a power given to several donees some of whom die before it has been fully exercised, the Bill declares (section 74) that the survivors may do all that might have been done by the whole number. An analogous declaration is made (section 77) as to a power exercisable with the consent of several persons.

PROPERTY HELD BY SEVERAL PERSONS.

Chapter XIII contains some rules as the devolution of shares of several persons holding the same property. The Bill proposes to declare that a right by survivorship can be created only by express words. This chapter also contains some provisions

(sections 91, 95, 96) as to partitions of immovable property, which may be useful in cases to which no local law as to the partition of revenue-paying estates applies. In case of illegal waste by one of several persons holding the same property, power is given (section 98) to sue for compensation or to obtain an injunction.

ASSIGNMENTS OF THINGS IN ACTION.

Chapter XIV deals with the assignment of debts and other things which are not in the possession of the person entitled to them, but for the recovery of which he may be obliged to sue. The only change proposed to be made in what is now the law in all Indian Courts is that the Bill requires (section 99) the assignee to complete his title by giving the debtor notice in writing of the assignment. Negotiable instruments are excluded from the operation of this chapter.

The subject of the Bill is one of great difficulty and complexity, and errors will doubtless be found in the present draft. Ample time will be given for the searching criticism which it is hoped the draft will receive at the hands of the Local Governments. the Judges and the legal profession.

Simla,
The 10th May, 1877.

Whitley Stokes,
A. Phillips,
Secretaries to the Government of India.

REPORT OF THE SECOND LAW COMMISSION, 1879.

[Consisting of Sir Charles Turner, Sir Reymond West and Mr. Whitley Stokes.]

Policy of sections 10-25.

RECOGNIZING in this Bill, which was originally drawn by the late Law Commission and has since been repeatedly revised, the most important of the measures laid before us, we have devoted to it perhaps an undue share of the limited time at our command.

Although it has been objected to the Bill that it deals with subjects which at later stage of the work of codification will have to be arranged under separate chapters, it has appeared to us convenient to retain for the present in a great measure the form in which it was originally drafted.

Dealing generally with the transfer of property, its arrangement enables the legislature to determine to what general principles the law of transfer should conform, and to apply such principles consistently.

Read with the Contract Act, this Bill covers almost the whole of the ground which could be profitably occupied by law relating to the transfer *inter vivos*, of interests in property; and for the convenience of the practitioner it could hardly be enacted in a more accessible form.

This, it appears to us, justifies the introductory chapter, which, after declaring what rights are inalienable and by what person's transfers may be made, proceeds to declare restrictions of the transfer of property called for in the interests of society. These restrictions are identical with those which are already incorporated into the law of India in the Succession Act.

In considering the necessity for these provisions, it must not be forgotten that the number of domiciled Europeans and Eurasians holding property in India has of late years greatly increased, and that the value of the property held by them in plantations of tea and coffee, in mills and machinery and in other investments, now

amounts to many millions of pounds sterling. These persons and their estates are subject to the Law of Succession (Act X of 1865), and it will be obviously inconsistent that they should possess powers of creating estates in their property by transfers *inter vivos*, which the legislature has declared they should not enjoy by testamentary disposition. Moreover, where the declared law is silent on the subject in respect of transfers *inter vivos*, the Courts may, and probably would consider themselves bound to recognize principles stamped with the assent of the legislature as conclusive of the question that transfers *inter vivos* creating estates in violation of these principles are invalid as opposed to public policy.

The Privy Council has already ruled that estates cannot be created by Hindus in contravention of the principles which underlie the Thellusson Act, or subject to conditions which are void for repugnancy.

The rules contained in sections 10 to 35 impugn, so far as our experience goes, no law or practice of Hindus, Muhammadans or other sects recognized in India as enjoying special personal laws, unless it may be the now obsolete practice among Muhammadans of devoting property to the maintenance of the family of a particular saint. But to avoid any disturbance of rights enjoyed under personal laws, sufficient provision is made in the Bill.

The persons to whom the provisions we are now considering will in practice be found mainly applicable are property-holders who have been designated in former Acts as "persons to whom the English law applies," a phrase which gave rise to no difficulty in the case of persons holding property in the muffassal. This class has now attained sufficient importance in numbers and wealth to demand at the hands of the legislature an explicit declaration of restrictions which may be imposed on their dealings with their property, and where these restrictions are founded on approved principles and not inconsistent with personal law, there is no reason why they should not be declared of general application.

The sections from 36 to 53 embody rules already applied in the Courts of India, or flowing naturally from accepted principles.

The rules relating to sales, mortgages, exchanges and gifts declare generally no more than is understood and applied as law in the Courts. The exceptions will be noticed in our detailed observations.

CHAPTER I.

PRELIMINARY.

We would expressly save, in section 2, transfer by decree or order of Courts of competent jurisdiction.

In the interpretation-clause (section 3) we would insert definitions of "ownership" and "property," we would extend the definition of "attached to the earth" so as to include trees and shrubs; and with reference to sections 40, 56, 78, 79 and 80 of the Bill as we have revised it, we would define "notice" as follows:

"A person is said to have 'notice' of a fact when he actually knows that fact, or when, but for wilful abstention from inquiry which he ought to have made or gross negligence, he would have known it, or when information of the fact is given to or obtained by his agent under the circumstances mentioned in the Indian Contract Act, section 229."

We would declare that all chapters and sections of the Bill which relate to contracts should be taken as part of the Contract Act, 1872. When the body of substantive civil law enacted for India is re-arranged in a more compact and convenient form than that of a series of fragmentary portions from time to time passed by the legislature,(1) the chapters on Sale, Mortgage, Lease and Exchange contained in the present Bill, will probably be placed in close connection with the rules contained in the Contract Act. But till then they may fitly be left in a law containing what the Contract Act does not contain, namely, general rules regulating the transmission of property between living persons.

CHAPTER II

OF TRANSFERS OF IMMOVEABLE PROPERTY

We think that chapter II should be extended to transfers of property, whether moveable or immoveable; that it should be entitled "*Of Transfers of Property by Act of Parties*," and that it should commence with two sections—one defining "transfer," the other showing what may be transferred. The latter section should, we think, to some extent follow the analogy of the Code of Civil Procedure, section 266, clauses *(e)*, *(g)*, *(h)* and *(k)*, as to property which may be attached.(2) We also think that this chapter should contain a section declaring that a transfer may be made without writing in every case in which a writing is not expressly required by law.

The law Commissioners, by whom the original draft of this Bill was framed, observed that their chief object was to bring the rules which regulate the transmission of property between living persons into harmony with the rules affecting its devolution upon death, and thus to furnish the necessary complement of the work which they commenced in framing the Law of Succession. With the view they inserted rules that conditions in restraint of alienation should be void; that conditions making an interest to cease on insolvency or attempted alienation should also be void; that restrictions should be placed on the power of tying up property by transactions *inter vivos* similar to those imposed by the Indian Succession Act, sections 100 to 104, in the case of Wills. They also proposed rules as to when certain interests created by transactions *inter vivos*, should be deemed vested. And they applied *mutatis mutandis*, to transfer the rules of the Succession Act as to contingent bequests, conditional bequests and bequests with directions as to application and enjoyment. It seems to us that subject to the following remarks, these rules are in themselves reasonable, and may properly be extended to the transactions *inter vivos*, of all the inhabitants of India, whether they are not subject to the Succession Act. But as to the rule cor-

(1). This, we understand, is all that was intended by the Government of India in paragraph 18 of its Legislative Despatch No. 34, dated 10th May, 1877, by the phrase, "scientifically arranging the various chapters of the Civil Code thus produced," and some such arrangement was contemplated by the late Indian Law Commissioners, who observe in their sixth report, referring to their rules relating to the transfer of property: "It is probable that several of these rules will eventually find a different place whenever a final distribution and re-arrangement of the whole law shall have been effected; but some blending of subjects is unavoidable in a work which the Government has, for sufficient reasons, instructed us to submit to it in portions, as each portion is completed."

(2). In view of the more general prohibition that no transfer can be made which is opposed to the nature of the interest affected thereby, Sir Charles Turner thinks it unnecessary to declare that "a strictly personal right," etc., cannot be transferred.

responding with section 100 of the Succession Act, Sir Charles Turner and Mr. West think that the law should be modified so as not to exclude the unborn beneficiary in the case supposed, but to make void any limitation beyond his interest. As to the rule corresponding with section 102 of the Succession Act, they think that, where distinct interests are given to persons as members of a class, which interests are ascertainable within the term prescribed by the rule against perpetuity, those interests should not fail by reason of other interests failing through the operation of that rule: and as to the rule corresponding with section 103 of the Succession Act, they think that, where an intermediate interest fails, the subsequent interest should not fail, if it is ascertained and vested immediately on the death of the specified persons who were living at the time of the transferor's death. Mr. Stokes is averse to making any of the modifications thus suggested. As to the rule prohibiting accumulation, we all should prefer the more liberal enactments of the Thellusson Act (39 & 40 Geo. III, c. 98) which allow an accumulation for twenty-one years, and do not affect provisions for payment of debts or for raising portions(1). But as the rule embodied in the Succession Act, section 104, has now been in force for fourteen years, Mr. Stokes and Mr. West do not press its alteration. The Law Commissioners also proposed to extend to transactions *inter vivos* the rules as to election contained in Part XXVII of the Succession Act. We think that these rules also, founded as they are on principles of equity which are universally applicable, may also properly be inserted in the Bill.

We think provision should be made for the satisfaction of a right arising in favour of several persons, where in consequence of transfer, property is divided, and held in several shares; and we have framed a section with this object. Mr. West is of opinion that a corresponding rule is necessary for the case of a division of the property burdened with an obligation, and that the rules should apply in all cases of legal division.

Section 7 of the Bill treats of the title which the transferor of immoveable property can confer, and of the protection given to innocent transferees for value. We think that this matter should be dealt with in more detail, and have accordingly framed sections in substitution, providing for each of the following five cases: –

(1) Where there is a transfer for consideration by a person, such as a Hindu widow, authorized only under circumstances in their nature variable to dispose of immoveable property ;

(2) Where a third person has a right to receive maintenance from the profits of immoveable property and such right does not amount to a charge ;

(3) Where for the more beneficial enjoyment of his own immoveable property, a third person has, independently of any interest in the immoveable property of another, a right to restrain the enjoyment of the latter property ;

(4) Where a third person is entitled to the benefit of an obligation arising out of a contract and annexed to the ownership of immoveable property, but not amounting to an interest or easement; and

(5) Where a person holds immoveable property as its ostensible owner with the consent of the other persons interested therein.

We recommend, too, that the Bill should here provide for the following cases:—

(a) where a person, erroneously representing that he is authorized to transfer

(1). Sir Charles Turner would also urge that these enactments are frequently required by the circumstances of large zemindari properties.

certain immoveable property, assumes to transfer it for consideration and afterwards acquires an interest therein ;

(b) where a transfer of immoveable property is made for consideration by persons having distinct interests therein ;

(c) where several co-owners of immoveable property transfer a share therein without specifying that the transfer is to take effect on any particular share or shares of the transferors ;

(d) where a person creates, by transfer at different times, rights in or over the same immoveable property, and such rights cannot all exist or be exercised to their full extent together. Mr. West thinks that the rule dealing with this case should be supplemented by a rule providing for the satisfaction of each later created interest to the fullest extent compatible with the rule of priority and for such adjustments as may further this object.

It seems to us that a clause resembling Act XI of 1855, section 2 which provides, in cases to which the English law is applicable, for improvements of immoveable property made by *bona fide* transferees who are subsequently evicted, may fitly be introduced into the Bill and applied to all persons in British India We think, too, that such transferees should be allowed to remove growing crops which they have planted or sown on the property.

We think that the section (10) relating to transfers of land *pendente lite* should not forbid such transfers when made under the authority of the Court and on such terms as it may impose, and that the section (10A) relating to fraudulent transfers may properly be extended to cases of fraudulent forfeitures and to cases where the persons defrauded are co-owners of creditors.

CHAPTER III.

OF SALES OF IMMOVEABLE PROPERTY.

We think that "sale" should be defined as a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised. We entirely agree with Sir Henry Maine as to the desirability of rendering the system of transfer of immoveable property a system of public transfer. But we must remember that, in the absence of a much larger number of registration-offices than at present exist in India, the requirement of registration in the case of every petty transaction relating to land would be an intolerable hardship. We have in this matter been guided by the analogy of the Indian Registration Act (III of 1877), section 17, and required that sales should be made in the case of immoveable property of the value of Rs. 100 and upwards only by a registered assurance, but that in the case of immoveable property of a less value it may be made either by registered assurance or by delivery of the property. As to delivery, we think it will be enough to say that it takes place, in the case of a reversion or other intangible thing when the parties consent to the delivery and in the case of other immoveable property, when the seller places the buyer, or such persons as he directs, in possession of the property.

The rights and liabilities of the seller and buyer may, we think, be conveniently classified as follows :—(a) duties of seller ; (b) rights of seller, (c) duties of buyer ; (d) rights of buyer, and according to that phase in each case which is the more prominent in practice. In addition to the duties which the Bill (section 12) imposes in the seller, and which are generally recognised by the Courts, we think that when the propetry is,

or forms part of, a revenue-paying estate, he should be bound to present an application to the proper officer for the requisite alteration of the revenue-register; that between the date of the contract of sale and the delivery of the property he should take due care of the property and the title-deeds in his possession; that on being so required, he should give the buyer, or such person as he directs, such possession of the property as its nature admits and that he should pay all public charges and rent accrued due in respect of the property up to the date of sale. As to his duty regarding incumbrances on property sold, we conceive that it will be in accordance with what is generally understood to be the law throughout India merely to require the seller, in the absence of a contract to the contrary, to pay the interest due on the date of sale and, where the property is sold free from incumbrances to discharge all incumbrances thereon then existing. As to the implied contracts of a seller, we think it will be enough to provide that he shall be deemed to contract that the interest which he assumes to transfer to the buyer subsists, and that he has power to transfer the same; provided that where the sale is made by a person in a fiduciary character, he shall be deemed to contract to the like effect so far only as his knowledge extends.

As to the buyer's duties, we would require him in addition to the duties expressly imposed by the Bill (sections 12, 15, 16), to pay or tender, at the time and place of completing the transfer, the purchase-money to the seller or such person as he directs. Power to retain out of the purchase-money the amount of the incumbrances should, we think, be given to the buyer only when the property is sold free of incumbrances. We would expressly require the buyer to re-transfer the property when the ownership thereof has passed to him before payment of the purchase-money and he fails to pay or tender it. We also think that where the ownership of the property has passed to the buyer he should as between himself and the seller, be expressly bound to pay all public charges which may become due in respect of the property, the principal money due on the incumbrances subject to which the property is sold, and the interest thereon afterwards accruing due.

CHAPTER IV.

MORTGAGES OF IMMOVEABLE PROPERTY AND CHARGES.

The objection raised by one eminent critic, that this chapter deals "with matters which do not transfer property, but only create a charge upon it" is one which seems to us to rest on an assumption that a transfer must of necessity extend to the whole property or interest of the transferor in the subject-matter of the transaction. We, considering ownership as generally divisible have regarded the term "transfer" as properly applicable to any interest carved out of the aggregate called "ownership." This is consistent with the English law. "A security," says Mr. Fisher in his work on Mortgages, "is a redeemable estate or right which one person has in the property of another."

We think that the definitions of the four chief kinds of mortgages with which this chapter commences, and which were taken from Mr. Macpherson's well-known work, require some modification to adopt them to the various parts of India. Mr. West is of opinion that the words 'without delivering possession' in the definition of 'mortgage by conditional sale' are not essential, and are opposed to a common practice in the Bombay Presidency. Sir Charles Turner considers that transfer of possession is

not of the essence of such mortgages although they are very generally combined with transfer of possession and usufructuary provisions.

We are of opinion that writing and registration should be compulsory whenever the principal money secured is one hundred rupees and upwards: when the principal is less than that sum and the property is not delivered, we would also require registration; and in all such cases we think the mortgagor, on payment of the amount remaining due, should be entitled to require the mortgagee to register an acknowledgment that any right in derogation of the interest transferred to him has been extinguished. The requirement of registration will not only discourage fraud and facilitate investigations of title; it will also preclude some difficult questions as to priority.

Mr. West would introduce a provision in the section treating of the right to redeem, to the effect that if the time fixed for repayment of the mortgage-money has been allowed to pass, or if no time has been fixed the mortgagee should be entitled to reasonable notice before payment. Mr. Stokes and Sir C. Turner are opposed to this provision as unsuited to India. In mortgages for considerable sums the parties would sufficiently protect themselves: in the far more numerous cases of mortgages for small sums to saukars, it would be inconvenient to require notice.

We think that a person interested in a share only of the mortgaged property should be entitled to redeem his own share only where the mortgagee, or, if there are several mortgagees, all of them, has or have acquired a share in the right to redeem.

The section (61) of the revised draft, declaring the right of an usufructuary mortgagor to recover possession, should, in Sir Charles Turner's opinion, enable him to do so—

Usufructuary mortgages.

Where the profits are to be applied in payment of interest at a rate agreed or prescribed by law and then in reduction of principal—when the mortgagor pays or tenders to the mortgagee, or deposits in Court as hereinafter provided, the sum then due thereon;

Where the profits are to be taken in lieu of interest and no time is specified for redemption; or where the profits are to be so taken and the mortgage is made for a term of years, but it was not the intention of the parties that redemption should be postponed to the expiry of the term — when the sum then due on the mortgage is paid, tendered or deposited as aforesaid;

Where the profits are to be taken in lieu of interest and the mortgage is made for a term, and it was the intention of the parties that redemption should not be allowed before the expiry of the term—when, after the expiry of the term, the sum then due on the mortgage is paid, tendered or deposited as aforesaid.

Explanation.—It is not necessarily to be concluded from the circumstance that a mortgage expressed to be made for a term of years that it was the intention of the parties that redemption should not be allowed before the expiry of the term. The contrary intention may be declared by, or inferred from, other stipulations of the contract.

The case where accessions to mortgaged property have been acquired at the cost of the mortgagee should, we think, be provided for.

Accession.

As the law stands, there is no implied contract on the part of the borrower to produce a security of any particular degree of safety, or any particular title, as in the case of a contract for sale. The implied contracts of the mortgagor should, therefore, in

our opinion, be that the interest which he assumes to transfer subsists, and that he has power to transfer the same; that the mortgagor will defend, or, if the mortgagee is in possession, enable him to defend, the mortgagor's title to the mortgaged property; that where the mortgage is a second or subsequent incumbrance, the mortgagor will pay the interest accruing due on each prior incumbrance, and at the proper time discharge the principal due thereon. There should also be, in the case of mortgaged leasehold, the stipulations specified in the Bill (section 24) as to payment of rent, performance of conditions, observance of contracts and indemnity.

For the section (27) treating of waste by a mortgagor in possession, Mr. West would substitute the following : "A mortgagor must not by any act or wilful omission destroy, or materially impair the value of, the mortgaged property or his interest therein as a security for the mortgage-money."

We recommend the omission of the section (28) requiring certain notices to be given by mortgagors making, or proposing to make, second and other subsequent mortgages. This provision (which was inserted by the Select Committee to which the the Bill was referred) is a novelty, and does not seem to us likely to be of any practical use.

Section 34, expressing the present rule in the case of a mortgage by conditional sale, treats the mortgagee as having no remedy against the mortgagor personally, except in certain specified cases. Mr. West would substitute the following : "A mortgagee may sue a mortgagor for mortgage-money which has become payable in all cases except those wherein a personal liability has been excluded by express contract or by the nature of the mortgage."

Where, by any cause other than the wrongful act or default of the mortgagor or mortgagee, the mortgaged property has been wholly or partially destroyed, or the security is rendered insufficient, the mortgagee should, we think, be entitled to require the mortgagor to give him within a reasonable time another sufficient security for his debt, and if the mortgagor fails to do so, to sue him for the mortgage-money.

We think that a mortgagee interested in part only of the mortgage-money should not be precluded from suing for a partial foreclosure where the mortgagees have, with the consent of the mortgagor, severed their interests under the mortgage.

We would modify section 35 so as to allow powers of sale in all cases where the principal money originally secured is five hundred rupees or upwards. They save litigation and expense. Their validity has been recognised in many parts of India. Moreover, interference with freedom of contract is *prima facie* undesirable and it is, in our opinion, only small transactions, where the mortgagor is generally poor and ignorant, that any real danger exists as to the misuse of such powers. In some cases the mortgagor obtains money on easier terms by conferring a power of sale on the mortgagee, and the power is usually, and not unreasonably, inserted in mortgages to agents of indigo, coffee and similar estates, where the value of the security might be considerably impaired, were the property neglected while the mortgagee was seeking a sale by order of Court.

Where the receipts from the mortgaged property are to be taken in lieu of interest, or of interest and defined portions of the principal, we do not think that a mortgagee in possession should be bound to collect the rents and profits and to repair.

The section (45) relating to mortgages made to secure the balance of a running account and expressing the maximum secured should, we think, be extended to mortgages to secure future advances and the performance of engagements.

We think that the Court should not postpone the day appointed for payment in a foreclosure-suit unless sufficient security is given as well as good cause shown, and we would modify section 50 so as to enable it to require such security.

O. 34, R. 3.

The power conferred on a Court to order, in a foreclosure suit, a sale in lieu of foreclosure, at the instance of the mortgagee, or at the instance of the mortgagor, furnishing security for any balance which may remain unsatisfied by the proceeds of a sale, will be novel throughout the greater part of the Mufassal.(1) But it seems to us expedient for the mortgagor that the Court should possess this power, and that where the sale takes place at the instance of the mortgagee, he should not be allowed to recover any balance which he could not have recovered in the event of foreclosure and that where the sale takes place at the instance of the mortgagor, the mortgagee obtains all that he is entitled to, if he receives his principal money and interest.

Where a decree has been made for redemption, if the amount due is not paid on the day fixed by the Court, the plaintiff, where the mortgage is simple or usufructuary, should not be foreclosed, nor where the mortgage is by conditional sale, should the property be sold.

Where one of several mortgagors redeems the mortgaged property and obtains possession thereof, we think that he should be declared entitled to a charge on the share of each of the other co-mortgagors in the property, for his proportion of the costs properly incurred in so redeeming and obtaining possession. A decision of the late Sadar Court, North-Western Provinces, is to this effect. The High Court of Bombay also has ruled that the purchaser of the interest of one of several co-sharers in an equity of redemption may redeem the whole property and hold it subject to the rights of contribution of the other co-sharers.

The Bill should, Mr. Stokes and Sir Charles Turner think, provide separately for the rights and liabilities which arise where two or more forms of mortgage are combined.

Mr. Stokes would insert the following:

"97. Where a simple mortgagee is, under the contract of mortgage, entitled as lessee or otherwise to receive the rents and profits accruing from the mortgaged property, such rents and profits shall, in the absence of a contract to the contrary, be credited to the mortgagor against the interest of the principal money, and if they exceed the amount due in respect of interest, against the principal money also. In other respects the rights and liabilities of the parties are the same as if the mortgage were purely simple.

Simple mortgage usufructuary.

Where a mortgagee by conditional sale is, under the contract of mortgage, entitled as lessee or otherwise to receive the rents and profits accruing from the mortgaged property, the rights and liabilities of the parties are, up to the date on which the principal money has become payable, the same as if the mortgage were purely usufructuary, and from and after that date the same as if the mortgage were purely by conditional sale."

Conditional mortgage usufructuary.

Sir Charles Turner thinks that it would be enough to insert a simple declaration that the mortgagee and mortgagor have respectively the same rights and liabilities as are declared to be created in each of the several forms so combined, so far as such rights and liabilities are consistent with the mortgagee's availing himself of any of his

(1). But see, as to the Presidency of Bombay, Bombay Regulation V of 1827 *ad finem*.

remedies. Mr. West thinks that the general provisions of the Bill sufficiently cover this matter.

There is a common practice on the part of mortgagees of suing their mortgagors on the debt as such, and in execution selling the mortgagor's interest in the property. This is purchased by strangers to the mortgage, who are thus virtually defrauded by an enforcement of the security, of the existence of which they were wholly ignorant. In order to check this practice, we have framed a section providing that where a mortgagee in execution of a decree for the satisfaction of any claim, whether arising under the mortgage or not, attaches and brings to sale the mortgaged property, or the mortgagor's interest therein, his security shall be extinguished unless before the issue of the proclamation under the Civil Procedure Code, section 287, he gives notice thereof to the Court executing the decree.

Equitable mortgages.

We concur with the late Law Commissioners in thinking that mortgage by deposit of title-deeds should not be recognized. It is now hardly known in the Mufassal. It is opposed to the policy of our registration law: it leads to evasions of the stamp-duty; and it is at variance with the principle of making the system of transfer of immoveable property as far as possible a system of public transfer. When the amount secured is Rs. 100 or upwards, it would also be inconsistent with our proposed rule requiring a written instrument.

The section (64) relating to the merger of charges is, in the opinion of Mr. Stokes and Sir C. Turner, in exact accordance with the English and Indian decisions on the subject. Mr. West would substitute the following: "The holder of one of two or more incumbrances may purchase another, or the property subject thereto, and hold the same with his original incumbrance as separate interest."

For section 54 (as to the right to recover a balance due on a mortgage) Sir Charles Turner would substitute the following:—

"Where the nett proceeds of any such sale are insufficient to pay the amount due for the time being on the mortgage, together with the costs, if any, awarded to the mortgagee by the decree or in execution thereof, he may recover such balance and costs—

If the sale has been made in a suit for foreclosure, under the last paragraph of section 87, in execution of the decree, by enforcing the security: and if such security is a bond, with sureties, both against such sureties and the principal;

in any case, if under the contract the mortgagee was entitled to any other remedy for the recovery of the mortgaged-debt in addition to a sale of the property sold, and such other remedy has been claimed and decreed in execution of the decree; but

if such other remedy has not been claimed and decreed; then by subsequent suit, unless he has by release or abandonment or otherwise lost such other remedy, or the suit is barred by limitation."

Tender: Notice.

Lastly, we all think that the Bill should contain provisions as to serving notices, and making or accepting tenders and deposits, under this chapter when the person concerned is non-resident, or unknown, or incompetent to contract. These provisions (which will be found in the revised Bill, sections 101, 102) are novel; but they are suggested by difficulties which have occurred in practice. Mr. West is of opinion that the following principles should be explicitly set forth: (1) a transaction in disguise, the real intent of which is to make property a security for a continuing debt, is to be deemed a mortgage; (2) an unreasonable

restriction on redemption is void; (3) time specified is not of the essence of the transaction for either party. Mr. Stokes and Sir Charles Turner consider that it may be left to the Courts to determine in each instance what is the nature of a transaction, and whether time is of its essence, and that it would be expedient to do more, in respect of restrictions on redemption, than to give effect to the intention of the parties when it can be collected from the contract.

CHAPTER V

OF LEASES OF IMMOVEABLE PROPERTY.

A high authority objects to this chapter in that it deals "with matters which do not transfer property, but only create a limited interest in it" This is not, we venture to think, in accordance with either English or Indian law. The lessor not only creates, but conveys, an interest in the property concerned. We conceive and have defined, a lease to be a transfer of a right to enjoy specified immoveable property, made in consideration of a premium or a rent. Such a right is "property," and the present chapter therefore, in our opinion, rightly falls within the scope of a Bill entitled "The Transfer of Property Act."

We would require all leases from year to year, or for any term exceeding one year, or reserving a yearly rent, to be made by registered assurance. This agrees with the rule in the Registration Act (III of 1877), section 17, save that it omits the power given by that Act to the Local Government to exempt leases for terms not exceeding five years and for annual rents not exceeding fifty rupees. It is hardly necessary to point out that it also carries out the policy above referred to, of rendering the system of transferring immovable property as far as possible a system of public transfer.

As to the respective rights and liabilities of the lessor and lessee, we would expressly recognise the right to distrain, subject to the local law relating to distress. We think that the lessor's implied contract for quiet enjoyment should not in India be limited to the acts of the lessor or his transferees, or any person claiming through him or them. Where any material part of the property leased is by *vis major* destroyed or rendered substantially and permanently unfit for the purpose for which it was let, we recommend that the lessee should have the option of treating the lease as void. The lessee should, we think, in the absence of a contract or local usage to the contrary, be bound to make good only such defects as have been caused by his own act or default.

As to the effect of a surrender on an under-lease, we think that when the under-lease has been granted on terms and conditions substantially the same (except as regards the amount of rent) as those of the original lease, the under-lease should not be prejudiced. Mr. West thinks that the original lessor ought to be guarded against loss through sub-leases at reduced rents, and that sub-lessees willing to make good terms of the original lease should be guarded against loss by any wilful forfeiture.

Mr. West would extend the section (73) relating to relief against forfeiture for non-payment of rent to all cases free from fraud and wilful neglect and reparable by damages.

Local legislation as to the relations of zemindar and raiyat being so copious and elaborate, we think, that the provisions of this chapter should not apply to leases for

agricultural purposes, except in so far as the local Government may declare all or any of such provisions to be so applicable, together with, or subject to, those of any local law for the time being in force.

CHAPTER VI.

OF EXCHANGES.

This chapter will supply a distinct defect in the Contract Act. We would define "Exchange," not as an agreement, but as the fulfilment of an agreement by mutual transfer of dominion, and accordingly make the first section of this chapter run thus:—

"When two persons mutually transfer the ownership of one thing for the ownership of another neither thing nor both things being money only, the transaction is called an 'exchange'.

A transfer of property in completion of an exchange can be made only in manner provided for the transfer of such property by sale."

The effect of this will be to render a registered assurance necessary in the case of an exchange of land worth one hundred rupees or upwards. Here, again, we have borne in mind the expediency of rendering the system of transfer of immoveable property as far as possible a system of public transfer.

We think the clause (section 77) relating to the right of a party evicted from a thing received in exchange should be made subject to a contract to the contrary.

Gifts.

In accordance with the suggestion of a distinguished Native lawyer, Srinivasa Rao, we recommend the insertion here of a chapter on Gift *inter vivos*, saving of course the rules of Muhammadan law on this subject. We have framed some sections on this subject which will be found in chapter VII of the revised draft of the Transfer of Property Bill annexed to this Report. They define "gift" : they show how a transfer must be effected for the purpose of making a gift *(a)* of immoveable property, and *(b)* of moveable property : they require registration in the case of gifts of immoveable property of whatever value (Act III of 1877, section 17, clause *a*), and in the case of gifts of moveables, whenever the property given is not delivered : they provide a rule as to the effect of giving benefits to the persons attesting gifts of land : they declare that a gift comprising both existing and future property is void as to the latter, and that a gift of a divisible thing to two or more donees, of whom one does not accept it, is void as to the interest which he would have taken had he accepted it. They show when a gift may be suspended or revoked. They exempt the donor from warranty. They deal, finally, with onerous and with universal gifts. Gifts of one's whole property to a relation or friend are not uncommon before an execution or in anticipation of insolvency. For such cases of fraud section 53 of the revised Bill would provide when the property is land. But an universal gift may conceivably be honest and comprise moveable property. It should, therefore, we think, be specially provided for.

Of these provisions it may be said, generally, that some have not hitherto been declared by the legislature or the Courts; but they proceed on principles already recognized. The rule declaring universal donee liable personally for the donor's debts due at the time of the gift to the extent of the property given is not only obviously equitable but is, as we have said, required to meet a not uncommon fraud. It is also in conformity with Hindu law.

CHAPTER VII.

OF TRANSFERS OF DEBTS.

We think that this chapter should be entitled "Of Transfers of Actionable Claims," and that its provisions as to charges on debts and beneficial interests in moveable property should be omitted. We would provide rules as to the application and extent of the warranty of the solvency of a debtor. We think that in India it would be expedient to declare that, as a rule, when an actionable claim is sold, he, against whom it is claimed, is discharged by paying the buyer the price and incidental expenses of the sale with interest from the date of payment. Lastly, we think that no judge, pleader or other officer connected with Courts of Justice should be capable of buying any actionable claim falling under the jurisdiction of the Court in which he exercises his functions.

We have inserted in the repealing schedule the Statute of Uses (27 Hen. VIII, c. 10). It has no operation in the Mufassal; and in the Presidency-towns it will be inconsistent with the provisions of section 8 of the Bill as now revised.

We annexed to this Report a copy (marked A) of the Bill as we have revised it.

FINAL REPORT OF THE SELECT COMMITTEE, 1881.

(Gazette of India, 1881, Pt. V, P. 395.)

The following Third (final) Report of a Select Committee, together with the Bill as settled by them, was presented to the Council of the Governor-General of India for the purpose of making Laws and Regulations on the 11th March, 1881:—

We, the undersigned Members of the Select Committee to which the Bill to define and amend the law relating to the Transfer of Property was referred, have the honour to state that the Report of the Indian Law Commissioners, 1879, was duly communicated to us. We have carefully considered so much of it as relates to that Bill, as well as the papers specified in the annexed list, and, in compliance with the wish of the Secretary of State for India, as expressed in his despatch (Legislative) No. 37, dated 7th October, 1880, we have now the honour to present this our third Report.

We agree generally in the enlargement of the Bill effected by the Law Commissioners, and we shall in this Report refer to the Bill as settled by them, and published in the *Gazette of India* for the 17th and 24th January, 1880.

CHAPTER 1.

PRELIMINARY.

We have rendered the definition of "attached to the earth" inapplicable to objects which merely rest upon the earth. And we have amended the definition of "Notice" by making it apply expressly to a case where a person wilfully abstains from a search in a register which he ought to have made.

CHAPTER II.

TRANSFER OF PROPERTY BY ACT OF PARTIES.

This Chapter, after declaring what rights are inalienable and by what persons transfers may be made, proceeds to declare restrictions of the transfer of property called for in the interests of society. These restrictions are in substance identical with those contained in the Indian Succession Act, and rights and liabilities arising out of customs or personal laws are sufficiently saved by section 2, clause *(a)*.

We have amended section 6 (as to what may be transferred) in these respects:

First, we have in the first clause substituted "Act" for "section." The effect will be to place Hindus on the same footing as Europeans as regards the power to make settlements, on marriage or otherwise, on persons not in existence at the date of the transfer. Although, no doubt, it has been laid down that the general principle of the Hindu law is that donee must be in existence at the time of the gift, such settlements are in accordance with native usage.

Secondly, we have redrawn clause *(a)* thus:—"*(a)* The chance of an heir-apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman, or any other mere possibility of the same nature, cannot be transferred: the chance of a Hindu heir succeeding to property in the possession of a Hindu female cannot be transferred to any one except the present or future owner or co-owner of the property affected thereby."

Thirdly, we have made clause *(c) run thus*:—"*(c)*. An easement cannot be transferred apart from the dominant heritage."

Fourthly, we have extended clause *(e)* to rights to sue for harm illegally caused to property.

We think that the power to transfer property to or for the benefit of women, so that they shall not be able, during their marriage, to transfer or charge the same should be confined, as it is now, to women not being Hindus, Muhammadans or Buddhists, and we have altered section 10 accordingly.

It cannot be denied that one school of Muhammadan Law does, as stated in the books (Baillie, p. 571), permit a settlement on a person, his children and their offspring in perpetuity. But in practice this form of settlement is obsolete, and, if made, the Courts would now refuse to recognise it as valid. We think, therefore, that section 14, which prohibits this kind of perpetuity, may stand unaltered.

We have shortened and simplified the sections (33, 34) which deal respectively with conditions that a transferee shall perform an act at or before a specified time and, like conditions wherein no such time is specified.

We do not think that the proposition laid down in section 40, as to a Hindu's right to receive maintenance from the profits of immoveable property, can be said to be authoritatively settled, and there are good grounds for questioning it.

We have therefore redrawn the first clause of section 40 thus:—

"40. Where a third person has a right to receive maintenance or a provision for advancement or marriage from the profits of immoveable property, and such property is transferred with the intention of defeating the right, such right may be enforced against a transferee with notice of such intention or a gratuitous transferee of the property affected by the right but not against a transferee for consideration and without notice of the right, nor against such property in his hands." The remainder of section 40, though suggested by English cases, is, in our opinion, founded on general

principles of equity applicable to India, and may, therefore, fitly be left unaltered in the Bill.

Section 41 has been amended so as to bring a benamidar clearly within its operation.

We have confined section 42 to cases of transfer for consideration by persons having authority to revoke the transfer.

To the section (44) dealing with transfer by one co-owner we have added a clause declaring that, when the transferee of a share of a dwelling-house belonging to an undivided family is a stranger, nothing in this section shall be deemed to entitle him to joint possession or other common or part enjoyment of the house.

We have confined section 53 to cases of fraudulent transfer. To provide, as it now does, for fraudulent forfeitures would involve a change in the law, the consequences of which cannot easily be foreseen.

CHAPTER III.

SALES OF IMMOVEABLE PROPERTY

We agree with Sir Henry Maine as to the desirability of rendering the system of transfer of immoveable property a system of public transfer, and we are inclined to go a little further in this direction than seemed good to the Law Commissioners. Thus, we think that in the case of a reversion or other intangible thing, though its value may be less than Rs. 100, the transfer should be made only by registered assurance, and we have altered section 54 accordingly.

As to the duties of the seller, we think that, except where the property is sold subject to incumbrances, he should be bound to discharge all incumbrances on the property existing at the date of the sale; that he should not be bound to deliver the title-deeds till the whole of the purchase-money has been paid. We also think that the Bill may reasonably declare, as it does, that, in the absence of a stipulation to the contrary, the seller shall be deemed to contract that the interest which he assumes to transfer subsists, and that he has power to make the transfer. But where he sells, in a fiduciary character, we would follow the present practice, and declare simply that he shall be deemed to contract, that he has done no act whereby the property is incumbered, or he is hindered from transferring it. We have altered section 55, clause *(a)*, (7), (8), (9), accordingly.

The proposition laid down in clause *(c)* (1), that a purchaser is bound to disclose any fact unknown to the vendor which increases his interest in the property, e.g., the actual or imminent death of a prior life-tenant, has been questioned by a high authority. It appears to us in exact accordance with the rule laid down in *Turner* v. *Harvey*, Jac. 169; *Ellard* v. *Lord Leandaff*, 1 Ball and B. 241; and (on the sale of a life-policy) *Jones* v. *Keene*, 2 Moo. and R., 348. We have, however, made a verbal amendment in this clause.

As to the duties of the buyer, we have struck out the clause requiring him to re-transfer the property sold, where the ownership has passed before payment of the purchase-money and he fails to pay or tender it. In such case the seller's lien is, we think, sufficient.

As to the buyer's rights, we think that his lien as against the seller for purchase-money paid in anticipation should be available against all persons claiming under the seller with notice of the payment; we have altered the section accordingly.

Where two properties are subject to a common charge and one is sold the buyer's right as against the seller to have the charge satisfied out of the other property does not depend on whether or not the buyer had notice of the charge. We have therefore, struck out of section 56, the words relating to notice.

CHAPTER IV.

MORTGAGES.

We think that in the definition of simple mortgage the expression "makes it a collateral security" is likely to give rise to difficulties. We also think that a transaction may be a "mortgage by conditional sale" although accompanied by possession, and in the definition of usufructuary mortgage the words "or agrees to deliver" and "actual" seem unnecessary. We have therefore amended these definitions as follows :—

Simple Mortgage.

"Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage-money, and agrees expressly or impliedly that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied so far as may be necessary, in payment of what may be due to him on the mortgage, the transaction is called a simple mortgage, and the mortgagee a simple mortgagee."

Mortgage by Conditional Sale.

"Where the mortgagor ostensibly sells the mortgaged property:

on condition that in default of payment of the mortgage-money on a certain date the sale shall become absolute, or

"on condition that on such payment being made, the sale shall become void, or

"on condition that on such payment being made, the buyer shall re-transfer the property to the seller,

"the transaction is called a mortgage by conditional sale, and the mortgagee a mortgagee by conditional sale."

Usufructuary Mortgage.

"Where the mortgagor delivers possession of the property to the mortgagee and authorizes him to retain such possession until payment of the mortgage-money, and to receive the rents and profits accruing from the property, and to appropriate them in lieu of interest or in payment of the mortgage-money, the transaction is called an usufructuary mortgage and the mortgagee an usufructuary mortgagee"

We agree with the Law Commissioners that the requirement of registration will not only discourage fraud and facilitate investigations of title, but that it will also preclude some difficult questions of priority. A majority of us, however, think that where the principal-money secured is less than Rs. 100, the assurance need not be registered. And we have altered the Bill accordingly. Our colleague, Mr. Stokes, dissents from this alteration, as, in his opinion, all incumbrances should appear on the register: those who mortgage their property for small amounts, as a rule require protection from fraud more than those who mortgage for large amounts and the changes impending in the working of the law will deprive the requirement of registration of all hardships even in the pettiest cases.

A majority of us are of opinion that equitable mortgages by deposit of title-deeds should be valid when they are made in Calcutta, Madras, Bombay, Rangoon and Karachi. The practice of raising money on such securities has long been established in

those towns, and any attempt to disturb it would cause much inconvenience. Here, again, Mr. Stokes dissents on the grounds *(a)* that such mortgages are opposed to the policy of the Registration Law; *(b)* that they lead to evasions of the stamp-duty, *(c)* that they are at variance with the principle of making the system of transfer of immoveable property, as far as possible a system of public transfer; and *(d)* that, when the amount secured is Rs. 100 or upwards, they would be inconsistent with the general rule in section 58 requiring a written instrument.

We think, with Mr. Justice West, that nothing in the section (59) declaring the mortgagor's right to redeem should invalidate any provision to the effect that if the time fixed for payment of the principal money has been allowed to pass, or no such time has been fixed, the mortgagee shall be entitled to reasonable notice before payment or tender of such money. In like manner, we think that nothing in sections 82 or 83 should deprive the mortgagee of his right to interest where there exists a contract that he shall be entitled to such notice.

We concur with the Law Commissioners in the solution which they have proposed (section 68) of the moot question as to whether a power of sale conferred on the mortgagee is invalid, and as there is no prospect of the High Courts or the Privy Council making an authoritative declaration on the subject, we think it desirable to settle the matter by legislation as soon as possible.

For the section (98) as to the abandonment of his security where a mortgagee attaches and sells the mortgaged property, we have substituted the following :—

"98. Where a mortgagee, in execution of a decree for the satisfaction of any claim, whether arising under the mortgage or not, attaches the mortgaged property, he shall not be entitled to bring such property to sale otherwise than by instituting a suit under section 66."

We think that the High Court should have power to make rules for carrying out the provisions of this Chapter.

CHAPTER V

LEASES

This Chapter will, in our opinion, be of practical use in the case of leases of buildings, gardens and mines. We agree with the Law Commissioners that it should not of itself apply to the relations between zemindar and raiyat, and we think that the power given to the Local Government by section 115 (now 116) to extend any of the provisions of the Chapter to agricultural leases should only be exercised with the sanction of the Governor-General in Council, and that the requisite notification should not take effect until the expiry of six months from the date of its publication.

The rule laid down in section 106, clause (i) as to the removability of tenants' fixtures, has been objected to as not in accordance with the laws in force in this country. But it will operate only in the absence of a contract or local usage to the contrary, and will not in practice apply to tenants in husbandry. Moreover, it is impossible to say, with certainty, what the Law of India on the subject really is. The Courts would, therefore, turn for guidance to the Civil Law and the Law of England. The Civil Law permits a tenant to remove all fixtures where this can be effected without material injury to the property, and the strictness of the Law of England has been relaxed where the fixtures have been annexed for the purposes of trade or manufacture, ornament, furniture and domestic use or convenience. The clause in question seems to us to represent, with reasonable accuracy, the rule of the Civil and the English Law.

CHAPTER VI

GIFTS

We agree with the Law Commissioners that registration should be required in the case of gifts of immoveable property of whatever value. Such gifts are, as a rule, made by a written instrument, and as under the Registration Act (III of 1877), section 17, clause (a), the registration of such instruments is compulsory, the change of the existing law here proposed is almost nominal.

We have struck out the clause in section 121 (now 122) which is founded on the rule in the Succession Act as to bequests to attesting witnesses. It is, we think, inapplicable to a transaction *inter vivos* where the donor can give evidence of his intention.

We have also struck out the section (120), which declares that the donor is not bound to warranty. It seems to the majority of us useless as denying what no one in this country would ever assert. Our colleague, Mr. Stokes, would retain it as precluding a doubt which may reasonably be felt by the Courts (*see* Bourge II, 145).

We have made verbal and other unimportant amendments in sections 11, 25, 36, 37, 51, 59, 61, 64, 80, 81, 90, 91, 99, 101, 106, 126 133.

The Bill, as now settled, seems to us a systematic and useful arrangement of the existing law. But we agree with the Law Commissioners that, when the body of substantive Civil Law enacted for India is recast in a more compact and convenient form than that of a series of fragmentary portions, from time to time passed by the legislature, the chapters on sale, mortgage, lease and exchange, contained in the present Bill will probably be placed in close connection with the rules contained in the Contract Act. Till then, they may fitly be left in a law containing what the Contract Act does not contain, namely, general rules regulating the transmission of property between living persons. We do not think that these rules, as now amended, will substantially alter or add to the existing law, or that they will invade or displace the functions of the Judges of the existing Courts. We, therefore, recommend that the Bill be passed. Drawn originally in England by the former Indian Law Commissioners, it was revised by Sir A. Hobhouse and introduced into the Council of the Governor-General in June, 1877. It has since been twice circulated to the Local Governments for opinion and publication, and twice reported on by Select Committees, in February, 1878, and February 1879. It was then carefully revised by the late Indian Law Commission. It has now been again revised by us. We think, therefore, of this Bill, as of the Bill dealing with negotiable instruments, that it is not now likely to be improved without the experiences to be gained from its actual working. We recommend, however, that it should be republished in the *Gazette of India* with this report, and in obedience to the orders of the Secretary of State, it must also be sent home to him, published in the Local Gazettes, and translated into the vernacular languages.

Our honourable colleagues, Messrs. Grant and Paul, have not been able to attend our meetings, and do not, therefore, sign this report.

The 11th March, 1881.

WHITLEY STOKES.
J. PITT KENNEDY.
B. W. COLVIN.
JOTINDRA MOHAN TAGORE.

THE TRANSFER OF PROPERTY (AMENDMENT) BILL, 1929.

REPORT OF THE SPECIAL COMMITTEE.

(Gazette of India, 1929, Pt. V, P. 71.)

To

HIS EXCELLENCY THE GOVERNOR-GENERAL IN COUNCIL

In accordance with the Legislative Department Resolution No. F. 43/27.G dated the 25th April, 1927 (Appendix A), we, the members of the Committee appointed by the Government of India to examine the provisions of the Bill to amend the Transfer of Property Act (4 of 1882), have the honour to submit the following Report :—

1. The constitution of the Committee was as follows ;—

Chairman.

The Hon'ble Mr. S. R. Das, Law Member to the Council of the Governor-General.

Members.

(1) Mr. B. L. Mitter, Advocate-General, Bengal.
(2) Mr. D. F. Mulla, M.A., LL.B., Advocate, High Court, Bombay.
(3) Dr. S. N. Sen, M.A. LL.B, Advocate, High Court, Allahabad.

Secretary.

Mr. J. R. Dhurandhur, B.A., LLB., Assistant Secretary to the Government of Bombay, Legal Department.

Mr. W. T. M. Wright, C. I. E., I.C.S., Secretary to the Government of India, Legislative Department, and Mr. D. G. Mitchell, C. I. E., I. C. S., Joint Secretary and Draftsman to the Government of India, attended the Meetings of the Committee.

2. The Committee assembled at Simla on the 27th April, 1927. The first meeting of the Committee was held on the 5th May, 1927, and it continued its deliberations till the 22nd June, 1927, when the last meeting was held. Dr. Sen left Simla on the 15th June, 1927. By that time, however, we were able to revise the whole Bill for the amendment of the Transfer of Property Act and the Supplementary Bill. Such further alterations as were found necessary in our drafts after he left have his approval.

3. Two Bills were submitted for our consideration, one relating to the amendment of the provisions of the Transfer of Property Act itself and the other a Supplementary Bill dealing with consequential amendments in the following Acts :—

(1) The Married Women's Property Act, 1874, section 8.
(2) The Code of Civil Procedure, 1908, Order 34.
(3) The Indian Registration Act, 1908, sections 17, 48 and 49.
(4) The Indian Succession Act, 1925, Ss. 115 to 117.

The notes on clauses setting forth in detail the reasons for the proposed amendments were also placed before us.

4. Although the Transfer of Property Act was enacted on the 17th February, 1882, it was in 1870 that its first draft in the form of rules was prepared by the First Indian Law Commission, consisting of Lord Romilly, M. R. Sir Edward Ryan formerly Chief Justice of Bengal, Lord Sherbrooke, Sir Robert Lush and Sir John McLeod who assisted Lord Macaulay in framing the Indian Penal Code. The Bill was again examined in 1879 by the Second Indian Law Commission consisting of Sir Charles Turner, the then Chief Justice of Madras, Sir Raymond West, Judge of the

Bombay High Court, and Mr. Whitley Stokes, Law Member of the Governor-General's Council. It appears that no less than seven Bills were prepared before the final Bill was passed into law in 1882. We fully recognize that any attempt to amend an Act which was the result of such long and careful consideration at the hands of eminent lawyers and jurists has to be made with the utmost caution. On the other hand, the passage of time has brought recognition to new principles in the law of property, and the conflict of judicial decisions with regard to some of its provisions and defects revealed by experience of its working for nearly half a century has made a revision of the Act necessary.

5. During the period of forty-five years that the Act has been in force, a large mass of conflicting decisions have arisen with regard to various provisions. As early as 1903 in his letter, dated the 21st August, 1903, Mr. Justice Rampini (afterwards Sir Robert Fulton) while commenting on the Bill introduced for the amendment of section 59 of the Transfer of Property Act suggested to the Government of India the propriety of undertaking a general and thorough revision of the Act. In paragraphs 3 and 4 of his letter, he observed as follows :

"The Transfer of Property Act was passed nearly twenty-five years ago, and was the first Act of the Legislature to embody the provisions of the Bengal Regulations of 1798 and 1806 and of the Bombay Regulation of 1827. It is usual to revise the Codes of the Indian Legislature after periods of about twenty years, and it is the more necessary to do so in the case of the Transfer of Property Act, because (1) it is the first Act dealing with a branch of law it relates to, and (2) during the past twenty-five years a large mass of conflicting case-law on the subject has grown up which it is advisable now either to embody in the Act or to set aside."

"Dr. Rash Behari Ghosh has observed in the preface to the 3rd edition of his work on 'The Law of Mortgage in India' that 'there is scarcely a single section in the chapter on mortgages in the Transfer of Property Act on which conflicting rulings cannot be found.' I would go even further and say that not only in respect of the chapter on mortgages but in respect of almost all the chapters of the Act there is a conflict of opinion between several High Courts."

6. Since the passing of the Transfer of Property Act in 1882, its provisions have been amended on twelve occasions.* But it does not appear that the general revision of the Act was undertaken or any new principle of importance or substance introduced.

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*(1) Act III of 1885, amending sections 1, 4, 6 (i) and 9.
(2) Act XV of 1895, saving Crown grants.
(3) Act II of 1900, amending sections 3, 6 (c) and (h) and Chapter VIII.
(4) Act VI of 1904, amending sections 1, 59, 107 and 117.
(5) Act V of 1908, repealing sections 85 to 90, 92, 94, 96 and 97 and re-enacting them in Order 34 of the Code of Civil Procedure.
(6) Act II of 1915, amending sections 59 and 69.
(7) Act XXVI of 1917, validating certain transactions made in Agra and Oudh and saving them from the provisions of section 59.
(8) Act XXXVIII of 1920 amending sections 1 and 117.
(9) Act XXXVIII of 1925, amending section 130.
(10) Act XXVII of 1926, amending section 3 and inserting the definition of 'attestation' which was further amended by Act X of 1927.
(11) Act X of 1927, amending section 3.
(12) Madras Act III of 1922, modifying the whole Act so as to give effect to the provisions of the Madras City Tenants' Protection Act, 1922.

7. Most of the provisions of Act IV of 1882 had been based on the decisions of the Courts of Equity in England before 1881, which had already been followed by Indian Courts. The Conveyancing Act, 1881 (44 & 45 Vict., c. 41) was passed in the previous year, but with the exception of a few provisions, such as sections 57, 61 and 69 of the Transfer of Property Act, the provisions of that Act were not used in drafting Act IV of 1882. Since 1882 the Conveyancing Act has been revised in England several times and the whole law of property is now consolidated and codified in the new Property Act, 1925 (15 & 16 Geo. V, c. 20).

8. In examining the two Bills which were submitted for our consideration, we have scrutinised the provisions of the Transfer of Property Act section by section in order to ascertain if any of the sections not included in the Bills required amendment in view of the amendments proposed in the Bills or in the light of judicial decisions or other circumstances With regard to the provisions which are based on the principles of English law or the decisions of English Courts, we have carefully examined the provisions of the English Property Act to see whether any change is necessary on the lines of the provisions of that Statute. Where it was found that the existing provisions of the Act or the new provisions proposed to be introduced in the Bills could be drafted on the lines of the English Act, we have tried to do so. In our opinion this will facilitate the interpretation of those provisions as the Courts will have the benefit of English decisions.

9. It was brought to our notice that the following points in connexion with the two Bills remitted to our consideration had been circulated to Local Governments for opinion:

(1) The application of the Transfer of Property Act to territories to which it has not yet been applied, e.g., Burma, Sind and the Punjab.

(2) The omission of the provision in section 2 exempting or saving the rules of Hindu, Muhammadan and Buddhist laws from the operation of the provisions of Chapter II of the Transfer of Property Act.

(3) The provision making registration amount to notice of documents registered.

(4) Compulsory registration of all sales, mortgages and leases.

(5) The provision requiring leases to be executed by both parties.

(6) The application of Chapter VII of the Transfer of Property Act, relating to gifts, to cases governed by the Hindu, Muhammadan and Buddhist laws.

The opinions received were placed before us and we have carefully considered the amendments in their light.

10. In the Bills submitted to us the policy which appears to have been followed was that no amendment should be attempted which would merely effect an improvement in wording, but that new principles of importance which had been judicially recognised since the passing of the Act should be incorporated. In our opinion it is a sound course to follow, particularly in an Act which has been in force for forty-five years and to whose phraseology the general public and the legal profession have become accustomed. Again, it is not safe to alter any wording which has received judicial interpretation, when the interpretation has not led to any inconvenience in practice or miscarriage of justice. We also agree that the Act must be amended to embody new principles. In the amendments which we propose we have also endeavoured to remedy any defect which has led to inconvenience or anomalous results. We have also acted on the principle that it is undesirable to attempt to provide in detail for every possible

contingency. No elaboration can be exhaustive, and the only result of over-elaboration would be to cramp the actions of the Courts and to encourage technicalities. Where there has been a conflict of decisions we have endeavoured to set it at rest.

11. Detailed reasons for all amendments proposed by us are given in the notes on clauses, but we think it desirable to draw special attention to some of the important points of principle which are included in the two Bills.

In the Transfer of Property Act the following important amendments are suggested:

(i) The omission of the words 'Hindus and Buddhists' in section 2 whereby the provisions of Chapter II will apply to all cases except those governed by a special rule of Muhammadan law (clause 3 of the main Bill):

(ii)(a) the provision making registration amount to notice of a registered document;

(b) the provision making constructive notice to an agent notice to the principal (clause 4 of the main Bill);

(iii) the validity of transfers in favour of a class, when some members of that class are unable to take (clause 8 of the main Bill);

(iv) the validity of a direction as to accumulation for a certain period and for certain purposes (clause 9 of the main Bill);

(v) the statutory recognition of the doctrine of part-performance (clause 15 of the main Bill);

(vi) the compulsory registration of sales and mortgages relating to immoveable property of whatever value, and of all leases except those from month to month or for any term not exceeding one month (clauses 16, 19 and 54 of the main Bill);

(vii) the abolition of the remedy of foreclosure in the case of all mortgages except a mortgage by conditional sale or an anomalous mortgage providing expressly for foreclosure (clause 30 of the main Bill);

(viii) the provision compelling a mortgagee to exhaust his remedies against the mortgaged property before enforcing his personal remedy (clause 32 of the main Bill);

(ix) the amendment of the provisions regarding sale without the intervention of the Court (clause 34 of the main Bill);

(x) the extension of the principle of 'subrogation' (clause 46 of the main Bill);

(xi) the modification of the law of 'merger' (clause 50 of the main Bill);

(xii) the provision requiring leases to be executed by both parties (clause 54 of the main Bill).

12. In Order 34 of the Code of Civil Procedure the important amendments are suggested on the following points:

(i) it is made clear that the right of redemption is not extinguished till a final decree is passed or till a sale held in execution of the mortgage decree is confirmed;

(ii) detailed provisions are included for the award of interest (clauses 4 and 6 of the supplementary Bill).

13. The forms in Appendix D to the First Schedule to the Code of Civil Procedure relating to mortgage decrees are made to conform strictly to the amended rules in Order 34. We have revised the forms and amplified them, and have added some extra forms. We hope these forms will facilitate the drawing up of decrees in mufasal Courts. In cases where several persons entitled to redeem are parties to a mortgage

suit, we propose to abolish the system of allowing successive periods of redemption (Clause 8 and Schedule I of the supplementary Bill).

14. In the Indian Registration Act we propose to provide that assignments of decrees, orders and awards relating to immoveable property and compromise decrees which affect immoveable property should always be registered. We also propose that sections 48 and 49 should be amended to empower Courts to admit unregistered documents in evidence in giving effect to the doctrine of part-performance (clause 9 of the supplementary Bill).

15. In the Indian Succession Act, 1925, amendments are suggested conforming to the amendments of sections 15 to 18 of the Transfer of Property Act (clause 10 of the supplementary Bill).

16. A provision is added in Chapter II of the Specific Relief Act to give effect to the principle of part-performance, embodied in the proposed new section 53A in the Transfer of Property Act (clause 3 of the supplementary Bill).

17. In conclusion, we desire to place on record our great sense of obligation to our colleague, Mr. J. R. Dhurandhur, B.A., LL.B., of the Bombay Judicial Service, who has, throughout the proceedings of the Committee, acted as Secretary and brought to bear upon the work great industry which has been of considerable assistance to us in the preparation of this report. We also desire to express our acknowledgment to Mr. W. T. M. Wright, C.I.E., I.C.S., and Mr. D. G. Mitchell, C.I.E., I.C.S., of the Legislative Department, for the great assistance they have rendered to us in drafting the clauses of the Bill.

SIMLA,
29th July, 1927.
S. R. DAS,
Chairman.

CALCUTTA,
27th July, 1927.
B. L. MITTER.

BOMBAY,
26th July, 1927.
D. F. MULLA.

ALLAHABAD,
26th July, 1927.
SURENDRANATH SEN.

SIMLA,
16th August, 1927.
J. R. DHURANDHUR,
Secretary.

NOTES ON CLAUSES.

Clause 2, Section 1. — We have proposed that paragraph 3 of section 54 of the Act should be omitted. Consequential amendments have, therefore, been made in sections 1 and 4 of this Act by deleting the reference to paragraph 3.

Clause 3, Section 2. — Section 2, which is a saving clause, does not provide that Chapter II shall not apply to Hindus, Muhammadans or Buddhists; it merely saves any rule of Hindu, Muhammadan or Buddhist law which is not consistent with its provisions. The chapter contains general rules regarding transfers. It is obvious that sections 5 to 10 contain rules which are of general application and do not in any way contravene any rule or principle peculiar to the personal laws of Hindus or Buddhists. So also sections 38 to 53 are not peculiar to any particular system of law and are rules of justice, equity and good conscience. Sections 11 to 35 correspond to parallel provisions of the Indian Succession Act, and were introduced in the Transfer of Property Act in

order to bring the rules which regulated the transfer of property between living persons into harmony with the rules affecting its devolution upon death. Sections 13 and 20 relate to transfers in favour of unborn persons, and section 14 enacts a modification of the rule against perpetuity. According to strict principles of Hindu law, as laid down by the Privy Council decision in *Tagore* v. *Tagore*, (I. A. Sup. Vol. 47), transfers or bequests in favour of unborn persons are wholly void. That principle is, however, now modified by the Hindu Disposition of Property Act (XV of 1916) and by Madras Acts (I of 1914 and VIII of 1921). So far, therefore, as the rules of Hindu law are concerned, the saving clause in section 2 seems unnecessary and we propose that the word 'Hindu' be omitted from that section. We also understand that the Government of Burma as well as the Rangoon High Court have no objection to the omission of the word 'Buddhist' from the last paragraph in section 2. We, therefore, propose to omit that word also. In view of this and the changes proposed to be made in sections 15 and 16 of this Act and also sections 115 and 116 of the Indian Succession Act, we consider that it is not necessary that the Hindu Disposition of Property Act, 1916, and the Madras Acts of 1914 and 1921, referred to above, need be kept in force. We propose that these Acts be repealed.

Since the rules contained in Chapter II are not in all cases in conformity with the personal law of Muhammadans, we have retained the word 'Muhammadan'.

Clause 4, Section 3. — 'Notice,' as defined in section 3, includes both actual and constructive notice. There is a conflict of decisions whether the registration of a document under the Indian Registration Act is of itself constructive notice of the transaction effected by the document. The High Courts of Bombay and Allahabad hold that it is (I. L. R. 6 Bom. 168, 9 Bom. 427, 26 Bom. 538, 16 All. 478). The Madras High Court hold that registration does not amount to notice in any case. In I. L. R. 15 Mad 268, it was observed that if the Legislature desire to regard registration as notice, it would have said so in express words. In some cases the Calcutta High Court took the same view as the Madras High Court (I.L.R. 23 Cal. 790, 27 Cal. 7). In 2 C W N 250, Sir Lawrence Jenkins observed :—

"Apart from authority, I should have thought, having regard to the statutes applicable in this country, that the proposition involved is not one of law but of fact, that as each case arises it should be determined whether in that individual case the omission to search a register, taken together with other facts amounts to such gross negligence as to attract the consequence which results from notice: and it well may be that this test will serve to reconcile the apparent conflict of view that at first sight the cases suggest."

Following that decision in 7 C. W. N. 11, the same High Court held as follows:

"Whether registration is or is not notice in itself depends, we think, upon the facts and circumstances of each case, upon the degree of care and caution which an ordinary prudent man would necessarily take for the protection of his own interest by search into the registers kept under the Registration Act."

The question was considered by the Judicial Committee in *Tilakdhari Lal* v. *Kheldan Lal* (L. R. 47 I. A. 239). After reviewing all the Indian decisions, their Lordships of the Privy Council approved of the view taken in the Calcutta cases in 2 C. W. N. 750 and 7 C. W. N. 11, and observed :—

"Their Lordships are impressed with the view that, since registration has for nearly two centuries been held not to operate as constructive notice in this country, and the knowledge of this law, which was then old, must have been present to the

Indian Legislature when they framed the different Indian Registration Acts, and the definition of notice in the Transfer of Property Act, yet none the less they have omitted to state the principle for which, according to the appellants' contention, it is essential that the register should provide.....For these reasons, their Lordships think that notice cannot in all cases be imputed from the mere fact that a document is to be found upon the Indian register of deeds."

The test laid down in 2 C. W. N. 750 and approved by the Privy Council would, as stated by Sir Rash Behary Ghose, inevitably lead to much perjury and litigation. (Ghose on Mortgage, Vol. I, p. 473.) At page 252 of the report in Tilakdhari's case, the Judicial Committee also observe that the real purpose of registration is to secure that every person dealing with property, where such dealings require registration may rely with confidence upon the statements contained in the register as a full and complete account of all transactions by which his title may be affected, unless indeed he has actual notice of some unregistered transaction which may be valid apart from registration.

In America, registration of a conveyance has been deemed to operate as constructive notice to all subsequent purchasers of any estate legal or equitable in the same property. The reason assigned for the application of this doctrine is as follows:

"The reasoning upon which this doctrine is founded is the obvious policy of the Registry Acts, the duty of the party purchasing under such circumstances to search for prior encumbrances, the means of which search are within his power, and the danger of letting in parol proof of notice or want of notice of the actual existence of the conveyance. This doctrine certainly has the advantage of certainty and universality of application; and it imposes upon the subsequent purchasers a reasonable degree of diligence only in examining their titles to estates" (Story on Equity Jurisprudence, Art. 534, pp. 510 and 511).

In England also in the counties of Middlesex and Yorkshire, where the system of local deed registries prevails, section 197 of the Property Act, 1925, provides that registration in a local deed registry of a memorial of any instrument transferring or creating a legal estate or charge shall be deemed to constitute actual notice of the transfer or the creation of the legal estate or charge to all persons and for all purposes whatsoever as from the date of registration and so long as the registration continues in force. So also under section 198 in the case of instruments which are registered under the Land Charges Act, 1925, it has been provided that registration shall be deemed to constitute actual notice of such instrument to all persons and for all purposes connected with the land affected.

In our opinion, in a country like India, where the system of registration has been generally applied, if registration is to be held as not implying notice, one of the objects for which instruments are required to be registered would be defeated. Moreover, as will be seen below, one of the important changes suggested by us is "compulsory registration." It is, therefore, necessary that express provisions should be made in the Act making it clear that registration of an instrument relating to immoveable property amounts to notice of the instrument from the date of the registration. For this purpose we propose to add Explanation 1 to the definition of 'Notice' in section 3.

It is not clear how far possession is to be regarded as notice. In some cases it has been held that possession amounts to such notice of title as the person in possession may have (I.L.R. 25 All. 366, 16 Mad. 148.). In other cases, Courts have felt difficulty in expressing any opinion on the point (I. L. R. 8 Cal. 597). Possession

which operates as notice, however, must be actual possession. It does not seem reasonable that a person entering into a transaction regarding immoveable property should be in a position to ignore the question of possession or should neglect to inquire into the nature of the possession or the title of the person who is in actual possession of such property, if he is not the person with whom he is dealing. We propose to add Explanation II to the definition of 'notice' providing that the person dealing with any immoveable property shall be deemed to have notice of the title of any person who for the time being, is in actual possession thereof. It may be noted that notice in this case is not extended to possession which is merely of a constructive nature. The Explanation is in accordance with Illustration 3 to section 27 (b) of the Specific Relief Act.

The last portion of the existing definition of notice which relates to notice through an agent seems to us to be defective. It provides that a person has notice of the fact when information of the fact is given to or obtained by his agent under the circumstances mentioned in section 229 of the Indian Contract Act. The words "given to or obtained by his agent" used in the definition suggest that the rule is restricted to the facts of which the agent has actual knowledge, or, in other words, express notice (*vide* observations of Pontifex, J., in I.L.R. 4 Cal. 897). The reference to section 229 of the Indian Contract Act does not extend the scope of the definition. That section merely provides that in order that notice to an agent should be notice to a principal, it must be given to, or the information must be obtained by, the agent in the course of business transacted by him for the principal. According to a well-established principle, the general rule is that an agent stands in the place of the principal for the purpose of the business in hand, his acts and knowledge being considered as the acts and knowledge of the principal. As observed by the Judicial Committee in *Rampal Singh* v. *Balbaddar Singh* (29 I. A. 203) : 25 All. 1, "it is not a mere question of constructive notice or inference of fact, but a rule of law which imputes the knowledge of the agent to the principal, or (in other words) the agency extends to receiving on behalf of his principal, of whatever is material to be stated in the course of the proceedings." In *Mohori Bibee* v. *Dhurmodas Ghose* (30 I. A. 114), their Lordships of the Privy Council held that, although the principal was absent from Calcutta and personally did not take part in the transaction, his agent in Calcutta stood in his place for the purposes of the transaction and the acts and knowledge of the latter were the acts and knowledge of the principal. If notice to the agent, whether actual or constructive, is not made notice to the principal, it has been said that "notice would be avoided in every case by employing agents." [*Berwick & Co.* v. *Price*, (1905) 1 Ch. 632.]

The general rule that the knowledge of the agent is the knowledge of the principal has no doubt certain limitations. It is necessary that the matter for which the agent was employed should be taken into consideration. It is necessary that the agent should be acting in the course of the particular business for which he was employed (34 I. A. 179). This general principle is now embodied in section 199 of the English Property Act, 1925. We propose, therefore, to add Explanation III to the definition.

Clause 5, Section 4. — As stated in the note to section 1, reference to para. 3 of section 54 is omitted in this section. The reference in this section to the Indian Registration Act of 1877 is changed to the Act of 1908 which is now in force.

Clause 6, Section 6. — Section 6, which enumerates property of different kinds which cannot be transferred, includes in clause *(d)* an interest in property restricted in

its enjoyment to the owner personally. A right to receive maintenance is a personal right, although any particular property or the income thereof may be charged with it. It is in accordance with public policy that these rights which are generally created for the maintenance or personal enjoyment of a qualified owner, e. g., a Hindu female, ought to be inalienable; but in some cases it has been held that if the amount of maintenance is fixed by an agreement or by a decree, it can be assigned. (I.L.R. 5 Bom. 99, 38 Cal 13.) Although an agreement or a decree would make such right definite, it is nevertheless a right created for the personal benefit of the qualified owner and should not be alienable. Section 60 of the Civil Procedure Code which protects such right from the process of a Civil Court does not make any exception in the case of maintenance fixed by agreemennt or decree. The above reasoning, however, does not apply to arrears of maintenance which have accrued due. To make the position clear, we suggest that the following clause should be inserted as clause *(dd)*, viz. :—

"*(dd)* a right to future maintenance in whatsoever manner arising or secured or determined cannot be transferred."

Section 10. — We have not suggested any change, but it is a question of policy whether the principle embodied in the section should be extended to Hindus, Muhammadans and Buddhists.

Clauses 7 and 11, Sections 11 and 40. — Sections 11 and 40 of the Act refer to affirmative and negative covenants in a transfer. Section 11 refers to rights as between a transferor and a transferee, while section 40 relates to the rights of third parties against transferees. The words "to compel its enjoyment" used in the second paragragh of section 11 and in the first paragragh of section 40, indicate that affirmative covenants for the beneficial enjoyment of one piece of the property of which the other piece has been transferred can in all cases be enforced. This paragraph seems to have been based on the observations of Lord Cottenham in *Tulk* v. *Moxhay*, 2 Ph. 774, a case decided in 1848. But in later English decisions, such as *Haywood* v. *Brunswick Building Society* (8 Q. B. D. 403), the observations in Tulk's case were not approved and it is now settled that except in certain special cases affirmative covenants cannot be specifically enforced. Thus, in *Austerberry* v. *Corporation of Oldham*, (1885) 29 Ch. D. 750, a covenant to spend money on the land was held as not binding on the purchaser of the land, although he had notice of the same. Indian Courts have followed the same principle (27 Bom. L. R. 73). We propose that the second paragraph of section 11 and the first paragraph of section 40 should be so amended as to make it clear that, although an affirmative covenant is not by itself invalid as between a transferor and transferee (section 11), negative or restrictive covenants only can be specifically enforced against a third person (section 40).

Clause 8, Section 15 — Section 15 of the Transfer of Property Act deals with a gift to a class. It reproduces with slight verbal alterations the provisions of section 102 of the Indian Succession Act, 1865 (now section 115 of the Indian Succession Act, 1925), which was enacted on the principle of the decision in *Leake* v. *Robinson*, (1817) 2 Mer. 363. The principle is thus stated in Theobald on Wills :—

"Where there is a gift to a class, any members of which may have to be ascertained beyond the limits of perpetuity—for instance, to the children of a living person who shall attain twenty-five—the whole gift is void."

It will be observed that the rule applies only to gifts to a class which offend the rule against perpetuities.

Section 102 of the Indian Succession Act, 1865, enacts that if a bequest is made to a class of person with regard to some of whom it is inoperative—

(1) by reason of the rule contained in section 100, as where a limited interest is given to an unborn person, or

(2) by reason of the rule contained in section 101, being the rule against perpetuity,

such bequest shall be wholly void.

Prior to certain special Acts, to be presently noted, Hindu law did not permit a gift in favour of a person who was not in existence at the date of the gift, or a bequest in favour of a person who was not in existence at the death of the testator [*Tagore* v. *Tagore*, (1872) 9 Beng. L. R. 377, 397. 400 : I. A. Sup. Vol. 47], on the ground that a person capable of taking must be in existence at the material date. Difficulties, however, arose where a gift was made to a class of persons of whom some were and some were not in existence at the date of the gift. The leading case on the subject is that of *Rai Bishen Chand* v. *Musammat Asmaida Koer*, (1884) 11 I. A. 164 : 6 All. 560. wherein a Hindu made a gift of his property to his grandson *S* who was then in existence "and his *(S's)* brothers who may be born thereafter." It was argued on the strength of the rule in *Leake* v. *Robinson* and the analogy of section 102 of the Indian Succession Act, 1865, that as the gift to the unborn grandsons was invalid according to the Hindu law, no benefit could be taken even by the grandson who was in existence at the date of the gift. But this contention was overruled by the Judicial Committee. As to section 102, it was observed that it did not apply to the facts of the case because the gift to the unborn grandsons did not fail by reason of the rules contained in section 100 or section 101, but by reason of the *personal incapacity* of the unborn grandsons to take. In the course of the judgment their Lordships said :

"It may be that illustration *(b)* to section 102 imports into India an English rule of construction which usually defeats the intention of the testator."

and later on :

"But their Lordships conceive that it is not necessary to view this transaction as though it were to be determined by rules of construction drawn from English law and applicable to English deeds of gifts."

The rule in *Leake* v. *Robinson* was applied by the High Court of Calcutta in several cases, e. g., 8 Beng. L. R. 400, 2 Cal. 262, 4 Cal. 455; but the tide turned after the decision of the Judicial Committee in *Rai Bishen Chand* v. *Musammat Asmaida Koer*, and the principle of this decision has been followed in a large number of cases in India.

The true scope of the rule in *Leake* v. *Robinson* was pointed out by Sir Lawrence Jenkins in *Radha Prasad* v. *Ranimoni Dasi*, (1911) 38 Cal 188 (affirmed in 41 I. A. 176). Dealing with that rule the learned Judge said at page 199 :

"On behalf of Ranimoni it is contended that as some of the class cannot take the whole gift is void and in support of this *Leake* v. *Robinson* has been cited. But this contention proceeds on a misapplication of this case and a misconception of the true nature of a gift to a class. In *Leake* v. *Robinson* the gift to the class failed because the class could not be ascertained within the period allowed by the rule against perpetuities. The gift here in no way offends that rule : its only fault is that the class of legatees includes some who were not in existence at the date of the testator's death and were thus under a *personal incapacity*. And the difference is obvious. In a gift to a class the

testator looks to the body as a whole rather than to the members constituting that body [*Kingsbury* v. *Walter*, (1901) A C 187, 191], and the class is in a sense personified. But if that class cannot be ascertained until a time beyond that permitted by the rule against perpetuity, there is no class to which the gift can legally be made. But if, as here, the fault is not that a class cannot be ascertained within the period permitted by law, but that certain members of the class are incapable of taking, different considerations apply."

The whole question of gifts to a class was gone into at considerable length by Wilson, J., in *Ram Lal* v. *Kanai Lal Sett*, (1886) 12 Cal 663. In that case the learned Judge disposed of the cases which had been treated in India as authority for introducing into the construction of Hindu wills the rule in *Leake* v. *Robinson*. He showed that the rule was introduced into India owing to a mistaken analogy and observed as follows :—

"It is no new doctrine that rules established in English Courts for construing English documents are not as such applicable to transactions between natives of this country. Rules of construction are rules designed to assist in ascertaining intention; and the applicability of many of such rules depends upon the habits of thought and modes of expression prevalent amongst those to whose language they are applied. English rules of construction have grown up side by side with a very special law of property and a very artificial system of conveyancing, and the success of those rules in giving effect to the real intention of those whose language they are used to interpret, depends not more upon their original fitness for that purpose than upon the fact that English documents of a formal kind are ordinarily framed with a knowledge of the very rules of construction which are afterwards applied to them. It is a very serious thing to use such rules in interpreting the instruments of Hindus who view most transactions from a different point, think differently, and speak differently from Englishmen, and who have never heard of the rules in question."

At the end of the judgment the learned Judge stated that he should be—"prepared to hold as the general rule that where there is a gift to a class, some of whom are or may be incapacitated from taking, because not born at the date of gift or the death of the testator, as the case may be, and where there is no other objection to the gift, it should enure for the benefit of those members of the class who are capable of taking."

The judgment of Wilson, J., was referred to by their Lordships of the Privy Council in *Bhagvati* v. *Kali Charan Singh*, (1911) 38 I. A. 54, at some length, and their Lordships expressed "their entire concurrence in the judgment."

It must also be observed that the rule in *Leake* v. *Robinson* has not escaped criticism even in England. In *Bhagvati* v. *Kali Charan Singh*, (1905) 32 Cal. 992 (affirmed in 38 I. A. 54), Maclean, C. J., said :

"But even in England the rule in *Leake* v. *Robinson* has been followed not without expressions of reluctance. In *Leake* v. *Robinson* itself Sir William Grant said: 'Perhaps it might have been as well if the Courts had originally held an executory devise transgressing the allowed limits to be void only for the excess, where that excess could be clearly ascertained.' *In re Mosley's Trusts*, (1879) 11 Ch. D. 555, the Lord Justice similarly expressed their non-concurrence with the reason of the rule though they were bound to follow it; and in *Pearks* v. *Mosley*, (1880) 5 App. Cas. 714, which was an appeal from the decision of the Lord Justice in *In re Mosley's Trusts* Lord Selborne, Lord Penzance and Lord Blackburn sufficiently indicated their inclination

against the rule, which, however, was settled in England by a long series of cases and could not be disturbed except by legislation."

The rule that a Hindu could not dispose of his property by gift or sale in favour of an unborn person fettered the free disposition of property. To remove this disability three Acts were passed, namely, (1) Madras Act 1 of 1914, (2) the Hindu Disposition of Property Act, XV of 1916, and (3) Madras Act VIII of 1921. The Madras Act 1 of 1914 applies to the Madras Presidency except the Town of Madras: the Madras Act VIII of 1921 applies to the Town of Madras; and the Hindu Disposition of Property Act extends to the whole of British India except the province of Madras. The following is a synopsis of the three Acts :

(1) It is declared by all the three Acts that a transfer *inter vivos* or disposition by will of any property shall not be invalid by reason only that the transferee or legatee is an unborn person at the date of the transfer or the death of the testator, as the case may be. Since gifts and bequests to unborn persons were declared to be valid, it became necessary to fix a limit of time within which the gift or bequest should vest. This was effected by applying to such gifts and bequests the provisions respectively of section 14 of the Transfer of Property Act and section 101 of the Indian Succession Act, 1865, which contains the rule against perpetuities.

(2) Further, by the Hindu Disposition of Property Act, the provisions of section 13 of the Transfer of Property Act and section 100 of the Indian Succession Act, 1865, were extended to gifts and bequests to unborn person, but it was not so done by the Madras Acts.

(3) All the three Acts left section 15 of the Transfer of Property Act and section 102 of the Indian Succession Act, 1865, which relate to gifts and bequests to a class, severely alone.

One important consequence of the above Acts must be noted here. Prior to the passing of the three Acts if a bequest was made by a Hindu in a case governed by the Hindu Wills Act, 1870, in favour, say, of his daughter for her life and after her death to "such of her children who shall attain the age of 21 years," and some of the children were born before and others after the death of the testator, the bequest, though it failed as to those that were not in existence at the death of the testator, did not fail in its entirety but enured for the benefit of those who were in existence at the death of the testator. The reason was that in such a case the bequest to the unborn persons failed not by reason of the rule against perpetuity contained in section 101 of the Indian Succession Act, but by reason of their *personal incapacity* to take. But the bar of personal disability was removed by the three Acts with the result that a bequest to the unborn children in the case put above would now fail by reason of the rule against perpetuities contained in section 101, the gift being to such "children who shall attain the age of 21 years," and the gift would, therefore, fail in regard to the whole class. Before the passing of the three Acts an unborn person could not take at all, and there would, therefore, be no scope for the operation of the rule against perpetuities. Since the enactment of the three Acts, an unborn person can take, but if he is to take on his attaining the age of 21 years, the bequest offends the rule against perpetuities and it, therefore, fails by reason of the rule contained in section 101, with the result that section 102 applies and renders the bequest void in regard to the whole class. And this is in fact what happened in *Sundara Rajan* v. *Natarajan*, (1925) 52 I. A. 310. Thus, while before the three Acts were passed, a bequest to a class of persons some of whom were not in existence at the death of the testator did not fail in regard to the whole class,

these Acts have brought about a result which, it is conceived, was hardly contemplated when the Acts were passed.

In view of what is stated above, it is proposed to alter section 15 of the Transfer of Property Act as follows :

Transfer to class some of whom come under sections 13 and 14.

"15. If, on a transfer of property, an interest is created for the benefit of a class of persons with regard to some of whom such interest fails by reason of any of the rules contained in sections 13 and 14, such interest fails *in regard to those persons only and not in regard to the whole class.*"

It is also proposed to alter section 115 of the Indian Succession Act as follows :—

Bequest to a class some of whom may come under rules in sections 113 and 114.

"115. If a bequest is made to a class of persons with regard to some of whom it is inoperative by reason of the provisions of section 113 or section 114, such bequest shall be *void in regard to those persons only and not in regard to the whole class.*"

For the reasons stated above, we suggest that the three Acts, namely, Madras Act 1 of 1914, Hindu Disposition of Property Act, XV of 1916, and Madras Act, VIII of 1921, should be repealed.

Clause 9, Section 16. — As section 15 of the Act when amended as above will no longer provide for the case of a failure of a transfer, reference to that section in section 16 is unnecessary and should be omitted. It is, however, necessary to provide for a case when the transfer may fail as to all the members of the class by reason of the rules contained in sections 13 and 14. Such a case would arise where a gift over is intended to take effect after a prior gift in favour of a body or a class of persons but the prior gift fails. In such a case, if the prior gift in favour of the class of persons fails by reason of the provisions of sections 13 and 14, the gift over also fails. In order to make this point clear, section 16 should be amended as follows :

"16. Where by reason of any of the rules contained in sections 13 and 14 an interest created for the benefit of a person or of a class of persons fails in regard to such person or the whole of such class, any interest created in the same transaction and intended to take effect after or upon failure of such prior interest also fails."

Clause 9—contd., Section 17.—The restrictions contained in sections 14 and 16 and also the restrictions as to accumulations should not apply to charities, and we propose that the section dealing with accumulations should come immediately after section 16 and be numbered 17, and the section dealing with charities, which is now numbered 17, should be numbered 18. In India a direction for accumulation has been held valid in the case of Hindu and Muhammadan religious endowments though it infringed the rule against perpetuities (I. L. R. 34 Cal. 5, 23 C. L. J. 241, 34 Mad. 12).

Clause 9 — contd., Section 18.—Section 18 relates to the rule against accumulation and provides how long the income of any property transferred can be directed to be accumulated so as to prevent its being received and enjoyed by the transferee. This section and section 117 of the Indian Succession Act allow accumulations for a period of one year only in certain cases. In England the Thellusson Act allowed a much longer period. Moreover, in certain cases, the restriction against accumulation was not applicable at all. Thus, that Act allowed accumulations for the payment of debts and for providing funds for children. Accumulations are also allowed

in English law for maintaing property in good repair [(1891) 2 Ch. 13]. By the Accumulation Act, 1892, and by the Property Act, 1922, some more exceptions were added to the rule enacted in the Thellusson Act. The whole law is now consolidated in sections 164-166 of the Property Act, 1925 (15 Geo. V, c. 20).

In their report, the Second Indian Law Commission remarked :

"As to the rule prohibiting accumulation, we all should prefer the more liberal enactments of the Thellusson Act (39 and 40 Geo. III, c. 98), which allow an accumulation for 21 years and do not affect provisions for payment of debts or for raising portions. But as the rule embodied in the Succession Act, section 104, has now been in force for 14 years, Mr. Stoges and Mr. West do not press its alteration." Sir Charles Turner was, however, of opinion that the above exemptions were frequently required by the circumstances of large zamindari properties.

In cases which were not governed by section 18 of this Act or section 104, Indian Succession Act, 1865 (section 117 of the Indian Succession Act, 1925), the rule followed was that if there was nothing *per se* illegal in a direction to accumulate and if such direction was neither so unreasonable in its conditions as to be against public policy, nor given for the purpose of carrying out an illegal object, the direction should be given effect to (I. L. R. 34 Cal. 5). In a case quoted in a footnote in I.L.R. 47 Cal. 88 at page 93, Sir Lawrence Jenkins, after reviewing English and Indian authorities on the subject, remarks—"A direction to accumulate with a gift of the accumulations is not fundamentally bad; it only fails if it offends some independent rule of Hindu Law.....Or the direction to accumulate may be repugnant and so void, as an attempt to deprive a person of the enjoyment of that which has become his property. But, if, as the decisions I have cited imply, it was within the power of a Hindu testator to direct the accumulations of property to be added to or made part of his own property, then there would seem to be no difficulty in the way of his making a gift of it to a person who under the same gift may become entitled to the original corpus of the testator's property.....What then is the period during which an accumulation can be validly directed ? On principle, I think, it must be for so long a time as the absolute vesting of the entire interest can be withheld, or for so long a time as that during which the corpus of the property can be rendered inalienable, or its course or its devolution can be directed and controlled by a testator." Although these decisions show that accumulations may be directed with certain restrictions, they do not lay down any rule which is definite and which Courts can easily follow. It is desirable to lay down definitely on the lines of the English law the periods and the objects for which a condition as to accumulation should be held valid. It is, however, difficult to adopt the English Law contained in the Property Act, 1925 in its entirety. Section 164 prescribes four periods during which accumulation can validly be directed, viz.—

(a) the life of the grantor or settlor;

(b) a term of 21 years from the death of the grantor, settlor or testator;

(c) the duration of the minority or respective minorities only of any person or persons living or *en ventre sa mere* at the death of the grantor, settlor or testator :

(d) the duration of the minority or respective minorities only of any person or persons who under the limitations of the instrument directing the accumulations would, for the time being, if of full age, be entitled to the income directed to be accumulated.

Rules regarding accumulation are closely connected with the rule against perpetuities (Cheshire on Modern Real Property, p. 482; Fearne on Contingent Remainders, p. 537). The English rule of perpetuities has a historical origin and has not been wholly adopted in India. According to the English law, the perpetuity period is the life of any person or of the survivor of any number of persons, who is or who are alive or *en ventre sa mere* at the moment when the deed or the will which creates the interest begins to operate, *plus* a period of 21 years from the time when such designated person or the survivor of several designated persons dies [*Cadell* v. *Palmer*, (1833) 1 Cl. and F. 372]. The rules against perpetuities in India so far as a transfer *inter vivos* is concerned are contained in sections 13 and 14. Under section 14 no transfer of property can operate to create an interest which is to take effect after the lifetime of one or more persons living at the date of such transfer and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the interest created is to belong. The periods in section 164 of the Property Act, 1925, cannot be incorporated in their entirety in the Transfer of Property Act without affecting the provisions of sections 13 and 14. We, therefore, consider it desirable to permit accumulations during the following periods only—

(1) the life of the transferor; or

(2) a period of 18 years thereafter.

This would avoid any difficulty of construction. At the same time we think it desirable to accept certain well-recognised exceptions in law such as those relating to provisions for the payment of debts, raising portions for children and the repairs to the property transferred. Section 18, therefore, should be amended accordingly.

Clause 10, Section 39. — Section 39 is intended to protect persons who are entitled to receive maintenance or for whom provision is made for advancement or marriage from the profits of any immoveable property. The section provides that such a right can be enforced against a transferee of the property, if the transfer has been made with the intention of defeating the right and transferee has notice of the intention. The Courts have, therefore, always required proof of the intention on the part of the transferor and also of notice of the intention to the transferee (I. L. R. 22 ALL. 226, 24 ALL. 160). The illustration to the section is not consistent with the section itself and does not make any reference to the intention of the transferor. In actual practice it is impossible to adduce proof of mere intention. As stated in 12 Bom. L R 1075 at pp. 1077 and 1078, in order to enable such proof to be adduced, a transferor must have announced his fraudulent intention of defeating the rights of persons entitled to maintenance and the transferee must have heard him doing so. As it is desirable to protect persons entitled to maintenance or for whom provisions for advancement has been made from improvident holders of the property that the reference to the transferor's intention should be omitted from the section, and the section should be amended accordingly.

Clause 11, Section 40. — Section 40 has already been dealt with along with section 11.

Clause 12, Section 43. — Section 43 refers to a person making an *erroneous* representation that he is authorized to transfer certain immoveable property. The underlying principle is also applicable to a case when the representation is fraudulent. The expression "erroneously" has, in fact, been construed to include all representations whether tainted or untainted with fraud (I. L. R. 7 ALL. 864, 20 Cal. 296). It is how-

ever, desirable to make the meaning clear by using the word "fraudulently" along with the word "erroneously."

The section also provides that a transfer by a person erroneously representing that he is authorized to make it operates on any interest acquired by such person in the property at any time during which the contract of transfer subsists. It embodies what is known as the principle of the "estate feeding the estoppel." The words "during which the contract of transfer subsists" are appropriately used and are clearly intended to mean that it is at the option of the transferee either to enforce the transfer or to repudiate the contract. In I. L. R. 18 Mad. 492, the Madras High Court has laid down in general terms that the contract of transfer subsists so long as the decree obtained in a suit to enforce a transfer has not been fully satisfied and that until then the transferee is entitled to claim the benefit of any subsequent acquisition of interest in the property by the transferor. This does not appear to us to be sound although, having regard to the terms of the decree which was passed in that suit, the decision itself cannot be said to be incorrect. Once a decree has been passed in a suit brought on the transaction as a completed transfer, the contract must be taken to have merged in the decree whereupon new rights arise not under the contract but under the decree.

With a view to meet the observations of the Madras High Court we think that the following paragraph should be added to the section after the words "till the contract of transfer subsists," viz.—

"Where a suit is brought by the transferee to enforce his rights under the transfer, the transferee shall be entitled to claim any interest which the transferor may acquire in such property at any time prior to the passing of any decree in such suit, from which no appeal lies, and not thereafter."

Clause 13, Section 52. — Section 52 deals with the doctrine of *lis pendens*. It begins with the words "during the active prosecution.....of a contentious suit or proceedings," the marginal note is "Transfer of property *pending suit* relating thereto." As to the words "active prosecution," it has been held that there could hardly be said to be active prosecution if after filing the plaint the plaintiff has taken no steps to effect service of summons, or if after a decree dismissing his suit he takes no steps to file an appeal (18 Cal. 188, 195; 28 Cal. 23, 26). In Bombay the decisions are not quite consistent. The view generally held is that if no steps are taken to execute the decree and the property comprised in the decree is transferred four years after the decree, as in 37 Bom. 621, or seven years after the date of the decree as in 12 Bom. 217, the transfer could not be said to have been made *pendente lite*. In the latter case the Court went so far as to hold that the *lis pendens* ended with the decree. This view was accepted in 22 Bom. 939, but it was held that that rule did not apply "to administration suits and suits for an account and to suits of a similar nature in which the decree is the inception of subsequent proceedings." 22 Bom. 939 was a mortgage suit, and the transfer in that case was made after the decree for sale and before the date of sale. It was held, following 21 W. R. 349, which was approved by the Judicial Committee in L. R. 15 I. A. 97, that the transfer was *pendente lite*.

As to the word "contentious" it was held in some cases that a suit became contentious only from the date on which summons was served on the defendant (15 Cal. 647; 27 Cal. 77; 21 All. 408), and in some cases that it became contentious when the defence was put in (31 Cal. 658, which was a partition suit). But these decisions are not good law since the ruling of the Judicial Committee in *Faiyaz Hussain Khan* v. *Prag*

Narain, (1907) 34 I. A. 102, where it was held that according to the true construction of this section there was no warrant for the view that a suit contentious in its origin and nature, is not so within the meaning of the section until after summons is served on the opposite party.

In view of the difficulties created by the use of the words "active prosecution" and "contentious", it is proposed to substitute the word "pendency" for the words, "active prosecution," and to omit the word "contentious", and to add an explanation, to make it clear when the pendency of a suit or proceeding shall be deemed to commence and when it shall be deemed to end.

We also propose to insert in the section the words "which is not collusive," for a collusive suit is no real suit at all, but merely a pretence. (6 Bom. 703, 11 Bom. 708) Further, to attract the doctrine of *lis pendens* the suit must be pending in a Court of competent jurisdiction, and this has been made clear in the explanation.

We have not thought it proper to include in the explanation cases where an order is passed against an intervener in execution proceedings, as the proper remedy in such cases is a suit under Order 21, Rule 63 of the Code of Civil Procedure, 1908. We have also excluded cases of review.

It has been suggested that to avoid the difficulties that may arise by the application of the doctrine of *lis pendens*, the system of registration of suits prevailing in England should be adopted in this country at least in the Presidency towns. This is really a question of administration and is beyond the scope of our reference.

Clause 14, Section 53 — The first and third paragraphs of section 53 are taken from 13 Eliz. c. 5 and 27 Eliz. c. 4. Both these statutes applied to Presidency-towns (22 W. R 60; 6 Mad. H. C. R. 455, 474; 25 Bom. 202, 208-209), and were repealed by the Transfer of Property Act, so far as they applied to those towns. 13 Eliz. c. 5 dealt with transfers made with intention to defeat or delay creditors, and 27 Eliz. c. 4 dealt with transfers made with intent to defraud subsequent transferees for consideration.

The first paragraph of section 53 consists of two parts of which the first relating to subsequent transferees is based on section 2 of 27 Eliz. c. 4, and the second relating to creditors is based on section 1 of 13 Eliz. c. 5. The second paragraph of section 53 had no place in either of the two statutes. It seems to have been founded upon the decisions on the two statutes. The third paragraph of the section is based on section 5 of 13 Eliz. c. 5 and section 4 of 27 Eliz. c. 4.

On the statute 27 Eliz. c. 4, the English decisions are clear to the effect that a voluntary transfer of land, afterwards made the subject of a conveyance for valuable consideration, may be avoided by the subsequent purchaser although in making the voluntary conveyance there was no actual fraud and although the purchaser had notice of the settlement : *see* 1 Smith's Leading Cases, 12th Edition, page 27. From the fact that the settlor afterwards conveyed the land to a purchaser for consideration it was inferred that the voluntary conveyance was made with intent to defeat the purchaser. "The principle appears to be that, by selling the property for a valuable consideration the settlor so entirely repudiates the former voluntary conveyance and shows his intention to sell, as that it shall be taken conclusively against him and the person to whom he conveyed, that such intention existed when he made the conveyance, and that it was made in order to defeat the purchaser." "It may be assumed," said Grant, M. R., "that a voluntary settlement, however free from actual fraud, is by the operation of that statute (27 Eliz. c. 4) deemed fraudulent and void against a subsequent purchaser for a valuable consideration even when the purchase has been made with notice of the

voluntary settlement." He added, however, that he had great difficulty in persuading himself that the words of the statute warranted or that the purpose of it required such a construction, for it was not easy to see how a purchaser could be defrauded by a settlement of which he had notice before he made his purchase.

The English decisions were followed by Couch, C. J., in *Judah* v. *Abdool*, (1874) 22 W. R. 60, a case decided before the Transfer of Property Act came into force. Following the same principle Sale, J., held in *Jashua* v. *Alliance Bank of Simla*, (1895) 22 Cal. 185, that the words "may be presumed" in paragraph 2 of the section should be construed as equivalent to "shall be presumed." and that a voluntary transfer of immoveable property afterwards made the subject of a transfer for consideration was void as against the subsequent transferee, even though the subsequent transferee had notice of the previous transfer. An appeal was preferred from the judgment of Sale, J., but the Appellate Court did not deal specifically with the point of law raised by the words "may be presumed" and the decision was confirmed on other grounds. The view taken by Sale, J., was dissented from by Jenkins, C.J in *Bai Cooverbai* v. *Muhammad*, (1905) 7 Bom. L. R. 267. As regards transfers made with intent to defraud creditors, the Courts in India have held that the phrase "may be presumed" in the second paragraph should be given its plain meaning, that is to say, the meaning which it bears in the Indian Evidence Act, 1872, section 3. The result is that the same phrase "may be presumed" may have one meaning attached to it in case of transfers made to defraud subsequent transferees and another meaning in case of transfers made to defeat or delay creditors. Again, paragraph 3 of the section can hardly apply to cases where there is a contest between a prior voluntary transfer and a subsequent transfer for consideration. Such being the case, it is desirable to split the section into two parts—one dealing exclusively with transfers made with intent to defraud creditors and the other with transfers made to defraud subsequent transferees. In drafting the two sections we have followed the lines of sections 172 and 173 respectively of the English Law of Property Act, 1925.

Paragraph 2 of section 53 lays down a rule of evidence. It says that when the effect of any transfer of immoveable property is to defeat or delay creditors and the transfer is made gratuitously, the transfer may be presumed to have been made with intent to defeat or delay creditors. The words "when the effect of any transfer is to defeat or delay creditors" have given rise to considerable difficulty and the Courts have resorted to English decisions to determine when a voluntary transfer can be said to have that effect. But even in England the course of decisions on the subject is not uniform. In *Spirett* v. *Willows*, 3 De G. J. & S. 293, Lord Westbury laid down two separate rules—one as to creditors existing at the date of the transfer and another as to subsequent creditors. In *In Re Lane-Fox*, (1900) 2 Q. B. 508, Wright J., adopted the second rule laid down by Lord Westbury, and held that an honest voluntary settlement made by a solvent person was not void merely because it proved some years afterwards *to have the effect* of defeating or delaying subsequent creditors. In *Freeman* v. *Pope*, 5 Ch. App. 538, it was laid down that it is not "necessary to prove any *actual* intention to delay creditors, where the facts are such as to show that the necessary consequence of what was done was to delay them," and that in such cases the intent *must* be inferred. This doctrine that the intent *must* be inferred was criticised in *Ex parte Mercer*, 17 Q. B. D. 290, a case which was approved by the Court of Appeal in *In re Holland*, (1902) 2 Ch. 360.

The principle now generally adopted by the Courts in England is that laid

down by Kindersley, V. C., in *Thompson* v. *Webster*, 4 Drew 628 at p. 632. That principle is as follows :—

"It is not necessary in order to set aside a voluntary deed, that a settlor should be actually in a state of *insolvency*. The principle now established is this: the language of the Act being that any conveyance of property is void against creditors if it is made with *intent* to defeat, hinder or delay creditor, the Court is to decide in each particular case whether, on all the circumstances, it can come to the conclusion that the *intention* of the settlor in making the settlment was to defeat, hinder or delay his creditors."

The above statement of the law was accepted as correct by the Judicial Committee in *Godfrey* v. *Pole*, 13 App. Cas. 497. Again, in *In re Holland*, (1902) 2 Ch. 360, it was held by the Court of Appeal that in considering whether a conveyance was void under the statute, the Court must look at the whole of the circumstances surrounding the execution of the conveyance and see whether it was *in fact* executed with the intent to defeat and delay creditors. It is, therefore, proposed to delete paragraph 2 of section 53 and to leave the determination of the question of intent to be dealt with according to the ordinary rules of evidence.

Coming now to transfers made with intent to defraud subsequent transferees for value, we have already referred to the English cases by which it was determined that every voluntary conveyance of immoveable property was void as against a subsequent purchaser for value. These decisions, as stated above, were followed by Sale J., but the law in England was altered by section 2 of the Voluntary Conveyances Act, 1893 (56 and 57 Vict. c. 21), by which it was provided that a voluntary conveyance, if made *bona fide* and without any fraudulent intent, should not be deemed fraudulent within the meaning of 27 Eliz. c. 4 by reason of any subsequent purchase for value. Section 2 of the Voluntary Conveyances Act has been repealed by the English Law of Property Act, 1925, and reproduced in section 173 of that Act. We think that a similar provision should be made and we have done so accordingly in sub-section (2).

For the reasons already given we have included paragraph 3 of section 53 in the new sub-section (1).

To make sub-section (1) more comprehensive we have provided, as is done in section 172 of the English Law of Property Act, 1925, that nothing contained in sub-section (1) shall affect the law of insolvency for the time being in force. Thus, a voluntary transfer, though it may be good under sub-sectien (1), may be avoided in insolvency proceedings under the circumstances mentioned in section 55 of the Presidency-towns Insolvency Act, 1909, and section 53 of the Provincial Insolvency Act, 1920. Similarly, a transfer is not necessarily void under sub-section (1) because it amounts to an assignment of all the transferor's property for the benefit of a particular creditor or of particular creditors [*Alton* v. *Harrison*, (1869) L. R. 4 Ch. 622, 626], but it may operate as an act of insolvency under section 9 of the Presidency-towns Insolvency Act and section 6 of the Provincial Insolvency Act, or it may be void as amounting to a fraudulent preference within the meaning of section 56 of the Presidency-towns Insolvency Act and section 54 of the Provincial Insolvency Act.

There has been some conflict of opinion whether a suit to set aside a transfer on the ground that it was made with intent to defeat or delay creditors should be brought on behalf of all the creditors or whether it is competent to any one creditor to institute such a suit. The trend of the decisions is in favour of a representative suit. In 34 Cal. 999, 16 Bom 1 and 27 Bom 822, it was held that the suit should be brought on behalf of all the creditors. The decisions under the corresponding section of 13 Eliz. c. 4

went the same way and it was held under that section that the action should be brought by the plaintiff on behalf of himself and all other unsatisfied creditors of the deceased : see *French* v. *French*, 6 De. G. M. & G. 95, *Richardson* v. *Smallwood*, Jac. 552. In 42 Mad. 143, however, the opinion was expressed that a suit to avoid a transfer made with intent to defraud creditors may be instituted by a single creditor. We are unable to accept this opinion. The practice followed by the High Court of Calcutta and Bombay is in accordance with Form No. 13, Appendix D to Schedule I of the Civil Procedure Code, and is based on the wholesome principle that the transferee should not be exposed to a multiplicity of suits at the instance of various creditors. We think it is desirable to give statutory recognition to this practice. We also do not agree with the view expressed by the High Court of Madras that a decree-holder is not a creditor and that he may therefore bring a suit on his own behalf to set aside the transfer. We have accordingly added a new paragraph.

The first paragraph of section 53 contains the words "prior or subsequent transferees," but it is difficult to see in what cases a prior transferee could have any reason to complain : for a completed transfer must always, in the absence of a special contract binding the transferee, take precedence of a later transfer : *see* section 48 of the Act. Hence we have omitted the word "prior" in sub-section (2) of the section.

The first paragraph also contains the words "or co-owners or other persons having an interest in such property." It is difficult to conceive of any case in which a co-owner or other person having an interest in the property could be defeated by a voluntary transfer made by the transferor ; and these words find no place in any of the corresponding English Statutes. We have accordingly omitted these words in sub-section (2).

Clause 15 Section 53A — We have proposed a more rigorous use of registration in the transfer of immoveable properties than is now enjoined by law, and the changes we have proposed are, we think, calculated to minimise, if not to prevent, perjuries and frauds. We cannot, however, ignore the fact that in actual practice circumstances do arise when the rigorous application of the law of registration may result in fraud instead of preventing it. Similar circumstances led to the introduction of the doctrine of part-performance in England.

By section 4 of the Statute of Frauds, 1677, (29 Car. II, c. 3), it is provided that no action or suit shall be maintained on an agreement relating to land which is not in writing signed by the party to be charged with it. The strict application of the provision led to great hardship in cases where a parol agreement relating to land had been partly performed by one party and yet he could not sue other party for specific performance. Thus, the latter party was enabled to practise a fraud upon the former. In such cases the Courts intervened on equity and enforced specific performance, holding that part-performance took the cases out of the Statute of Frauds. The general ground upon which the doctrine is based is prevention of fraud. It is said that where one party has executed his part of the agreement in the confidence that the other party would do the same, it is obvious that, if the latter should refuse, it would be a fraud upon the former to suffer this refusal to work to his prejudice (*see* Story on Equity, section 1045). Again, "a more general ground and that which ought to be the governing rule in cases of this sort is that nothing is to be considered as a part-performance which does not put the party into a situation which is a fraud upon him unless the agreement is fully performed." (*Ibid* section 1047.)

In applying the doctrine of part-performance the Courts have confined it within strict limits. From the decided cases the following may be taken to be the essential elements necessary for the application of the doctrine—

(1) that the transferee has been put in possession of the property :

(2) that his possession can be referred to the particular transfer and not to any other relationship;

(3) that it will amount to a fraud on the part of the transferor to back out of such transfer; and

(4) that the terms of the transfer can be ascertained with reasonable certainty.

Notwithstanding weighty opinion to the contrary, the doctrine is still found to be necessary in England. In India the position is somewhat different though the doctrine is just as applicable. In England the Statute of Frauds is a bar to a suit or action when the agreement is not in writing; in India registration is necessary to the validity of a transfer. Notwithstanding this difference the need for the prevention of fraud is the same in both countries. Hence, the doctrine has been applied by the Indian Courts to cases where the transfer was not effected by a registered instrument. In the case of *Mahomed Musa* v. *Aghore Kumar Ganguli* (42 I. A. 1), their Lordships of the Privy Council observed:

"They do not think that there is anything either in the law of India or of England inconsistent with it (the doctrine of part-performance), but, upon the contrary, that these laws follow the same rule. In a suit, said Lord Selborne in *Maddison* v. *Alderson* (8 App. Cas. 467), founded on such part-performance . . . . . the defendant is really 'charged' upon the equities resulting from the acts done in execution of the contract, and not . . . . . upon the contract itself. If such equities were excluded injustice of a kind which the statute cannot be thought to have had in contemplation would follow."

Their Lordships further said :

"The matter has advanced beyond the stage of contract: and the equities which arise out of the stage which it has reached cannot be administered unless the contract is regarded."

They go on to say :

"Many authorities are cited in support of these propositions from English and Scotch law, and no countenance is given to the proposition that equity will fail to support a transaction clothed imperfectly in those legal forms to which finality attaches after the bargain has been acted upon. From these authorities one dictum quoted by Lord Selborne from Sir John Strange (1 Ves. 441) may be here repeated: 'if confessed or in part carried into execution, it will be binding on the parties, and carried into further execution as such, in equity.' Their Lordships do not think that the law of India is inconsistent with these principles. On the contrary it follows them."

The doctrine has been applied to numerous cases in India, as in—
(1914) 18 C. W. N. 445; (1916) 20 C. W. N. 149; (1918) 22 C. W. N. 522; (1919) 23 C. W. N. 284; (1920) 24 C. W. N. 463; (1921) 25 C. W. N. 905; (1917) 41 Bom. 438; (1921) 45 Bom. 1170; (1918) 40 All. 187; (1923) 46 Mad. 919; (1923) 1 Rang. 419; (1925) 3 Rang. 243.

We do not think that the time has arrived when this equitable doctrine can be safely abrogated in favour of a rigid application of the law of registration. Ignorant transferees in this country who have partly performed the contract require a greater measure of protection than even a transferee in England. When the transferee has in the faith that the transfer would be completed according to law taken possession, it would be inequitable to allow the transferor to treat the transferee as a trespasser. We. therefore, think that statutory recognition should be given to the doctrine of part-performance. At the same time care should be taken that the law of registration is not evaded and that the introduction of the doctrine does not lead to "perjuries and frauds" which it is the object of the doctrine to prevent. With this end in view we propose—

(1) that the agreement should be in writing signed by the party or his agent whom it is sought to bind;

(2) that the transferee should in part-performance of the contract take possession of the property or, if already in possession, should continue in possession and in the latter case should do some act in furtherance of the contract;

(3) that the transferee, seeking to avail himself of the doctrine, should perform or be willing to perform his part of the bargain as contained in the writing;

(4) that when the contract has been partly performed all rights and liabilities under the contract should arise and be enforceable as between the parties to the contract notwithstanding that the transaction has not been completed according to law; and

(5) that the application of the doctrine should not affect the rights of a transferee for consideration who has no notice of the contract or of the part-performance thereof.

We think that it should be made clear that by reason of the part-performance, although the terms of the contract are made binding on the parties thereto, the transferee will not get a good title unless the transfer is effected according to law, that is, executed and registered. In this view registration would still be necessary in order that the transferee may acquire a perfect and marketable title. But, although on account of non-registration no title has passed, yet by reason of part-performance equities have arisen which Courts of law ought to recognise and enforce. As pointed out in Mohammed Musa's case, "when a contract has been partly performed, the matter has advanced beyond the stage of contract and the equities which arise out of the stage which it has reached cannot be administered unless the contract is regarded," i. e., as if the transaction had been completed according to law. We propose, therefore, that all the rights and liabilities arising under the contract as expressed in the writing should be enforceable but no more. There is no difficulty in the case of sale or a mortgage because a contract for sale or mortgage need not be in writing or registered. Questions may arise in the case of an agreement for a lease which creates a present demise. Such agreements require to be in writing and registered. If in performance of such an agreement the lessee takes possession, he may not even sue for specific performance because he cannot prove the agreement if it be not registered (*see* 26 C. W. N. 329). Such a state of things enables the lessor to treat the lessee in possession as a trespasser and thereby practise a fraud upon him. We think that the Courts should be in a position to give relief to such a lessee in possession. We propose therefore that in such a case the writing containing the agreement may be proved in Court notwithstanding non-registration. In order to

avoid perjured evidence, it is desirable in our opinion that the agreement should in all cases be in writing when the doctrine of part-performance is sought to be invoked.

We are not unmindful of the weighty opinion expressed in Chapter 35 of the report of the Civil Justice Committee. That Committee has recommended a rigid application of the law of registration and the rejection of the doctrine of part-performance. The principal objections formulated by the Committee are—

(1) "The recognition of the doctrine is inconsistent with the necessity for registration." We have shown that, inasmuch as part-performance cannot confer a title, registration would still be necessary.

(2) "A mass of perjured evidence will be introduced if oral agreements are allowed to be proved." To meet this objection we have proposed that the agreement should be in writing.

(3) "If registration is made essential in every case people will get accustomed to it and there will be no necessity for the application of the doctrine of part-performance." We do not think the country has arrived at that stage when the necessity for the application of this equitable doctrine has ceased to exist.

We think that with the safeguards we have suggested the doctrine should be given statutory recognition. In fact, our proposal does not go beyond what the Courts in India have already recognised by judicial decisions. We have deliberately excluded voluntary transfers from the operation of the doctrine of part-performance because obviously no equities arise in favour of volunteers.

There is some conflict of decisions in the Indian Courts with regard to the period within which equitable relief can be given to parties to a transaction when there has been no registered instrument. One view is that such relief can be given only within the period during which a suit for specific performance would lie, the other view being that such relief can be given even after the period has expired. It seems to us that the first view, to which we propose to give effect by adding section 30A to the Specific Relief Act, 1877, does not go far enough, in all cases, to afford the relief which the equities arising out of part-performance require. Because, even after the period of limitation, when part-performance has taken place, the parties stand in the same relation to each other as they did within the period of limitation and the equities which arose within that period remain the same. In fact, the longer the possession in part-performance, the higher will be the equities. We, therefore, think that in order that the relief may be effective, it ought to be available at all times during which the transferee is in possession in part-performance of the contract and subject to the other conditions which we have proposed. In 46 Mad. 919 and 23 C. W. N. 284, the Court took the view that the relief was available even after the period of limitation for specific performance was over. We feel that, in order that the relief may be real, it ought to be available as between the parties to the transaction even after such period of limitation.

It is necessary in this connection to have a new section in the Specific Relief Act dealing with the same subject, and we have, therefore, proposed the addition of section 30A at the end of Chapter II in the Specific Relief Act. We propose that section 49 of the Registration Act should be amended so as to provide for the admission of unregistered documents, required by law to be registered, for the purpose of proving part-performance within the meaning of the new section 53A of the Transfer of Property Act and section 30A of the Specific Relief Act.

Inasmuch as the statutory recognition of part-performance is a matter of considerable importance, we think it desirable to explain in further detail the reasons for the various recommendations we are making—

(1) In order to avoid perjured evidence which is likely to centre round an oral agreement we are providing for the agreement to be in writing.

(2) If possession be taken in part-performance of the contract, that fact along with the writing ought to be sufficient to attribute the possession to the agreement. But in the case of a person already in possession we have recommended some further act of part-performance, e.g., by payment of different rent or the spending of money, because the possession may not be exclusively referable to the agreement.

(3) In providing that the transferor shall be debarred from enforcing against a transferee any rights except such as arise out of the agreement, we desire to make it clear that the rights arising out of the contract as between the transferor and the transferee should be enforceable as if the transfer has been completed according to law. This provision will prevent a transferor from ejecting a transferee who has in part-performance of the contract taken possession, and at the same time enable the transferor to sue the transferee upon his covenant, say, to pay rent. The effect of this provision will be that the mutual covenants between the transferor and the transferee will be operative, though by reason of non-registration no title has passed. This will necessitate the completion of the transfer according to law by execution and registration in order that the transferee may get a marketable title. Thus, the law of registration will not be evaded.

(4) We have provided for a further safeguard in that equities arising out of part-performance may not affect the rights of a transferee for value without notice. This will again have the effect of requiring the completion of the transfer according to law because, otherwise, the first transferee will be in a precarious position in the case of a subsequent transferee for value without notice asserting his rights under such subsequent transfer. The claims of the subsequent transferee will, of course, be subject to the doctrine that, ordinarily, possession will constitute notice of the title of the person in possession. Thus, the transferor will not find it easy to practise a fraud upon a transferee in possession by making a second transfer. The second transferee will have notice of the title of the first transferee in possession whatever that title may be. The protection given to the second transferee is not illusory because under the amended section 3 of this Act he will be regarded as having notice of the title of the person in actual possession and not of the title of the prior transferee who may be only in constructive possession. Therefore, it would be still necessary for the first transferee in constructive possession to have his transfer perfected according to law by registration and thereby acquire an indefeasible title.

SALES.

Clause 16, Section 51. — Except in the case of gifts, all transfers dealt with in the present Act are required to be made by registered instruments only if the immoveable property involved therein is of the value of Rs. 100 and more. During the passage of the Act Sir Richard Garth (the then Chief Justice of Bengal) recorded a strong opinion that registration should be compulsory in the case of all transactions relating to immoveable property. The Civil Justice Committee in Chapter 35 of their report (page 447) has strongly advocated that the law as to registration should be stiffened and that every instrument relating to immoveable property should be compul-

sorily registrable. This important change should now be made. Section 54 of the Transfer of Property Act should be amended by providing that a sale in the case of all kinds of immoveable property or any interest therein can only be effected by a registered instrument.

The distinctions drawn between tangible immoveable and intangible immoveable property in section 54, and between property of the value of less than Rs. 100 and property of the value of Rs. 100 or more become unnecessary, and paragraph 3 also is not necessary while paragraph 2 should be amended so as to apply to all kinds of immoveable property.

Although sales by the delivery of property merely are done away with, the paragraph which explains what constitutes 'delivery' should be retained since in subsequent sections reference is made to delivery of property.

Clause 17, Section 55. — Sub-clause (a) of clause (1) of section 55 provides that a seller is bound to disclose to the buyer any material defect in the property of which the seller is aware. The expression "material defect in the property" has been held to include a defect in the title of the seller. (I. L. R. 20 Bom. 522). We propose to give effect to the decision by inserting the words "or in the seller's title thereto" in sub-clause (a).

Sub-clause (b) of clause (4) of the same section provides that the vendor's lien for the purchase-money can be enforced against the property in the hands of the buyer. The provision as it stands is insufficient, as such lien can easily be defeated by the buyer by parting with the property. It is, therefore, proposed to provide that it can be enforced against the property in the hands not only of the buyer but also of all other persons claiming under him if they have notice of the sale. This clause is also silent as to the date from which interest on the unpaid purchase-money should run. It seems fair that it should run from the date when the buyer is put in possession.

Sub-clause (b) of clause (6) of the same section relates to the buyer's lien and provides that it can be enforced against the seller and other persons claiming under him with notice of the payment. It also provides that the buyer's lien can only be enforced against a person claiming under the seller, if such person has notice of the payment of the purchase-money. The transferees and legal representatives of a seller are thus enabled to escape any liability for the amount received by the seller by pleading that they had no notice of the payment of the purchase-money. The reasons for limiting the seller's lien against third persons who have notice of the sale do not hold good in the case of the buyer's lien against persons claiming under the original seller. The words "with notice of the payment" in sub-clause (b) of clause (6) should, therefore, be omitted.

Clause 18, Section 56 — Section 56 purports to give effect to the doctrine of "marshalling." In the case of a sale the right of marshalling is given "as against a seller." It has been accordingly held by the High Courts of Madras and Allahabad that the buyer has no such right as against a prior mortgagee (31 Mad. 419. 17 All 434). In 13 Bom. L. R 678 the High Court of Bombay also took the same view and held that section 56 applied only as between a seller and his buyer and not as between a mortgagee of the seller and the buyer. Under section 55 (1) (g), in the absence of a contract to the contrary, it is the duty of the seller to discharge all encumbrances existing at the date of the sale. In practice section 56 does not give any relief to the purchaser.

The section begins with the words "Where two properties are subject to a common charge," and does not provide for the case when there are more properties which are subject to a common charge and some or one of them is afterwards sold. To provide for such cases we propose to amend this section and bring it into line with section 81 which deals with the marshalling of securities.

Clause 19, Section 58 (a). — The words "if any" in paragraph 2 are now superfluous and should be omitted.

Section 58 *(c)* contains the definition of a mortgage by conditional sale. It is with the greatest difficulty in many cases that such mortgages can be distinguished from sales with a condition for repurchase. As clause *(c)* of section 58 indicates, the real point of difference between the two kinds of transactions is that, in the case of a mortgage by conditional sale, the sale is only ostensible, whereas in the case of an out and out sale it is real. The ostensible or real nature of the transaction can, however, be only determined by finding out the intention of the parties. In order to escape the liability of accounting for the profits of the property and other liabilities imposed on a mortgagee, and also to escape the provisions of some of the local laws enacted for the benefit of agriculturists, creditors resort to the mode of having a mortgage which is in form an out and out sale. Since the decision of the Privy Council in *Balkishen Das* v. *Legge* (I.L.R. 22 All. 149), it has been a well-settled rule that it is not open to Courts to allow any extraneous evidence in order to find out the intention of the parties. Such intention must, therefore, be gathered from the document itself which purports to effect the transaction. These transactions have given rise to a great deal of litigation and Courts are compelled to enumerate and consider all the various criteria which have been laid down for the purpose of determining whether a transaction is a mortgage or an out and out sale. In order to avoid the difficulties indicated above, we think it is desirable to lay down a statutory test by which the intention is to be gathered. We, therefore, propose that no transaction should be deemed to be a mortgage by conditional sale unless the condition is embodied in the document which operates or purports to effect the sale.

Clause 19 — contd., Section 58 (d). — In a suit on a usufructuary mortgage where possession had not been delivered, the Madras High Court held that the mortgage money had not become due under section 68 of the Transfer of Property Act and that under section 67 the mortgagee was entitled to a decree for sale. They held that the provision of the latter section that the usufructuary mortgagee has no right to sell did not apply on the ground that delivery not having been effected, the transaction did not amount to a usufructuary mortgage (I. L. R. 41 Mad. 259). It seems to us that the High Court in that case omitted to notice that the mortgagee could only sue for the mortgage money under section 68 on the basis of the transaction being a usufructuary mortgage and on no other, and that the same transaction could not be treated as a usufructuary mortgage for the purpose of attracting the provisions of section 68 and as not being a usufructuary mortgage for the purpose of applying section 67. The remedy of a usufructuary mortgagee to whom possession is not delivered is to sue for possession, and the mere fact that possession is not delivered cannot alter the character of the transaction (7 N. W. P. 56, 7 Beng. L. R. 14, I.L.R. 10 Cal 66, 4 I. A. 15 31 All. 318). We think it necessary to amend the section so as to avoid the anomalous result arrived at in the Madras case quoted above. We accordingly propose that after the words "where the mortgagee delivers possession" the words "or expressly or by implication binds himself to deliver possession" should be inserted.

The definition of a usufructuary mortgage is not exhaustive. It does not provide for a case where the mortgagee is entitled to appropriate a portion only of the income of the property mortgaged in payment of the mortgage-money. We propose to alter the section accordingly.

Section 98 only deals with certain classes or types of anomalous mortgages and is not exhaustive. We think it would be better to define anomalous mortgages as covering all mortgages other than those defined in clauses *(b)* to *(d)* of section 58 and that the definition should be inserted in this section as a separate clause. The rights and liabilities of the parties under anomalous mortgages should be dealt with in section 98.

Clause 20, Section 59. — For the reasons set out in the note relating to section 54, the difference between mortgages relating to immoveable property of the value of less than Rs. 100 and those of the value of Rs. 100 or upwards is done away with. All mortgages, irrespective of the value of the property involved therein, should be compulsorily registrable.

Clause 21, Section 59A. — Whether the words 'mortgagor' and 'mortgagee,' as used in the different sections in this Chapter, include all persons deriving title from them has given rise to some difficulties. (*See* 39 I. A. 7 and 21 All. 223.) In order to make this clear, we propose the addition of section 59A.

Clause 22, Section 60. — The word 'payable' in section 60 at one time gave rise to a diversity of opinion. It was held in some cases that when a day was fixed for the payment of the debt secured by a mortgage and nothing more was stated, the presumption was that the day was fixed for the convenience of the debtor and that it was open to the mortgagor, if he liked, to pay the debt at an earlier date (I.L.R. 10 All. 602). A contrary view was taken in other cases and the general principle that the rights of redemption and foreclosure are co-extensive was strictly followed (I.L.R. 5 Bom. 22, 29 All. 471). In the last mentioned cases, where the deed provided that the mortgagor should pay "within . . . . . years" the suit brought to redeem the property before the expiry of that period was held premature. There is nothing in law to prevent the parties from stipulating expressly that the mortgagor may discharge the debt within the specified period and take back the property, but it is an elementary proposition that the mortgagee is not entitled to foreclose before the mortgage-money has become due. As a corollary to that proposition it is reasonable to hold that a mortgagor also should not be allowed to redeem before the mortgage-money has become due. It is possible that a mortgagee, relying on the condition in a mortgage regarding the period of redemption, may have entered into other transactions which will be affected if the mortgage is redeemed before the period stipulated for redemption or foreclosure has expired. In *Bakhtawar Begum* v. *Hosaini Khanum*, I. L. R. 36 All. 195, the Privy Council has approved of the view taken in I.L.R. 29 All. 471, that redemption should not be allowed within the term of the mortgage. In order to remove any doubt on this point, the word 'due' has been substituted for the word payable' in the first paragraph.

It should be made clear that on redemption a mortgagee is bound to deliver not only the mortgage-deed in his possession but all documents in his possession relating to the mortgaged property. As it is proposed that hereafter all mortgages should be by registered instruments, the words in brackets, viz., "where the mortgage has been effected by a registered instrument" have become unnecessary and should be omitted.

The last paragraph of the section relates to what is known as the principle of the 'indivisibility or integrity of a mortgage'. Such integrity or indivisibility exists not only with reference to the mortgagee who may be generally benefited thereby, but also with reference to the mortgagor. Save as a matter of special arrangement neither the mortgagor, nor the mortgagee nor any person claiming through either of them should get relief except in consonance with the principle of indivisibility. We do not think it necessary to alter the last paragraph of the section except that the word "only" should be inserted between the words "except" and "where" with a view to get rid of the effect of the decision in 27 Bom. L. R. 1449. The only case, therefore, when the integrity of a mortgage may be allowed to be broken, apart from special arrangement, is when a mortgagee acquires a share in the mortgaged property.

Clause 23, Section 61. — Section 61 abolished the doctrine of the consolidation of mortgages. The section was based on section 17 of the Conveyancing Act, 1881, (corresponding to section 93 of the Property Act, 1925). In England before that statute was enacted, and in this country before Act IV of 1882 was passed, a mortgagee was allowed to consolidate securities in his hands and force a mortgagor to redeem all of them or to prevent him from redeeming one of them without redeeming the others. [Ghose on Mortgage, Vol. 1, p. 429, 5th Edn., 6 Bom. H. C. R. (A. C. J.) 90.] This was inequitable and was altered by section 61 of the Act. But even that section is not exhaustive. It is proposed, therefore, that a mortgagor should be allowed to redeem simultaneously all debts or any one or more of them which have become due to the same mortgagee. The same principle ought to apply where portions of one and the same property are mortgaged separately. Accordingly, any reference to "property" has been omitted and the words "two or more mortgagees" have been used and the illustration has been omitted.

Clause 24, Section 62. — Section 62 which relates to a usufructuary mortgage requires to be amended on the same lines as section 58 *(d)*.

Clause (b) of the section is limited to a case where out of the rents and profits of the mortgaged property the mortgagee is entitled to recover only the interest due to him on the principal. The clause should also be made applicable to cases where the rents and profits are to be appropriated in payment of a part of the mortgage-money, i. e., in payment of either interest in part or principal in part or both in part. To effect this change, the words 'principal money' should be changed into 'the balance of the mortgage-money'.

Clause 25, Section 63. — Section 63 relates to accessions and the second paragraph of the section provides for the payment of the cost of accessions by the mortgagor where such accessions are made in certain circumstances and are delivered to the mortgagor. It is stated that the proper cost payable by the mortgagor is to be added to the principal money "at the same rate of interest". Nothing is stated in the section about any rate of interest. Difficulty might also arise where a mortgage-deed is silent as to the rate of interest. For the words "at the same rate" the following words should be substituted, viz., "at the rate of interest payable on the principal, and, where no such rate is fixed in the mortgage-deed, at the rate of nine per cent. per annum."

Clause 26, Section 63A. — Section 63 applies to accessions only. There is no express provision in the Act allowing a mortgagee to make improvements to the mortgaged property. In the absence of such express provision it has been held in some cases that a mortgagee is not entitled to charge or obtain any compensation for

improvements made (I. L. R. 19 Mad. 327 ; 37 All. 81). On the other hand, same Courts following the English decisions in *Shepard* v. *Jones*, 21 Ch. D. 469; *Sandon* v. *Hooper*, 6 Beav. 246; *Henderson* v. *Astwood*, (1894) A. C. 150, have held that a mortgagee should have a charge for improvements if they are reasonable (I. L. R. 43 Bom. 69; 45 Bom. 1301). According to the English law, as summarized by Fisher on Mortgage (Art. 1782, 6th Edn.), "the improvements must always be reasonable having regard to the nature and value of the estate; for, if it were not so, a weapon would be put in the mortgagee's hands with which he might greatly clog the right of redemption, which he has no right to make more expensive than is necessary to keep the estate in good repair and working order and to protect the title." The English cases on the subject are also reviewed in Coote on Mortgage, where it is pointed out that the later decisions are more favourable to the mortgagee than the older authorities. In the 8th Edition of Coote on Mortgage, the law is thus expounded (page 1232):.

"Unless the sanction of the mortgagor has been obtained, the mortgagee will not be allowed for substantial repairs, not being strictly necessary, or for improvements, unless the value of the property has been increased thereby.....Indeed, according to some older cases, even substantial improvements have been disallowed, unless done with the consent of, or acquiescence after notice by, the mortgagor. A mortgagee can hardly be said to be safe in making improvements in the mortgaged property without such consent or acquiescence. But the tendency of later decisions appears to be more favourable to the mortgagee in this respect and it has been laid down that *prima facie* a mortgagee who has expended money in improvements is entitled to an inquiry whether the outlay has increased the value of the property and to be allowed such outlay so far as the value is proved to have been increased thereby."

We prefer to adopt in India the view summarized in Fisher on Mortgage except that we do not consider it desirable to leave it to the Court to determine in each case what improvements are reasonable and what not. We accordingly propose to have a uniform and definite rule, namely that no mortgagee shall be entitled to charge for any improvements unless they are made to preserve the property from destruction or deterioration or unless they are necessary to prevent the security from becoming insufficient or made in compliance with the lawful order of any public servant or public authority. We accordingly propose to add a new section 63A dealing with improvements. We have throughout guarded the right of private contract.

Clauses 27, 28 and 35, Sections 64, 65 and 71.—The words "for a term of years" in these sections are unnecessary and should be omitted.

Clause 28, Section 65. — This section relates to the implied covenants by a mortgagor, and provides in the penultimate paragraph that covenants regarding payment of public charges and future rent in the case of leasehold property do not apply in the case of a usufructuary mortgage. This provision is not clear. Covenants specified in the section are binding on a mortgagor in consequence of his obligation to preserve the mortgage security. No sufficient reason is apparent why, in the case of a usufructuary mortgage when possession is not delivered to the mortgagee, the mortgagor should not be under a duty to pay the public charges and future rent. It appears from the papers underlying the Act that the provision at present contained in this paragraph was first introduced in Bill IV of 1879, when clauses *(c)* and *(d)* did not contain the words "so long as the mortgagee was not in possession." In the case of a usufructuary mortgage if the mortgagor has not put the mortgagee in possession, it is as much his duty as it is in the case of any other mortgage to preserve the property on

the security of which he has obtained a loan. The words "so long as the mortgagee was not in possession" were added in sub-clauses *(c)* and *(d)* of section 65 in the final Bill, but, apparently through inadvertence, this paragraph was not omitted.

Clause 29, Proposed new Section 65A.—In the absence of an express provision in the Act, a question is sometimes raised whether a mortgagor in possession is competent to grant a lease of the mortgaged property during the continuance of the mortgage and whether such a lease is binding on the mortgagee. In England, before the Conveyancing Act, 1881, was passed a mortgagor could not grant leases which were binding on the mortgagee. [*Keech* v. *Hall*, 1 Smith L. C. 577, 12th Edn., *Corbett* v. *Plowden*, 25 Ch. D. 678, *Robbins* v. *Whyte*, (1906) 1 K. B. 125.] This view was followed in the case of an English mortgage in Bombay (I. L. R. 30 Bom. 250) and it was observed as follows :

"If a mortgagor left in possession grants a lease without the concurrence of the mortgagee, the lessee has a precarious title, inasmuch as although the lease is good as between himself and the mortgagor who granted it, the paramount title of the mortgagee may be asserted against both of them."

In Allahabad, it was held that a mortgagor ordinarily cannot, without the concurrence of his mortgagee, execute a lease which would be binding upon the mortgagee. He may execute a lease which may be binding upon himself and so long as the mortgagee does not interfere with the possession of the lessee so long may the lessee enjoy the benefits of the lease; but ordinarily without the concurrence of the mortgagee the mortgagor cannot grant a lease which will be binding upon the mortgagee (2 A. L. J. 294). This view was not accepted in Calcutta. In 40 C. L. J. 500, following the observations in Ghose on Mortgage (Vol. 1, p. 283), it was held that a mortgagor may make a lease conformable to usage and in the ordinary course of management, and the tenancy so created will be binding on the mortgagee. The Conveyancing Act, 1881, expressly authorises a mortgagor to grant leases of the mortgaged property for particular periods (section 18 of the Conveyancing Act, 1881, and section 99 of the Property Act, 1925). In our opinion, it is necessary to provide expressly in the Transfer of Property Act that a mortgagor shall, subject to express conditions in the mortgage-deed, be entitled to grant a lease of the mortgaged property. In order, however, to protect the interests of the mortgagee, we propose to provide certain restrictions, mostly taken from section 99 of the Law of Property Act, 1925, with variations suitable to the conditions of this country.

Clause 30, Section 67. For the reasons stated in the notes under section 60, the word 'payable' should be replaced by the word 'due.'

Under the present law the remedy by way of foreclosure is open to a mortgagee in the case of a mortgage by conditional sale and in an English mortgage, as also in anomalous mortgages, by the terms of which the mortgagee is entitled to foreclose. By Rule 4 (2) of Order XXXIV of the Code of Civil Procedure, 1908, the Courts in India have been empowered, when a suit is brought for foreclosure, to direct a sale in lieu of foreclosure. The discretion conferred by that rule on the Courts has been exercised in different ways, some Courts refusing foreclosure, while others have granted it. We understand that in Allahabad foreclosure decrees are more frequent. As to equitable mortgages by deposit of title deeds also, a different practice prevails in different Courts. In Calcutta and Allahabad the Courts have invariably refused foreclosure in such cases (24 Cal 348; 14 All 238), while in Bombay foreclosure decrees are sometimes passed (14 Bom. 269).

The question is discussed by the late Sir Rash Behari Ghose in the 5th Edition of his Law on Mortgage, at p. 32, where he says :

"But although sales take place more frequently now, foreclosure is still a common method of working out the rights of mortgagees in England. I may, however, be permitted to observe that in complicated cases, the rights of the parties can be adequately protected only by a decree for sale; foreclosure being both a cumbrous and dilatory method of procedure. When the Transfer of Property Act was under consideration, it was proposed in this country to do away with foreclosure altogether, and to give the mortgagee only the right to realise his security by a sale of the pledge. But it was thought by the then Law Member of the Governor-General's Council that the amount of simplicity which would be thus gained would not justify the amount of disturbance which would be created by such a change in the law. I, however, venture to doubt whether the slight disturbance which would have been created by such a law would have been too dear a price to pay for the elegance and simplicity which such a measure would have given us. At any rate the gain to the community would have been sufficient compensation for any possible disturbance. The right of a mortgagee to foreclose, we should remember, naturally grew in England out of the form of an English mortgage, which consists of a transfer of ownership, accompanied by a condition for re-transfer upon due payment of the debt, probably the rudest method, as Professor Holland points out, in which security can be given for the fulfilment of an engagement. In many of the States of America, as well as in Ireland, sale is regarded as the most appropriate remedy on a mortgage. The same practice is followed in countries which have adopted the Roman law as the basis of their jurisprudence. In English law, however, the more cumbrous mode of proceeding has stood its ground down to the present day, but it may be affirmed without much temerity that foreclosure with its successive periods of redemption, its liability to be reopened, and the manifest inadequacy of the remedy in complicated cases, is doomed even in England."

In Wiltsie on Mortgage Foreclosure, Vol. 1, p. 5, 3rd Edn. (an American work), it is observed :

"Strict foreclosure or foreclosure without a sale was a procedure greatly used in England at one time and its purpose was to perfect in the mortgagee an absolute title, instead of to obtain a decree for sale; the Courts in most States recognise this method but allow its use only in exceptional cases, owing to its severity upon the rights of the owner of the equity of redemption."

We, therefore, consider it desirable to confine the remedy of foreclosure to the case of a mortgage by conditional sale or an anomalous mortgage where, by the express terms of the deed, the parties have stipulated for foreclosure; and to disallow it in all other cases.

Clause 31, Section 67-A — While dealing with section 61, we pointed out that it is inequitable to enforce the principle of the consolidation of securities to the prejudice of a mortgagor. When, however, a mortgagee holds several mortgages in respect of the same or different properties, it will be prejudicial to the mortgagor if the mortgagee is allowed to enforce one mortgage and keep the other mortgages alive. In the case of a number of mortgages in which the only remedy open is foreclosure, the disadvantage of the mortgagor will be very marked as he may lose the whole property in satisfaction of one debt, which may be less than the real value of the property, and will be liable to have a personal decree passed against him in satisfaction of the debts under the other mortgages. In the case of mortgages too where the only remedy is sale,

the property will never realize its fair and proper value if it be sold subject to another mortgage. Thus, in 25 C. W. N. 129, where the Calcutta High Court was constrained to hold that the holder of two independent mortgages over the same property, in the absence of a contract to the contrary, was not prevented from obtaining a decree for sale on each of them in a separate suit, it had to add a reservation in the decree that he could not sell the property twice over nor could he sell it under either of the decrees subject to the other. In that case the Court held that the right course to follow in such circumstances was to direct that the property be sold free of both charges, whether in execution of the decree on the first mortgage or of the decree on the second mortgage, and that the balance of the sale proceeds after payment of incidental expenses be applied in discharge of the dues on the first mortgage and the second mortgage one after the other, and that the residue, if any, stand to the credit of the holder of the equity of redemption. This course, although equitable, is not warranted by any provision of the Act or of Order XXXIV, Civil Procedure Code. To avoid such difficulties, we propose a new section to be numbered section 67A.

Clause 32, Section 68. — Section 67 and section 67A deal with the right of a mortgagee against the mortgaged property, while section 68 relates to his right to recover the mortgage-money personally from the mortgagor. Section 68 indicates the circumstances under which the right accrues or the cause of action arises, namely—

(i) when the mortgagor binds himself personally to repay the debt,

(ii) when the mortgage-security is wholly or partially destroyed or rendered insufficient in consequence of any cause other than the wrongful act or default of the mortgagor or mortgagee.

(iii) when the mortgagee is deprived of his security by or in consequence of the wrongful act or default of the mortgagor,

(iv) where, the mortgagee being entitled to possession, the mortgagor fails to deliver possession of the mortgaged property or to secure to him the undisturbed possession thereof.

The cases mentioned in clauses *(i)*, *(iii)* and *(iv)* are referred to in clauses *(a)* to *(c)* of the present section, while that mentioned in clause *(ii)* is contained in the last paragraph.

But section 68, as it stands at present, deals not only with the cases in which a mortgagee is entitled to sue for the mortgage-money ; it also indicates to some extent the persons against whom the suit may be maintained. The opening words of the section are : "The mortgagee has a right *to sue the mortgagor* for the mortgage-money." We propose to omit the words "the mortgagor." The reason is that the use of these words has given rise to a doubt as to whether the words "the mortgagor" refer to the mortgagor personally or whether they include his legal representatives or transferees (*see* 27 M. L. J. 494 and 39 I. A. 7). As to clause *(i)*, being the case where the mortgagor binds himself to repay the sum, no question can arise as to the liabilities of the legal representatives of the mortgagor or his transferees; the word "himself" in that clause clearly indicates that none but the mortgagor can be sued for the mortgage-money in that case. As regards clauses *(ii)*, *(iii)* and *(iv)*, the legal representative of the mortgagor or his transferee may be liable to be sued personally in some cases, while not in others. It would make the section very cumbrous if we attempted to lay down the different circumstances under which the personal liabilities of legal representatives and transferees arose and the extent of their liability. We have, therefore, considered it desirable to leave these matters alone, as we think that the question in each case should be decided by the general law.

Clause *(c)* of the present section provides that the mortgagor is personally liable when he fails to deliver or to secure to the mortgagee the possession of the property without disturbance by him or "any other person." The words "any other person" are very wide and might include a trespasser. The disturbance of the mortgagee's possession by a trespasser or by a third person with whom the mortgagor was not in collusion should not confer upon the mortgagee a right to sue the mortgagor for the mortgage-money. The words "or any other person" have been held to mean a person claiming under a title superior to that of the mortgagor (I. L. R. 15 Mad. 304; 19 All. 191; 42 Mad. 578). In clause (iv) above we propose to substitute for the words "any other person" the words "any person claiming under a title superior to that of the mortgagor."

The personal remedy declared by the section is additional and it has been held that it can be pursued by the mortgagee concurrently with the other remedies or even before he proceeds against the mortgaged property or security (17 Mad. 469). Although *prima facie* a mortgage involves the idea of a loan (I.L.R. 44 Cal. 388 at p. 400), it is essentially a security. In actual practice, this concurrent remedy has led to considerable abuse. The mortgagee, with a view to get an increase of interest or other undue advantage by the threat of arrest and imprisonment, may obtain a money decree without proceeding against the property. We, therefore, propose that in the cases mentioned in clause *(i)* and clause *(ii)* the mortgagee should exhaust all his available remedies against the mortgaged property before he seeks to pursue the personal remedy against the mortgagor. In cases falling under clauses *(iii)* and *(iv)* above, such a restriction on the rights of a mortgagee is not called for. The proposed provision will not be inconsistent with Order XXXIV, Rule 6 of the Civil Procedure Code, under which, in a mortgage suit, the mortgagee is not entitled to execute the decree personally against the mortgagor till the mortgaged property has been sold and the sale proceeds are found insufficient to pay off the entire mortgage debt.

We also consider that it should be open to a mortgagee to abandon or relinquish the security, if he chooses to do so, in cases falling under clause *(i)* and clause *(ii)* above, if he is anxious to pursue the personal remedy. The mortgagee should not, however, be allowed to relinquish a portion only of the security so as to increase the burden on the remaining portion (I. L. R. 50 Cal. 718). In order to ensure that the relinquishment of the security is complete, it is proposed that it should be made by a registered instrument.

In the case mentioned in clause *(i)* above, the cause of action to sue for a personal decree will arise on the date fixed for repayment. In other cases the cause of action is accelerated and the mortgagee need not wait till the due date has arrived (I. L. R. 25 Cal 450; 15 Mad. 174; 16 All. 318; 26 Bom. 241). The period of limitation for the enforcement of the personal remedy, if the document be registered, is six years (Art. 116 or 120 of the Limitation Act, 12 Cal. 389; 12 I. A. 12; 34 All. 246). Much longer periods are provided for remedies against property. A suit for enforcement of the personal remedy may, therefore, have to be instituted earlier than the mortgage suit. In order that such a suit may not be barred by limitation, or struck off for non-prosecution, we propose to provide that it should be stayed till the mortgagee exhausts his remedies against the mortgaged property.

The amendment of section 68 does not necessitate the amendment of Order XXXIV, Rule 6, Civil Procedure Code. The rule applies to a mortgage suit and has no application to a suit under this section in which the only decree that can be passed is for the payment of money (I. L. R. 29 Mad. 362).

S. N. DAR, B. A. LL. B.,
Vakil High Court.

So also no amendment of Rule 14 of Order XXXIV is necessary. In cases where the mortgagee is required to exhaust his remedies against the mortgaged property, the property would be sold before he is allowed to exercise his right for a personal decree against the mortgagor and the provisions of Rule 14 will not come into operation. That rule can only apply to other cases where he is not required to proceed against the mortgaged property first.

In cases in which the mortgage-money is agreed to be paid by instalments or the interest is to be periodically paid it has been held that a sufficient portion of the mortgaged property may be brought to sale for the amount due. These cases are governed by the express terms of the mortgage-deed (I. L. R. 35 Bom. 327: 42 Mad. 813), and are not affected by section 68.

Clauses 33 and 34, Section 69 and Proposed new Section 69A.—Clause *(a)* and the last paragraph of section 69 refer to English mortgages. Clause *(a)*, however, relates to an English mortgage which contains an express power of sale, while the last paragraph deals with one which does not contain any such power. In the case of English mortgages dealt with in clause *(a)* the power of sale is to be exercised in accordance with the procedure prescribed in paragraphs 2 to 4 of the section, whereas in the case of those in the last paragraph the rules contained in sections 6 to 11 of the Trustees' and Mortgagees' Powers Act (XXVIII of 1866) apply. The procedure laid down in section 69 differs from that prescribed in Act XXVIII of 1866 in several particulars. Act XXVIII of 1866 was based on Lord Cranworth's Act (23 & 24 Vict., c. 145) which was repealed by the Conveyancing Act, 1881 (41 & 42 Vict., c. 41). Sections 19 to 22 of the latter statute relate to the exercise of the power of sale by a mortgagee and are now reproduced in sections 101 to 108 of the Property Act, 1925 (15 & 16 Geo. V. c. 20). The provisions of Lord Cranworth's Act were, as pointed out by Fisher on Mortgage (paragraph 975, 6th Edn.), open to the following defects:

"If.....the interest on the mortgage be payable half-yearly, it seems that the repealed statutory power cannot be exercised till at least eighteen months have expired from the date of the security. The interest must have been in arrear for six months, and six months' notice must have been given: and in the absence of a provision that the notice may be given before the interest has actually fallen into arrear for six months, an exercise of the power depending upon such a notice could hardly be considered safe.

Again, the purchaser's title is protected only where no case has arisen to authorise the exercise of the power, and where no notice has been given. The act is silent as to an improper exercise of the power after it has arisen, and which is irregular otherwise than by the absence of notice; nor does it protect the purchaser where he is aware of the absence of notice, or of other irregularities; and it gives the person damnified an express remedy in damages only where the exercise of the power was unauthorised: but none were being authorised, it was improperly exercised either for want of notice or otherwise."

These defects are also present in the Indian Act (*cf.* sections 6 to 9 of Act XXVIII of 1866). In England they were removed by sections 19 to 21 of the Conveyancing Act, 1881, corresponding to sections 101 to 108 of the English Property Act, 1925. Paragraphs 2 to 4 of S. 69 are also based on these sections of the Conveyancing Act, 1881. We think that the antiquated and manifestly defective procedure in Act XXVIII of 1866, based on an English statute which has long been repealed, should be revised.

In our opinion, English mortgages, whether they contain an express power of sale or not, should all be governed by the provisions of paragraphs 2 to 4 of section 69 which are based on the existing provisions of the English law. We, therefore, propose that section 69, along with clause *(a)*, should be recast and the provisions relating to the appointment of a receiver, referred to in the last paragraph of the section, should be the subject of a separate section.

As the Trustees' and Mortgagees' Powers Act, 1866, deals with other matters, such as trusts and leases, besides mortgages, it should not be repealed. In order, however, to make it clear that the Act will no longer apply to mortgages, we propose that the words "notwithstanding anything contained in the Trustees' and Mortgagees' Powers Act, 1866," should be inserted at the beginning of section 69.

We also consider that in all cases where the mortgagee is entitled to exercise the powers of sale under section 69, it is desirable to make provision for the appointment of a receiver. We propose that a new section (section 69A) should be added on the lines of sections 101 (iii) and 109 of the English Property Act, 1925, providing for the appointment of a receiver, the rights and liabilities of such receiver and the procedure to be followed when such appointment is made. At the same time, we think it desirable that specific provision should be made under section 69A for the following:

(a) unless otherwise provided by the terms of the mortgage deed, the receiver should be appointed by the consent of both the mortgagor and mortgagee:

(b) where the parties do not agree regarding the person to be appointed as a receiver, they should have liberty to apply to the Court in a summary proceeding.

We also think it desirable to make provision in the section on the lines of section 34 of the Indian Trusts Act, 1882, enabling the parties or the receiver to apply in a summary proceeding to the Court for its opinion or advice or for directions in matters connected with the management or administration of the mortgaged property.

Clause 36, Section 72. — It is inequitable to confine the section to a mortgagee in possession. With the exception of the provision in clause *(a)* relating to the management of the property and the collection of rents and profits, this section may apply to all mortgagees generally. A mortgagee, whether he is in possession or not, is entitled to spend money for the purposes mentioned in clauses *(b)*, *(c)*, *(d)* and *(e)*, subject as regards clauses *(b)* and *(c)*, to the proviso that he should not be entitled to exercise that right unless the mortgagor is in default. It has been held that if a mortgagee who is not in possession spends money to preserve the property from forfeiture or sale he is entitled to be reimbursed for the money spent (I. L. R. 30 Cal. 794). In a Bombay case it was recently held (25 Bom. L. R. 843) that section 72 did not imply that a mortgagee not in possession had no right to charge the mortgaged property for payments properly made by him in relation to his security. Whether a mortgagee is in possession or not, it is to his interest to spend money to preserve his security and he should have a right to do so. We, therefore, propose that a mortgagee, though not in possession, should be entitled to spend such money as may be necessary for purposes mentioned in clauses *(b)*, *(c)*, *(d)* and *(e)*, subject to the condition, as to *(b)* and *(c)*, that he should not be entitled to do so until the mortgagor is in default.

We also propose to omit the words in the first paragraph of the section, namely, "during the continuance of the mortgage." These words had to be in the original section as the section was confined to a mortgagee in possession. Further, as we propose to amend Order XXXIV of the Code of Civil Procedure, so as to entitle the mortgagor to redeem at any time before the sale is confirmed or the foreclosure takes place under

the provisions of the Code, these words have to be omitted in order that a mortgagee may be entitled, if occasion arises, to spend such money as may be necessary for these purposes until the sale is confirmed or a final decree for foreclosure is passed.

By the omission of clause *(a)* from section 72 we do not propose to take away the right of a mortgagee in possession to spend money for the management of the property or collection of the rents and profits. As section 76 relates to a mortgagee in possession, we propose to make provision in that section for the recognition of the right.

In the penultimate paragraph of section 72 it is stated that a sum paid as insurance premium shall be a charge on the mortgaged property, while the second paragraph provides that sums mentioned in clauses *(a)* to *(e)* should be added to the principal money. It is not clear whether any distinction is really intended between insurance premia and other necessary costs and charges. The sums payable for insurance ought to be treated on the same footing as those spent for necessary costs and charges. We are, therefore, of opinion that such sums should be added to the principal money and should carry the same rate of interest.

Clause 37, Section 73. — The present section deals only with the case where the mortgaged property is sold for the arrears of revenue or rent. There is a conflict of decisions on the point whether the principle underlying the section applies to a case where the mortgaged property is compulsorily acquired under the Land Acquisition Act. 1894. In I. L. R. 16 All. 78, the Allahabad High Court held that a mortgagee had no charge on the amount of compensation awarded for the acquisition of the mortgaged property under the Land Acquisition Act and that the mortgagee ought to have claimed apportionment in acquisition proceedings. A contrary view was taken in I. L. R. 6 Mad. 344, and the Allahabad decision was dissented from in Calcutta and Patna (13 C. W. N. 350: 5 Pat. L. J. 650). It has been held that the compulsory acquisition of a property does not amount to its destruction within the meaning of section 68 and that the property acquired is converted into money (I. L. R. 13 Mad. 321). According to the general principle of 'conversion' on which section 73 is based the amount awarded as compensation is impressed with the charge to which the land is subject. In England, where money is paid into Court as the proceeds of real estate converted by compulsory powers under Acts of Parliament, as under section 69 of the Land Clauses Consolidation Act, it usually remains in Court subject to the rights of the parties interested in it to have it reinvested in land, and it is considered to be impressed with the quality of real estate (*In re Stewart*, 1 Sm. and G. 32, I. W. & T. L. C. 393, 8th Edn.). The view taken by the majority of the High Courts is in accordance with the general principle stated above and we propose to give effect to it by the addition of sub-section (2) to section 73.

Section 73 at present provides that a mortgagee has merely a charge on the surplus sale proceeds. The use of the word "charge" appears to us to be unhappy inasmuch as a charge under section 100 relates to immoveable property and is enforced as a simple mortgage. The procedure for enforcing a simple mortgage obviously does not apply to the enforcement of a claim against a fund. The use of the word also leaves the remedy of the mortgagee uncertain. We, therefore, propose to avoid its use and to provide that the mortgagee shall be entitled to claim payment out of the surplus fund or compensation money payable to the mortgagor as the case may be. In the amended section we have also provided for priorities as in the case of a charge. The mortgaged security being converted into money, we see no reason why the mortgagee

should have to wait until the due date, particularly when he can no longer bring a suit to enforce the mortgage.

Clause 38, Sections 74 and 75. — These sections are based on what is known as the principle of "subrogation." For reason stated in the notes in the proposed new sections 92 and 94, we propose to delete these sections.

Clause 39 Section 76. — In clause *(c)* of section 76 it is provided that the mortgagee in possession shall be liable for the payment of Government revenue, other public charges and arrears of rent. If the mortgaged property is leasehold, it is also his duty to pay any rent which may become due during the period of the lease. We propose, therefore, to insert in clause *(a)* the words "and all rent" after the words "charges of a public nature."

In clauses *(b)* and *(d)* of the section the term "rents and profits" is used, while in clause *(c)* the word "income" is used. In clauses *(h)* and *(i)* and also in section 77 the word "receipts" is used. In our opinion the use of these different terms is appropriate in regard to the context in which they are used and they are in contradistinction to one another. Government revenue, public charges and rent are always paramount charges on immoveable property and the failure to pay them renders the property liable to be sold. The liability of a person in occupation of the property, including a mortgagee in possession, is commensurate with his right to enjoy the income of the property. In clause *(c)*, therefore, it is provided that in the absence of a contract to the contrary it is the primary duty of a mortgagee in possession to pay the aforesaid dues out of whatever income he may realise from the property. He cannot claim any deduction until these liabilities aae satisfied. In clause *(d)*, however, the term "rent and profits" is used to indicate that a mortgagee is liable to make necessary repairs to the property out of the balance of the actual realisations from the property after deducting these from the payment mentioned in clause *(c)* and the interest on the principal money. He is not bound to spend money on repairs out of his own pocket (I. L. R. 15 Mad. 290). Clause *(h)* refers to the manner in which the account he is bound to keep under clause *(g)* is to be taken. Under clause *(g)* he is to keep a clear, full and accurate account of "all sums received." Clause *(h)* provides how the balance of the sums received by a mortgagee after deducting outgoings mentioned there in is to be debited towards the payment of the mortgage money. The clause properly uses the term "receipts" and shows that they are to be actual and gross realisations. In clause *(i)*, the words "gross receipts" are used. This phrase was quite appropriate with regard to the fact that no provision was made in clause *(h)* for deducting expenses incurred for the management of the property or the collection of the rents and profits. Now that this provision has been made in clause *(h)* it is unnecessary to retain the word "gross" in clause *(i)*. The same has been accordingly omitted.

The words "on the mortgage-money" after the words "on account of interest" in clause *(h)* are ambiguous. As defined in section 58, the word "mortgage-money" includes both principal and interest. Where the mortgage-deed provides for the payment of simple interest only, the word "mortgage-money" in this clause might indicate compound interest. In our opinion the words "on the mortgage-money" should be omitted. The word "interest" by itself is sufficient to show that according to the terms of a particular mortgage-deed it will be calculated as simple or compound as the case may be.

In section 72 we have proposed the omission of clause *(a)* which relates to a right of a mortgagee to spend money for the management of the mortgaged property and the collection of rents and profits. In our opinion the inclusion of the clause in that section was not appropriate, particularly as money spent for the purposes mentioned therein is to be added to the principal. We do not think that money spent for management of the property or the collection of rents and profits should be treated as an accretion to the principal. In our opinion, as in the case of payment mentioned in clauses *(c)* and *(d)* of S. 76, money spent for management or the collection of rents and profits should be treated as outgoings (*see* Ghose on Mortgage, Vol. II, p. 805, 4th Edn.). In England, such expenses are treated as "just allowances" (*see* Seton on Decrees Vol. III, p. 1976). We therefore, propose to provide in clause *(h)* of section 76 that the expenses of management and collection of rents and profits should be deducted out of the receipts of the mortgagee in possession along with other outgoings mentioned therein. We thereby also give effect to the right of a mortgagee in possession to incur such expenses. A right to recover such money accrues to him only in making deductions from the receipts while taking accounts under clause *(h)*.

In spite of the provisions in clause *(i)* that after the tender or deposit by the mortgagor, the mortgagee must account for his receipts or gross-realisations, it has been held in I. L. R. 47 Mad. 7, that it was open to a mortgagee to deduct any sum which he may have properly incurred in respect of the mortgaged property even after such tender or deposit. In our opinion, this view is not correct. After the amount due in respect of the mortgage has been properly tendered or deposited in Court, it should not be open to a mortgagee to add any sum to the mortgage-money. We, therefore, propose to provide in clause *(i)* that a mortgagee shall not be entitled to deduct any amount from the receipts on account of any expenses incurred after the date of the tender or deposit.

Clause 39 - cont. Section 79.—Section 79 is based on the dissenting judgment of Lord Cranworth in *Hopkinson* v. *Rolt* (9 H. L. C. 514). The majority of the Judges held in that case that the first mortgagee should be postponed in respect of any advances made by him after notice of a subsequent incumbrance. The principle on which the majority judgment is based is that the prior mortgagee has the option to make or refuse to make any further advance and, although he may have agreed to do so, no specific performance of such an agreement could be obtained [(1892) 1 Ch. 271, 12 Bom. 242]. He should not, therefore, be permitted by any voluntary addition to the amount of his advance to affect the rights of the subsequent incumbrancer who acquires his security on the property as it exists. On the other hand, as pointed out by Lord Cranworth, mortgages are but contracts and, when once the rights of parties under them are defined and understood, it is impossible to say that any rule regulating their priority is unjust. His Lordship observed : "If the law is once laid down and understood, that a person advancing money on a second mortgage, with notice of a prior mortgage covering future as well as present debts, will be postponed to the first mortgagee, to the whole extent covered or capable of being covered by the prior security, he has nothing to complain of."

In their report, dated 20th May, 1870 the Law Commissioners observed that the dissenting view of Lord Cranworth in *Hopkinson* v. *Rolt* was more just than the view taken by the majority of the Judges. However, the majority view prevailed in England [*West* v. *Williams*, (1898) 1 Ch. 488, C. A., (1899) 1 Ch. 132], but in 1924 the Property Law (Amendment) Act provided that a prior mortgagee may

tack further advances to his original advance and claim priority to subsequent incumbrances in the following cases :

(i) if further advances are made by arrangement with subsequent mortgagees to that effect ;

(ii) if they are without notice of the subsequent mortgages ;

(iii) if they are made in pursuance of an obligation covenanted in the prior mortgage, it being immaterial whether at that time the prior mortgagee had or had not notice of subsequent mortgages.

These provisions are reproduced in section 94 of the Property Act, 1925. In our opinion, therefore, the section does not require amendment.

Clause 40, Section 80.—As the principle of 'tacking' is akin to subrogation, we propose to number section 80 as section 93, so as to place it after the section which relates to subrogation.

Clause 41, Section 81.—Section 81 deals with the marshalling of securities. It appears from the proceedings underlying Act IV of 1882 that the section is based on the following passage in Fisher on Mortgage (Art. 1356, p. 694, 6th Edn.) :

"If the owner of two estates mortgaged them both to one person, and then one of them to another, without notice, the second mortgagee may insist, under the doctrine of marshalling, but without interfering with the rights of the former that the debt of the first shall be satisfied out of the estate not mortgaged to the second, so far as that shall extend."

Like section 56 this section provides for marshalling when there are "two properties only." It is also restricted to a case when the second mortgagee intends to marshal the securities. It does not provide for the case of more than two properties nor for the case where the property has been mortgaged more than twice and a mortgagee subsequent to the second mortgagee desires to marshal the prior securities. We propose to widen the scope of the section by providing that it should apply to cases where there are more than two properties and to all subsequent mortgagees generally.

The section also requires that, in order that a subsequent mortgagee should be entitled to have the securities mashalled, it must be shown that the had no notice of the prior mortgage (I. L. R. 23 Cal. 790). This condition appears to have been based on the observations of Lord Hardwicke in *Lanoy* v. *Duke of Athol* (2 Atk. 446). In later English decisions this condition was held to be unnecessary. In *Gibson* v. *Seagrin* (20 Beav. 614) Lord Romilly remarked that the rule of marshalling was independent of the question whether the subsequent mortgagee had notice of the prior mortgage or not. [See also *Flint* v. *Howard*, (1893) 2 Ch. 54, 73]. In India also, in cases where the Transfer of Property Act did not apply, it was held that a subsequent mortgagee could marshal the securities even though he had notice of the prior mortgage (I. L. R. 18 Bom. 160, 22 Bom. 304). As stated in the leading case of *Aldrich* v. *Cooper* (1 W. & T. L. C., at p. 38), the principle of "marshalling" is that it shall not depend upon the will of one creditor to disappoint another and that equity intervenes to restrain the first creditor from resorting to the security of the subsequent creditor, until the other, which he alone possesses, is exhausted. Thus, according to the correct application of the principle, the question of notice of the prior mortgage to the subsequent encumbrancer is immaterial. Further, the words "not so as to prejudice the rights of the first mortgagee" are sufficient to prevent any injustice being done to the prior mortgagee. We, therefore, propose that the words "who has not notice of the former mortgage" should be omitted.

It is well established that in order that the doctrine of "marshalling" can be applied, there must be two funds or securities, both originally the property of the same owner; and the debts must be the debts of the same person [*Ex parte Kendall*, (1811) 17 Ves. 520, 1 W. & T. L. C. 46, Halsbury's Laws of England, Vol. 21, p. 304] Neither in England nor in this country has the doctrine been extended to a case where only a portion of the property already mortgaged is subsequently sold or mortgaged. If the prior mortgagee is forced to have recourse to a portion of the mortgaged property for the recovery of his money, it may be that both he and the mortgagor will be prejudiced, and the sale of the property in portions will not realise an adequate price. We do not, therefore, consider that it will be safe to extend the doctrine of marshalling to such a case.

We propose to omit the word "valuable" before the word "consideration" in the concluding portion of the section. The Indian law does not recognise any distinction between good and valuable consideration (*see* section 25 of the Indian Contract Act, Pollock and Mulla's Contract Act, p. 34).

Clause 42, Section 82.—This section enunciates the rule of contribution, where several properties are mortgaged. In our opinion, the principle of contribution ought to cover a case not only where several properties are mortgaged but where the mortgaged property is subsequently sub-divided into distinct and separate portions, the liability of the cosharers being distinct and several and not joint. This question was raised in I. L. R. 26 Mad. 686, but was not decided. In some cases it has been held that when the title becomes severed after the mortgage either by the death of the mortgagor or by the sale of the shares in the property by the mortgagor, the rule of contribution applies (*see* 1 All. 455, 20 Bom. 615, 21 C. L. J. 104, 43 All. 589). We propose to amend the section to make this point clear.

There is also some difference of opinion as to whether for the purposes of contribution the value of the different properties or the portions of one property should be calculated as at the date of the original mortgage or at the date of the subsequent transfer. In some cases it has been held that valuation is to be made as at the date of the mortgage irrespective of the price that may have been paid by the purchaser (*see* 12 C. W. N. 107; 745; 27 All. 549). In a Bombay case, however, the valuation at the date of the sale was adopted (I. L. R. 26 Bom. 88). We propose to provide that the value taken shall be the value as at the date of the original mortgage. This rule has the support of the Judicial Committee who, in assessing contribution to a decree for mesne profits, assessed liability at the date of the decree (L. R. 31 I. A. 94).

Following the reasons for the similar amendment in section 81, in the last paragraph of the section the word "subsequent" has been substituted for the word "second" before the word "mortgagee."

Clause 43, Section 83.—In addition to the remedies open to a mortgagor for redemption by tender out of Court or by a suit, this section provides a summary procedure for redemption. The section is a survival of the repealed Bengal Regulations 1 of 1798 and XVII of 1806. Deposit made under this section has all the effects of a valid tender, and the withdrawal of the deposit by the mortgagee has the effect of discharging the mortgage (I. L. R. 17 Mad. 267). According to the rules framed with reference to this section by the High Courts of Calcutta, Madras and Bombay, the mortgagee, before he is entitled to draw the money, may be required to file all documents of title that are in his possession and also a draft reconveyance or an acknowledgment as he would be required to do under section 60. In the absence

of an express provision similar to that in the first paragraph of section 60, the validity of those rules has been doubted (*see* Shephard and Brown, Transfer of Property Act, p. 352, 7th Edn.) The proposed amendment is intended to remove this doubt.

Clause 44, Section 84.—Section 84 provides for the cessation of interest after a tender or a deposit. As a tender, if refused, is generally followed by a deposit, the case of a deposit without a previous tender ought to be distinctly mentioned. In I. L. R. 49 Mad. 619 it was held that if, after a reasonable time, the mortgagee who has notice of a proper deposit, refuses to take the deposit, there is still a presumption that the mortgagor continues ready and willing to pay, and the interest does not run even if the mortgagor withdraws the deposit. In our opinion this view is not correct. It is obviously unreasonable that interest on the mortgage debt should cease to run if the mortgagor withdraws the deposit and derives benefit from the money withdrawn. We propose to add a proviso to the first paragraph of the section making it clear that where the mortgagor has deposited the amount without having made a previous tender thereof and has subsequently withdrawn the same or any part thereof, interest on the principal money shall be payable from the date of the withdrawal.

In para. 3 we also propose to make it clear that if the mortgage-deed provides that reasonable notice before payment or tender of the mortgage-money is to be given to the mortgagee, the provisions of this section will not apply till such notice has been given.

Clause 45, Section 91.— Section 91 specifies persons who, in addition to a mortgagor, are entitled to redeem. Clauses *(a)* and *(b)* can be suitably combined in one clause. Clauses *(d)* and *(e)* are superfluous, and, in our opinion, should be omitted.

An attachment does not create any interest such as a charge or a loan in the property attached (I. L. R. 29 Cal 428, 32 Mad. 429). and there is no reason why an attaching creditor should have the right of redemption. We, therefore, propose to omit clause *(f)*.

Clause 46, Proposed new Section 92.— As stated before, sections 74 and 75 of the Act are based on what is known as the principle of subrogation. The principle can come into operation either by act of parties, e.g., by assignment of the debt, or by operation of law, but, technically, the term "subrogation" is confined to cases where the right arises by operation of law. In Roman law, a creditor, who lent money to the debtor for the purpose of paying off a mortgage on condition that he was to be substituted in the place of the mortgagee, was entitled to claim the benefit of the security discharged with his money (*see* Donatt's Civil Law, section 1774; *see also* Hunter's Roman Law, pp. 441 and 443); and this right has been recognized in all modern systems derived from Roman law. Section 74 is confined to the case when a subsequent mortgagee pays off a prior mortgagee. The rule contained in the section is really covered by section 75, but both those sections apply only to the case of a subsequent mortgagee. The principle of subrogation, however, ought to apply generally to all cases other than those of a mortgagor who pays off his own debt or of a mere volunteer. In *Bisseswar Prasad* v. *Lala Sarnam Singh*, 6 C. L. J. 134 at pp. 137-38, it is observed as follows:

"The doctrine of subrogation is a doctrine of equity jurisprudence. It does not depend on privity of contract, express or implied, except in so far as equity may be supposed to be imported into the transaction, and thus raise a contract by implication. It is founded on the facts and circumstances of each particular case, and on the principles of natural justice. While, therefore, the doctrine will be applied in general

wherever any person other than a mere volunteer pays a debt or a demand, which in equity or good conscience should have been satisfied by another, or where the liability of one person is discharged out of a fund belonging to another, or where one person is compelled for his own protection or that of some interest which he represents, to pay a debt for which another is primarily liable, or wherever a denial of the right would be contrary to equity and good conscience, the doctrine will never be permitted, where the application of it would work injustice to the rights of those having equal or superior equities."

In our opinion all persons who have an interest in the mortgaged property or in the right of redemption, except in mortgagor, that is, all those who are referred to in section 91 as having the right of redemption, should be entitled to be subrogated to or substituted in the place of the creditor who is paid off. We think proper to omit sections 74 and 75 and to provide in this new section 92 for the principle of subrogation.

A surety is obviously entitled to be subrogated to the rights of the creditor if he pays him off. To use the argument of Sir S. Romilly in *Craythorn* v. *Swinburn* (14 Ves. 160 at p. 162) "a surety will be entitled to every remedy which the creditor has against the principal debtor to enforce every security and all means of payment; to stand in the place of the creditor, not only through the medium of contract, but even by means of securities entered into without the knowledge of the surety; having the right to have those securities transferred to him, though there was no stipulation for that; and to avail himself of all those securities against the debtor." The same principle has been incorporated in sections 140 and 141 of the Indian Contract Act, 1872.

The right of a co-mortgagor or one of several joint debtors to be subrogated to the security of the creditor, so as to enable him to recover from his co-debtors by means of such securities their proportionate shares of indebtedness which has been discharged by him, rests upon the same equity as that of a surety or any other person entitled to redeem the mortgage; for each joint debtor is regarded as the principal debtor for that part of the debt which he ought to pay and as the surety for his co-debtors as to the part which ought to be discharged by them (*see* Ghose on Mortgage, Vol. 1, p. 371, 5th Edition).

It cannot, however, be laid down as a general rule that a person merely discharging a debt is entitled to the benefit of the mortgage. Obviously, a mortgagor himself who is liable to pay a debt contracted by him, or the transferee from such a mortgagor who has undertaken the liability, cannot claim the right of subrogation; nor can the application of the principle be invoked in favour of a mere volunteer (I. L. R. 32 All 25). As stated in Ghose on Mortgage, Vol. 1, p. 364, 5th Edn., the real question in all such cases is whether the payment made by a person who is not in any way interested in the mortgaged property or the right of redemption was a mere loan to the debtor on his personal security, or whether it was made under an agreement that he should be substituted for the creditor. Although in most cases a Court may presume such an agreement, we think it desirable to provide that such an agreement must be reduced to writing and must be registered.

In order to avoid any complication and the difficulty of apportioning the claims arising from subrogation, the Courts have held that a right of subrogation does not arise till the whole of the mortgage debt is paid off (I. L. R. 36 Cal. 193, 38 All. 502). We, therefore, propose to provide in the last paragraph of section 92 that the right of subrogation shall not be claimed unless the mortgage in respect of which the right is claimed has been redeemed in full.

Clause 46—contd., Section 93.—As the principle of "tacking" is closely allied to subrogation, we propose to put section 80 as section 93.

Clause 46 — contd., Proposed new Section 94. — Section 75 and Order XXXIV, rule 11 of the Code of Civil Procedure embody partly the principle of subrogation and partly the principle expressed in the phrase "redeem up and foreclose down." We have transferred to section 92 so much of section 75 and of Order XXXIV, rule 11, as relates to the doctrine of subrogation and embodied in a new section so much of the section and rule as relates to the conception of "foreclosing down." As this is a rule more of substantive law than of procedure, its proper place is in the Transfer of Property Act and not in the Code of Civil Procedure. We, therefore, propose to omit section 75 and to repeal Order XXXIV, Rule 11. As this doctrine is akin to the doctrine of subrogation, we have placed it after section 92.

Clause 47, Section 95.—Section 95 gives a co-mortgagor redeeming the mortgage a charge on the shares of other co-mortgagors in the mortgaged property for expenses incurred by him in redeeming the mortgaged property and obtaining possession thereof. The section has been based on the observations in Macpherson's Law of Mortgage in Bengal and the N.-W. Provinces, 5th Edn., p. 145. It is difficult to understand why the words "obtains possession thereof" are inserted in this section. In I. L. R. 11 Mad. 416 the Madras High Court observed that the section gave the redeeming co-mortgagor two rights, (1) a right to obtain possession, and (2) a charge on the interests of his co-mortgagors. In I. L. R. 26 All. 227 the Allahabad High Court held that the words were only applicable if the mortgagee is in possession. In *Malik Ahmad Wali Khan* v. *Musammat Shamsi Jahan Begam*, L. R. 33 I. A. 81, their Lordships of the Privy Council observed as follows :

"The section might be so strictly construed as to limit its operation to mortgages under which possession passes, and, therefore, on redemption property re-passes. But it seems to their Lordships more reasonable to construe the section distributively, to make the condition of obtaining possession apply only to the cases in which its fulfilment is from the nature of the mortgage possible, and in other cases to make the charge follow upon redemption."

In view of the above observation, the reference to the recovery of possession in the section seems undesirable and we propose that it should be omitted. Moreover, as in the proposed section 92 a co-mortgagor is allowed the right of subrogation, we are of opinion that instead of providing for a separate charge for the costs of redemption it will be better if it is provided that a co-mortgagor can add such costs to the mortgage money and recover them from other co-mortgagors in proportion to their shares in the property. We have amended the section accordingly.

Clause 48, Section 98. — As stated in the notes under section 58, the definition of an anomalous mortgage is included in that section. In our opinion, this section should be confined to the rights and liabilities of parties to these mortgages.

Clause 49, Section 100.—Section 100 defines a charge, and the latter part of the section provides that all provisions relating to a mortgage and sections 81 and 82 shall apply in the case of a charge. This does not clearly show what exactly are the rights and liabilities of a charge-holder. It is true that a charge is distinguishable from a mortgage in that it does not amount to transfer of any interest in the property subject thereto (*see* Ghose on Mortgage, Vol. 1, p. 110). We think it would be desirable to provide that the rights and liabilities of the parties in the case of a charge should be similar to the rights and liabilities of parties to a simple mortgage, as a charge

resembles a simple mortgage more than any other kind of mortgage. A charge-holder, like a simple mortgagee, has only a right to bring the mortgaged property to sale; he cannot have a right of foreclosure (*see* Order XXXIV, Rule 15 of the Civil Procedure Code).

As a charge does not involve the transfer of an interest in the property subject thereto, it has been held that it cannot be enforced against a transferee for consideration without notice (I. L. R. 9 All. 591, 13 All. 28, 33 Cal. 985, 42 Cal. 849 and 19 C. W. N. 37). The contrary view was taken in some cases where a charge was created by a decree (2 All. 162, 28 All. 655 and 38 All. 254). The former view appears to us more consistent with equity.

As charges created by the operation of law or by a decree will not necessarily be registered it is desirable to protect transferees for consideration without notice and provide that a charge will not be enforced against them.

Clause 50, Section 101. — Section 101 relates to the principle of "merger" and provides that if a mortgagee or charge-holder of property acquires the interest of the mortgagor or the owner, his own mortgage or charge is extinguished, unless he expressly reserves the continuance of such mortgage or charge or unless such continuance is held to be for his benefit. As stated in an American case, "the doctrine of merger springs from the fact that when entire equitable and legal estates are united in the same person there can be no occasion to keep them distinct, for ordinarily it could be of no use to the owner to keep up a charge upon an estate of which he has been seised in fee simple. But if there is an outstanding or intervening title, the case is different. It has, therefore, been expressly enacted in America that a mortgage is never merged if there is an outstanding incumbrance." (Jones on Mortgage, Vol. II, pp. 401 to 403, 7th Edn.). In *Toulmin* v. *Steere* (3 Mer. 210), it is held that the purchaser of an equity of redemption with notice of subsequent incumbrances stands in the same situation as if he himself had been the mortgagor, and cannot set up against such subsequent incumbrances either a prior mortgage of his own or a mortgage which he may have paid off. A purchaser of the equity of redemption can easily take steps to defeat the effect of Toulmin's case by simply stating that the original debt paid off subsists for his benefit. The rule in Toulmin's case has been embodied in the present section 101, but decision in that case has been more than once questioned in English Courts (*see* 2 W. & T. L. C., p. 49, 8th Edn.). In *Thorne* v. *Cann*, (1895) A. C. 11, Lord Herschell observed with regard to Toulmin's case as follows :

"A case which has certainly not met with universal acceptance and it has often been commented upon and criticised adversely."

In the same case Lord Macnaghten said :

"The authority of that case cannot now-a-days be treated as going beyond the actual decision."

In several cases the Privy Council has laid it down that in each case it will depend on the intention of the parties whether a particular charge or incumbrance was extinguished or subsisted (10 I. A. 62, 11 I. A. 126, 29 I. A. 9 and 39 I. A. 68). In *Gokuldoss* v. *Rambux*, 11 I. A 126 at p 133, Sir Richard Couch, after reviewing the Indian decisions on the point which followed the rule in Toulmin's case, observed:

"The doubts as to that case (*Toulmin* v. *Steere*) or the propriety of introducing the doctrine of it into India as a rule of justice, equity, and good conscience, do not seem to have been considered by the High Court at Calcutta or Bombay.

"The doctrine of *Toulmin* v. *Steere* is not applicable to Indian transactions except,

as the law of justice, equity, and good conscience. And if it rested on any broad intelligible principle of justice it might properly be so applied. But it rests on no such principle. If it did it could not be excluded or defeated by declaration of intention or formal devices of conveyancers, whereas it is so defeated every day. When an estate is burdened by a succession of mortgages, and the owner of an ulterior interest pays off an earlier mortgage, it is a matter of course to have it assigned to a trustee for his benefit as against intermediate mortgagees to whom he is not personally liable.

"In India the art of conveyancing has been and is of a very simple character. Their Lordships cannot find that a formal transfer of a mortgage is ever made, or an intention to keep it alive ever formally expressed. To apply to such a practice the doctrine of *Toulmin* v. *Steere* seems to them likely, not to promote justice and equity, but to lead to confusion, to multiplication of documents, to useless technicalities, to expense and to litigation."

In a recent case in *Malireldi Ayyareddi* v *Gopala Krishnayya*, I. L. R. 47 Mad. 190, the Privy Council has again remarked as follows :

"It is now settled law that where in India there are several mortgages on a property the owner of the property subject to the mortgages may if he pays off an earlier charge, treat himself as buying it and stand in the same position as his vendor, or put it in another way, he may keep the incumbrance alive for his benefit and thus come in before a later mortgagee."

We propose to give effect to the long course of decisions both in England as well as of the Judicial Committee referred to above. It may generally be taken to be the intention of a creditor, and to his benefit, to keep his own incumbrances, as well as those which he has paid off, alive against subsequent incumbrances. We propose accordingly to amend the present section.

Clause 51, Section 102. — Section 102, which relates to the service of notice on or tender to an agent of a mortgagee allows the mortgagor to apply to the Court for direction if the mortgagee or his agent cannot be found in *the district* in which the mortgaged property is situate. Even if the mortgagor knows the mortgagee or his agent's whereabouts outside the district, the section allows him to apply to the Court. The third paragraph also contains a similar provision as regards tender. We think that unless the whereabouts of the mortgagee or his agent are *entirely* unknown to the mortgagor or unless the mortgagee or his agent cannot be found *anywhere*, the mortgagor should not be entitled to apply to the Court for direction. We propose to omit the words "in the district" in paragraphs 2 and 3 of the section. In paragraph 2, we propose to make it clear that the application for the service of notice shall be made to the Court in which the deposit has been made and not to any other Court. In paragraph 3 we propose to make it clear that the deposit is to be made in the Court in which a suit for redemption could be filed.

Clause 52, Section 103. — To correct a mere clerical error we propose to insert the words "on or by" after the words "such notice may be served." The latter part of the section has been omitted as being unnecessary.

Clause 53, Section 106. — It has been held both in England and in India that, in the case of notice to quit, service by post is a recognised mode of service [(1906) 2 K. B. 82, I. L. R. 46 Cal. 458]. We, therefore, propose to make an addition to the second paragraph of section 106 that notice under the section may be sent by post to the party who is intended to be bound by it.

Clause 54, Section 107. — As in the case of sale and mortgage, we propose to provide in this section that all leases of immoveable property shall be registered. We think, however, that an exception must be made in the case of leases from month to month or for any term not exceeding one month. The power of Local Governments to except particular leases from compulsory registration is, however, preserved.

There has been a difference of opinion whether a lease should be executed by both the lessor and the lessee or need only be executed by one of them. The Allahabad High Court hold to the view that a lease must be by deed signed by the lessor and that a unilateral document executed by a lessee alone does not constitute a lease (I. L R. 26 All. 368, 27 All. 190, 31 All. 276). This view was taken by the Madras and Calcutta High Courts in the earlier cases (I. L. R. 30 Mad. 322, 32 Mad. 582, 14 C. W. N. 73), but was abandoned in Madras in 35 Mad. 95 and in Calcutta in 39 Cal. 1016. The Rangoon and Bombay High Courts adopt the Allahabad view (3 Rang. 379, 27 Bom. L. R 626). It is desirable that a lease containing, as it usually does, covenants both on the part of the lessor and lessee, should be executed by both the lessor and the lessee. The first paragraph of the proposed new section 107 introduces this requirement.

Clause 55, Section 108, sub-section (h). — The use of the words "during the continuance of the lease" in section 108, sub-section *(h)*, has given rise to a conflict of judicial opinion (I. L. R. 38 Mad. 710 and the cases considered there). In English law the 'time of removal' is not certain. "It has been said to extend 'to such further period of possession by the tenant as holds the premises under a right still to consider himself as tenant,' or as he holds them 'in the capacity of a tenant'—a period which has been described as an *excrescence* or, an *enlargement* of the term. It has also been said that possibly this may intend a tenancy at sufferance, but at any rate not after the landlord has determined it by a re-entry, or by the issue of a writ in ejectment" (Foa on Landlord and Tenant, p. 784, 6th Edn). We think it desirable to remove all uncertainty regarding the tenant's right of removal. We think it would be consistent with justice if the tenant is allowed to remove his fixtures so long as he is in possession of the property even though the tenancy has come to an end. This would make the period certain, and it is immaterial whether the tenant vacates voluntarily or is compelled to vacate by process of law. The landlord does not suffer, because if the tenant is in wrongful possession, the landlord will be entitled to damages. If the tenant is in rightful possession, he obviously ought to have the right to remove his fixtures. In either case the certainty of the period would work less hardship than the present uncertainty.

It may be said that a dishonest tenant may take advantage of the proposed rule and keep the landlord out of possession for an indefinite period. But such a tenant can do so whether he has fixtures or not, and in either event the landlord has his remedy in damages.

Clause 55—contd., Section 108, sub-section (o). — Sub-section (o) of section 108 provides that the lessee must not fell timber or pull down or damage buildings, but does not make a distinction between timber or building belonging to a lessor and those belonging to a lessee. To make this point clear we propose to add the words "belonging to a lessor" after the word "buildings."

Clause 56, Section 111, Clause (g). — Clause *(g)* of section 111 relates to the determination of a lease by forfeiture and provides for two cases in which forfeiture can be enforced. Under sub-head (1) forfeiture can be enforced—*(a)* if the lessee breaks an express condition in a lease which provides that on its breach the lessor may re-enter

and *(b)* if the lessee breaks an express condition on the breach of which the lease shall become void. The provision under *(b)* is not in accordance with the well-established principle of English law that a lessee cannot re-enter on the breach of any condition in a lease unless there is an express stipulation to that effect. The same view has been followed in India (I. L. R. 17 Cal. 826). The words in clause *(g)* "or the lease shall become void" should therefore be omitted.

Section 111, as it stands, does not provide for the case of forfeiture by reason of the adjudication of the lessee as insolvent. It is provided by section 12 *inter alia* that where property is transferred subject to a condition making any interest therein reserved or given to or for the benefit of any person, to cease on his becoming insolvent, such condition is void. At the same time it is provided in the second paragraph of the section that nothing therein contained applies to a condition in a lease for the benefit of the lessor or those claiming under him. The result is that if a lease contains a condition that on the lessee becoming insolvent the lease shall determine, the condition is valid. Such a condition would not, however, operate as a determination of the lease or have the effect of forfeiture under section 111 as it now stands. It is, therefore, desirable to make express provision that if the lessee is adjudicated an insolvent and the lease provides that a lessor may re-enter on the happening of that event, the lease is determined by forfeiture.

Under sub-section *(g)* of section 111, which provides also for forfeiture in the case of the denial of the lessor's title, it has been held that the lessor must do something showing his intention to determine the lease before actually filing a suit for ejectment (I. L. R. 47 All. 348, 45 Cal. 469). As there has been some difference of opinion whether the mere institution of a suit amounts to such an act (I. L. R. 42 Bom. 195) it is necessary to clear up the point. Before a suit in ejectment is filed, the lessee must know that the lessor has decided to determine the lease and does not waive his right to do so.

Clause 57, Proposed new Section 114A.—As the Transfer of Property Act stands, the only case in which relief against forfeiture is provided for is non-payment of rent —in section 114 of the Act. Considerable hardship has been caused in cases where forfeiture accrues on breach of an express condition which provides that on breach thereof the lessor may re-enter, although the breach may be capable of easy remedy. This defect does not exist in the English law where there was provision made by the Conveyancing Act of 1881 for relief against forfeiture in such cases. These provisions of the Conveyancing Act are reproduced in the English Law of Property Act, 1925, section 146. We think it desirable that similar provisions, suitable to Indian conditions, should be introduced in the Transfer of Property Act, and we have accordingly added section 114A.

Clause 58, Section 119. — This section relates to the rights of a party deprived of the thing received in exchange, but does not provide for the rights of transferees from such party. We propose to amend it on the lines of section 109 of the Indian Contract Act.

Further, the section, as it stands, gives a right to the transferee to claim compensation or the return of the thing transferred by him. Obviously, the thing transferred by him cannot be returned to him unless the other party is in possession of it. To provide for this we have at the end of the new section added the words "if still in the possession of such other party."

Clause 59, Section 128. — The scope of this section is made clear by the addition of the word "liabilities" after the word "debts." A donee should be liable to the extent of the property in his hands not only for the debts of the donor, but also for his other liabilities (Hunter's Introduction to Roman Law, p. 150).

Clause 60, Section 129. — Apart from the provisions of section 123, section 129 saves all rules of Hindu and Buddhist law relating to gifts. The provisions of chapter VII relating to gifts are based on general principles and do not conflict with the rules of Hindu or Buddhist law. The Government of Burma does not object to the omission of the word "Buddhist" from the section. We propose to omit the reference to Hindu and Buddhist law.

Clause 61, Section 130. — The words "notwithstanding anything contained in section 123" were inserted in the section by the Transfer of Property (Amendment) Act XXXVIII of 1925. The object was to give effect to representations made by insurance companies that it involved considerable hardship when a gift was to be made of a life policy, as, under section 123, such a gift could only be made by a registered instrument. Doubts, however, have arisen whether these words applied to a gift of an actionable claim by a Muhammadan. In a recent Bombay case it was contended that the words applied only to those cases where, prior to the amending Act, a gift of moveables was required to be effected by a registered instrument under section 123; and, as section 123 did not apply to a Muhammadan gift, those words did not apply to Muhammadan gifts. This view was given effect to by the High Court of Bombay. We do not think it desirable that a gift of an actionable claim by Muhammadans should be exempted from the operation of the present rule which requires a writing in the case of a gift of an actionable claim. In fact, in a large majority of cases a gift of an actionable claim is in fact made by a writing, as in the case of gifts of life policies. To remove the doubt caused by the words "notwithstanding anything contained in section 123" we propose to omit them and insert instead the words "whether with or without consideration" after the words "the transfer of an actionable claim."

Clause 62. — In this clause the provisions of the Bill which are not to have retrospective operation are specified.

REPORT OF THE SELECT COMMITTEE

SECOND REPORT ON THE TRANSFER OF PROPERTY (AMENDMENT) BILL, 1929.

The following Report of the Select Committee on the Bill further to amend the Transfer of Property Act, 1882, for certain purposes, was presented to the Legislative Assembly on the 2nd September, 1929 :—

We, the undersigned members of the Select Committee to which the Bill further to amend the Transfer of Property Act, 1882, for certain purposes, was referred, have considered the Bill and the papers noted in the margin (papers Nos. 1 to V) and have the honour to submit this our Report, with the Bill as amended by us annexed hereto.

The history of this Bill is as follows : — In 1921, an exhaustive examination of the case-law bearing on the Transfer of Property Act, 1882, was made by Mr. (now Mr. Justice) Lal Gopal Mukherji. The results of the examination were thereafter in 1926 considered in the Legislative Department, and a Bill was prepared for the purpose of amending the Act in such a way as to clarify the numerous points upon which conflicting judicial decisions had been given; and in 1927 a Committee, consisting of the late Mr. S. R. Das, Law Member in the Executive Council of the Governor-General, Sir B. L. Mitter, the present Law Member, Mr. D. F. Mulla and Mr. (now Mr. Justice) S N. Sen, was appointed to consider generally the question of the amendment and in particular to examine the draft Bill. This Committee, whilst endorsing the departmental decision that the scope of the Bill should be limited to matters in regard to which there had been a conflict of judicial decisions or in regard to which such decisions had shown the Act to be defective, made certain additions and alterations in the Bill. The Bill, as finally settled by them, was introduced in the Legislative Assembly in September, 1927, and was circulated for opinion. The opinions were carefully considered by Mr. D. F. Mulla, at that time holding the office of the Law Member of the Governor-General's Executive Council. The Bill which had been introduced in 1927 having lapsed, a fresh Bill substantially on the same lines was introduced in the Legislative Assembly in March, 1929. This Bill and the opinions have now been laid before us, together with a draft of certain amendments arising therefrom which we have been invited to consider.

It will, therefore, be apparent that the Bill has not only itself been founded upon an exhaustive examination of the defects which have been revealed during nearly half a century, but has also received the detailed scrutiny of lawyers and commercial and other bodies and associations throughout the country. On the whole, the opinions received show that the proposals formulated in the Bill have been generally approved. In view of these facts and of the fact that we ourselves are in agreement with all but one of the provisions embodied in the Bill which mark a radical departure from those embodied in the existing Act, we propose in this Report to confine ourselves almost entirely to the points upon which we consider that further amendment of the Bill is desirable. Of the provisions above mentioned, the only one which we are not prepared to accept is that contained in clause 54 of the Bill as introduced, which sought to provide that a lease of immoveable property for a term exceeding one month only must be made by a registered instrument. The consensus of opinion is opposed to that proposal, and we ourselves consider that it would lead to inconvenience and hardship out of proportion to the benefit to be expected from it. We now proceed to refer in detail to the amendments which we have made.

Clause 1.—We propose that the Act should come into force on the 1st day of April, 1930. Assuming that the Bill will be passed into law, during the forthcoming

Simla Session of the Assembly, we think it essential that a sufficient period should be allowed to elapse before it takes effect. A new edition of the Act embodying the extensive amendments made by the Bill will be necessary, and we think it most important that, when prepared, that edition should be translated and put into wide circulation. At the same time the period will enable Local Governments to make such arrangements and extensions as may be necessary to meet the increased volume of registration which may be expected, if the provisions of clause 16 (now clause 17) of the Bill become law.

Clause 4.— In regard to *Explanation I* which it is proposed to add to the definition of 'notice' in section 3 of the Transfer of Property Act, 1882 (in this Report referred to as the principal Act), it has been pointed out that the provision that the registration of a document amounts to notice from the date on which it is registered, will cause difficulties in a case in which the document has not been registered at the place where the property is situate. This objection has some force. We have, therefore, added at the end of *Explanation I* the following words :

'or if the instrument has been registered under sub-section (2) of section 30 of the Indian Registration Act, 1908, from the earliest date on which a memorandum thereof has been filed by any Sub-Registrar under section 66 of that Act.'

Explanation III which provides that notice to an agent whilst acting in the course of business is notice to his principal has been properly criticised as being too general and vague. We have added provisions to the effect that the notice must be of a fact which is material to the course of the business in which the agent is engaged, and that the agent must not fraudulently have concealed the fact from his principal.

Clause 6.—We have amended section 5 to make it clear that a transfer can be made by a person to himself as, for instance, by a person making a settlement or trust in which he constitutes himself a trustee. An *Explanation* has also been added to the section to make it clear that the words "living persons' include corporations and other associations of persons.

Clause 10 (now clause 11). — We have thought it desirable to omit the *Illustration* to section 39 instead of amending it. Even as amended by the omission of the words "*bona fide*" the *Illustration* might have been misleading.

Clause 12 (now clause 13).—We approve of the alteration proposed to be made by the insertion of the words "fraudulently or." In regard to the amendment in sub-clause *(b)* of this clause in the Bill as introduced, we think that it will unnecessarily restrict the operation of the principle of 'the estate feeding the title.' A limitation of the right of a transferee to an interest which may accrue to his transferor up to the date of the decree in a suit instituted to enforce that right might work injustice, and we do not think that the decision in 18 Mad 492 is sufficient justification for any amendment of the section in this respect.

Clause 13 (now clause 14.)— In the *Explanation* which prescribed the period during which *lis pendens* is to operate, we have provided for the case of the discharge of a decree by the relinquishment by a decree-holder of his decretal rights.

Clause 15 (now clause 16). — We entirely approve of the proposal to give statutory recognition to the principle of part-performance and of the limits which the Bill prescribes for its application. We have, however, removed a slight ambiguity latent in the phrase "rights arising under the contract" in the fourth paragraph.

Clause 16 (now clause 17). — Some of us are of opinion that registration in the case of sales of immoveable property of the value of less than one hundred rupees

should not be made compulsory, and that the present provision in section 54 of the principal Act and in section 17 of the Indian Registration Act, 1908, should be retained. The proposal, however, involves a very important question of policy, which we think should be decided by the house itself.

Clause 19 (now clause 20). — We propose to insert in section 58 a definition of the mortgages referred to in section 59 as mortgages by deposit of title-deeds.

Clause 20 (now clause 21). — Our remarks on clause 16 (now clause 17) apply also to the question of making compulsory the registration of mortgages of immoveable property of the value of less than one hundred rupees. The amendment in the preceding clause involves the omission of the third paragraph in section 59 and a consequential amendment in the second paragraph.

Clause 22 (now clause 23). — As the old practice of passing 'orders absolute' in mortgage-suits has been abolished by the enactment of Order XXXIV in the first Schedule to the Code of Civil Procedure, 1908, we propose in sections 60, 67 and 67A of the principal Act to substitute the word 'decree' for the word 'order' wherever it occurs [as also in clauses 30 and 31 (now clauses 32 and 33)].

Clause 24. — We have added on the lines of sections 95 and 96 of the English Property Act two new sections—sections 60A and 60B—to define the obligation of a mortgagee, when so required, to transfer the mortgage-debt to a third person named by the mortgagor, and also to make it clear that a mortgagor has a right to inspect and take copies of the documents of title relating to the mortgaged property which are in the possession of the mortgagee.

Clause 24 (now clause 26).—In order to make section 62 comprehensive, we have on the lines of section 60 provided that the mortgagor has a right to require the mortgagee to deliver back the title-deeds and other documents relating to the mortgaged property.

Clause 29 (now clause 31). — We have omitted clause *(c)* of sub-section (2) of section 65A which related to agricultural leases. In our opinion the power of a mortgagor to make leases of agricultural land should be governed by local laws and customs for which provision is made in clause *(a)*.

Clause 32 (now clause 34). — As under clause 21 (now clause 22) unless otherwise expressly provided, the term 'mortgagor' will include persons claiming title from him, we have added a proviso to make it clear that such persons are not included in that term as used in clause *(a)* of sub-section (1) of section 68.

Instead of making it obligatory on a Court to stay a suit or proceeding brought for the enforcement of the personal remedy until the mortgagee has exhausted his remedies against the mortgaged property, we have in sub-section (2) of section 68, preferred to leave it to the discretion of the Court to stay that suit or proceeding. We see no reason to require a registered instrument when the mortgagee is abandoning the security, as under the provisions of the Indian Registration Act it will have to be decided in each case whether a registered instrument is necessary or not. We have also made it clear that the mortgrgee abandoning the security is bound to re-transfer the mortgaged property to the mortgagor, if requireed to do so.

Clause 34 (now clause 36). — In clause (3) of sub-section (1) of section 69A we have made it clear that the liability of a mortgagor for the acts or defaults of a receiver is removed if such acts or defaults are due to the improper intervention of the mortgagee.

Clause 36 (now Clause 38). — In the proviso in sub-clause *(v)* of section 72, we have inserted words to make it clear that a mortgagor is not liable for money spent by the mortgagee for the preservation of the mortgaged property or for support of the title unless he was called upon and has failed to take the necessary steps himself.

Clause 42 (now clause 44).—The word 'shares' is inserted in the clause to make it clear that it applies to cases where the property is owned by several owners, but has not been physically partitioned.

Clause 47 (now clause 49).— As the present law is not clear regarding the rights and liabilities of parties to a mortgage by the deposit of title-deeds, we have inserted a new section (section 96) applying to such mortgages the provisions applicable to simple mortgages.

Clause 49 (now clause 51).— For the reasons given by the Special Committee in the last paragraph of their note to section 81 (clause 43), we have omitted the word 'valuable' which was used in conjunction with the word 'consideration.'

Clause 52 (now clause 54). — We do not consider that the words beginning with '*ad litem*' in the concluding part of section 103 should be omitted as proposed in sub-clause *(b)* of this clause. In our opinion, those words are necessary, as the preceding part of the section applies to legal curators generally and is not confined to guardians *ad litem*. The reference to Chapter XXXI of the Code of Civil Procedure, 1882, has, however, been replaced by a reference to O. 32 of the present Code.

Clause 54 (now clause 56). — As already stated, we do not approve of the amendment proposed to be made in section 107 making compulsorily registrable all leases except leases for periods not exceeding one month or leases from month to month. We, however, approve of the alteration which requires that a lease shall be executed by both the lessor and the lessee, and which in our opinion is a very salutary provision.

Clause 56 (now clause 58). — We approve of the principle of the amendment contained in sub-clause *(d)* of this clause. The conflict of decisions as to whether the mere institution of a suit constitutes an overt act on the part of the lessor for the purposes of this section requires to be set at rest. But instead of adding the words 'other than the institution of legal proceedings' after the words 'does some act' as is proposed in sub-clause *(d)*, it is, in our opinion, preferable to remove any further doubt as to the nature of the act which the lessor must do by requiring him to give notice in writing to the lessee of his intention to determine the lease.

Clause 57 (now clause 59). — In the new section—114A—which it is proposed to insert, we think it desirable to provide that the notice required to be given by the lessor should be in writing; and instead of prescribing an arbitrary period of thirty days within which the lessee is required to remedy the breach—a period which will undoubtedly be insufficient in many cases and may be excessive in others – we prefer to follow the English Act and to require the remedy to be completed within a reasonable time.

Clause 62 (now clause 64). — The section mentioned in this clause have been re-numbered in consequence of the insertion of two new clauses in the Bill and the date mentioned in the last part of the clause has been altered to conform to the amendment made in clause (1).

2. We have made a few alterations of a purely drafting nature to which we have not thought it necessary to refer in detail.

3. The Bill was published in English in the *Gazette of India* on the 9th March 1929.

4. We think that the Bill has not been so altered by us as to require re-publication, and we recommend that it be passed as now amended.

B. L. MITTER,
M. A. JINNAH,
M. ANWAR-UL AZIM,
AMAR NATH DUTT,
M. SHAH NAVAZ,
V. V. JOGIAH,
M. S. ANEY.*

The 4th of June 1929.

LAW COMMISSION OF INDIA

SIXTH REPORT, Dated 13th July 1957.

REPORT ON THE REGISTRATION ACT

* * * * *

16. It would have been better had the substantive law provided that transactions relating to immoveable property, such as partition, release and surrender, should be effected only by registered documents. If a registered document were made obligatory in such cases, disputes relating to these matters would be reduced to a minimum. But these are not matters which can be provided for in the Registration Act. They will require attention when the reform of the substantive law is considered.

* * * * *

21 (B) The definition of "immovable property" in clause *(6)* should be redrafted so as to make the meaning clear and to enable a separate definition of movable property, which is, in fact, a counter-part of the definition of "immovable property," to be omitted.

There is a conflict of views on the question whether standing timber when it is not intended to be severed immediately should be treated as movable or immovable. We are of the view that for the purposes of this Act, standing timber should not be regarded as immovable property whether such timber is intended to be severed immediately or not. It may be noted that the definition of "immovable property" in the Transfer of Property Act excludes standing timber.

In accordance with the prevailing judicial opinion, it should be made clear that fruits upon and juice in trees should not be considered as immovable property, whether they exist at the date of the contract or are to grow in future.

Hardship is caused where machinery embedded in or attached to the earth is sold without the land and is treated as immovable property. The purchaser has to pay stamp duty on the value of the machinery as well as the land and get the document registered at considerable expense. To avoid this hardship we consider that it should

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* The only point on which I wish to record my opinion separately is whether the words, "Hindu, or Buddist" in clause (3) should be omitted. I think that mere superfluity is not a very strong ground for their omission as their retention re-affirms a principle to which the Government stands committed. M. S. ANEY.

be made clear that machinery embedded in or attached to land, when dealt with apart from the land, should be regarded as movable property and not immovable property.

It may be necessary to redraft the definition of "immovable property" in the Transfer of Property Act so as to bring it in consonance with the definition of immovable property suggested by us for the purposes of this Act.

* * * * *

26. Clause *(b)* requires registration of certain instruments in respect of any right, title or interest of the value of rupees one hundred and upwards affecting immovable property. We consider that the time has come for removing the exemption in respect of instruments where the value of the right, title or interest dealt with is below one hundred rupees. If this exemption is removed it would mean that even for transactions of smaller value there will have to be documents requiring both stamp duty and registration fees. This cannot, however, be effected by a mere change in the Registration Act, without amending the Transfer of Property Act under which a sale or mortgage does not require even a writing if the value of the property is below one hundred rupees. The question whether this limit should be removed from the Transfer of Property Act is one which requires careful consideration as it involves a question of policy. It is not possible to anticipate our conclusion on this question and we, therefore, recommend that this provision in section 17 (1) (b) of the Registration Act may be retained for the present.

* * * * *

30. Our recommendation, therefore, is that the Transfer of Property Act should be extended throughout India, and that section 17 (1) (c) of the Registration Act should be omitted. If our recommendation to so extend the Transfer of Property Act is not accepted, clause *(c)* of the sub-section should be redrafted so as to make it clear that it does not apply to receipts in respect of transactions already registered under clause *(b)*.

* * * * *

104. The definition of notice in S. 3 of the Transfer of Property Act was extended by the Amending Act of 1929, by including in it a provision that registration would be noticed not only where the instrument was actually registered under any of the provisions of the Registration Act but also where a memorandum of such registered instrument was filed before a Sub-Registrar in the manner provided by sections 65 and 66. But the definition does not make it clear whether documents sent to the registering officer under section 89 and filed by him in Book 1 would also have the effect of notice of such documents as affecting title (See Mulla, Registration Act, 5th Edition, p. 294, citing (1882) 2 A. W. N. 51 and (1908) P. R. 143 (FB)). It is, therefore, necessary to make the matter clear by enacting a provision on the lines of section 90 sub-section (2), giving an entry in Book 1 the same effect as if the document was registered in accordance with the provisions of the Registration Act.

If it is further provided that copies of all documents affecting title have to be compulsorily sent to the Registrar under section 89, for being filed in Book 1, and that memoranda of such documents should also be entered in Book 1, the registry would afford a complete history of the title to every parcel of immovable property in the district and would enable a person to get definite information relating to it. If a search in the Registry is to be effective, the register must be as complete as possible.

The above-mentioned lacuna in the definition of notice under the Transfer of Property Act is probably due to an oversight and the question of amending that definition will have to be considered at the time of the revision of that Act. Meanwhile, it will be sufficient to introduce the proposed changes in the Registration Act.

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APPENDIX IV

SUGGESTIONS IN RESPECT OF OTHER ACTS.

IV. Transfer of Property Act.—(1) The Act should be extended to the whole of India. (Para 30).

(2) The definition of "immoveable property" in section 3 of the Act should be amended so as to bring it into conformity with the definition proposed for the Registration Act. (Para 21 (B).)

(3) The definition of 'notice' in section 3 of the Act should be amended to provide that the filing of a document or a memorandum in Book I, would be equivalent to registration for purposes of notice under the Transfer of Property Act (Para 104).

(4) While revising the Act, it is to be considered whether it should be provided that any transaction affecting immoveable property, irrespective of the value of the property or consideration, shall be effected by only a registered instrument (Paras 16, 26).

NINTH REPORT, Dated 19th July 1958.

REPORT ON SPECIFIC RELIEF ACT, 1877

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S. 27A. — In our report on the Registration Act, we have recommended the exclusion of 'agreement to lease' from the definition of lease in section 2 and the omission of clause *(c)* from section 49. The result of these changes will be that an agreement to lease, even if in writing, will not require registration; and even an unregistered deed of lease would be admissible in evidence to prove an agreement to lease.

In the result, a person will be entitled to enforce specific performance of an agreement to lease even if it has to be gathered from an unregistered deed. Hence section 27A of the Specific Relief Act will be unnecessary, whether it is interpreted to be applicable to an unregistered agreement for lease or an unregistered deed of lease.

We, therefore, recommend that section 27A be omitted.

Note.—Specific Relief Act 1877 has now been repealed by Specific Relief Act, 1963 (XLIII of 1963). The new Act does not contain any provision corresponding to S. 27A of the repealed Act. Nor has the Registration Act 1908 so far been amended as suggested here.

TWENTY-FIRST REPORT ON THE LAW OF MARINE INSURANCE

(Dated 1st September 1961)

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APPENDIX II

NOTES ON CLAUSES :

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CLAUSES 52 AND 53

This deals with the assignment of a marine policy.

The subject-matter of assignment of marine policy has been dealt with to some extent in the Transfer of Property Act, 1882. Section 130, Exception, in that Act first provides that the general provision regarding formalities of assignment of actionable claims does not apply to transfer of marine policies The next section, section 130A, then proceeds to lay down certain special rules for assignment of marine policies. Section 135A deals with assignment of rights under marine policies. The following comparative table will show the provisions in the English Act and the corresponding provisions in the Transfer of Property Act :

(English) Marine Insurance Act.	(Indian) Transfer of Property Act.
Section 50 (1)	... Section 130A (1)
Section 50 (2)	... Section 135A (1)
Section 50 (3)	... Section 130A (2)
Section 51	... Section 130A (3)

..... Section 130A (4) which provides that the provisions of section 6 (e) of the Transfer of Property Act do not apply to assignment of marine policies. The result is, that the general rule that a mere right to sue cannot be transferred, does not apply to marine policies.

By the combined effect of sections 15, 50 and 51 of the English Act, the position regarding the stage at which a policy of marine insurance can be assigned (with reference to the assignment of the interest) is as follows :

(i) the mere assignment of the interest of the owner does not transfer the policy—(section 15);

(ii) the owner of the goods may, however, assign the policy if there is no prohibition against assignment in the policy—(section 50);

(iii) such assignment may be made—

(a) before or at the time of parting with the subject-matter (section 51, main paragraph) whether or not loss has occurred – (section 50 (1)).

(b) after the loss has occurred (section 51, proviso);

(c) but not in between his parting with the subject-matter and the date of the loss—(section 51 main paragraph).

The principle appears to be, that to make a valid assignment, the assured must still be entitled to the insurance. When he loses the subject-matter, that is the

insurable interest, his title to insurance is also gone, and therefore he cannot subsequently assign it. But it must be noted that where the goods have been lost, what remains is merely the right of indemnity—which can always be assigned. Thus, in an English case goods insured under a marine policy were lost and after the loss the policy was assigned. It was held that the assignee could maintain an action against the insurer. The reason for prohibiting assignment without the subject-matter is that the person must be prejudiced by the loss before he can recover on the policy. But, as Blackburn J., observed : "after the loss has happened ..... the risk ceases at once ..... the right to indemnity no longer depends on the right to property in the subject-matter ..... but on the right of property in the thing ..... lost".

In a C. I. F. contract (cost. insurance and freight), it is the seller's duty to effect insurance, because the price includes the items of cost, insurance, and freight. In a F. O. B. (free on board) contract, it is for the buyer to insure the goods. Section 39 of the Indian Sale of Goods Act (corresponding to section 33 of the (English) Sale of Goods Act) provides that unless otherwise agreed, where goods are sent by a seller to a buyer by a route involving sea transit in circumstances in which it is usual to insure, the seller should give notice to the buyer to enable him to insure, failing which the goods are deemed to be at the seller's risk during the transit.

The assignee can sue the insurer in his own name, irrespective of the fact that he was not interested in the subject-matter when the damage occurred.

The insurer is entitled to make any defence "arising out of the contract" which he would have had against the person by whom the policy was effected. Thus, an insurer may avoid the policy on the ground of non-disclosure of a fact by the assignor even though the assignee is innocent. But the defence must arise out of the "contract" —out of the very contract on which the assignee sues. As has been pointed out, if an insurer is liable under two policies, A and B, to the same assured, and he pays on policy A under a mistake of fact, he can claim a refund. If the assured sues him under policy, B, he can set off (against the claim for the policy B) the claim for refund under policy A. But if policy B has been assigned in the meantime, the refund under policy A cannot thus be set off. The reason is, that the claim for refund does not arise out of the policy sued upon.

Sections 130A and 135A (1) of the Transfer of Property Act, 1882, should be deleted, since their substance is being incorporated in the clause under discussion.

It appears that the need for passing the Transfer of Property (Amendment) Act, 1944, which inserted the provisions regarding marine policies arose in this way. Section 135 of the Transfer of Property Act, as it stood then, ran as follows :

"135. Every assignee, by endorsement or other writing, of a policy of marine insurance or of a policy of insurance against fire, in whom the property in the subject insured shall be absolutely vested at the date of the assignment, shall have transferred and vested in him all rights of suit as if the contract contained in the policy had been made with himself."

The words "property ..... shall be absolutely vested" implied that at the time of the assignment the assignee must have become the owner of the goods. It was realised, however, that while this requirement would be all right for fire insurance, it was difficult to comply with it in marine insurance. Frequently, it is difficult to determine whether at a given time the property in the goods which are the subject-matter of a contract of sale has passed. Loss is very often unknown either to the

shipper or to the consignee, and it is possible that after the policy is assigned it is discovered that goods had been lost and the property had not yet passed to the consignee. Further, often the assignee would be a person who has only a limited interest in the subject insured (e. g. a pledgee). Section 50 of the (English) Marine Insurance Act, which is much wider should, it was felt, be adopted. To make the matter complete, section 51 of the English Act was also adopted. (Section 15 of the English Act, however, was regarded as standing on a different footing and as not proper for inclusion in the frame work of the Transfer of Property Act).

It had also been pointed out by commercial bodies that section 79 of the (English) Marine Insurance Act did not (at that time) find a place in the Transfer of Property Act, with the result that grave doubts were felt as to whether the doctrine of subrogation applied in India and whether an insurer could, availing of this doctrine, sue in his own name without making the assured a party. It was, therefore, felt that section 79 of the Marine Insurance Act should also find a place in the Transfer of Property Act. As a consequential change, it was decided to exclude section 6 (e) of Transfer of Property Act from its application to any right to sue under the proposed provisions. An amendment Bill on these lines was, therefore, introduced at the instance of commercial bodies. The Statement of Objects and Reasons appended to that Bill is given below :

"The rules and principles governing a marine insurance policy being materially different from those governing a fire insurance policy, it is very unsatifactory to accord the same treatment in the matter of assignment to both categories of policies. To take but one instance, a fire insurance policy is not assignable after loss, but the nature of a marine insurance contract is such as to require that marine insurance policies should be assignable even after loss. In the United Kingdom, assignability of marine insurance policies after loss is placed beyond doubt by section 50 of the Marine Insurance Act. But in the absence of a similar provision here, it is doubtful if Courts in British India would hold that they are so assignable. It is proposed, therefore, to amend the Transfer of Property Act by—

"(i) omitting from section 135 thereof the reference to marine insurance policy; and

(ii) inserting a new section reproducing the provisions of section 50 of the Marine Insurance Act".

"Provincial Governments, High Courts, and commercial bodies in the Provinces have been consulted and they are almost unanimously in favour of legislation on these lines. As assignability of marine insurance policies is dealt with in the United Kingdom in sections 50 and 51 of the Marine Insurance Act, it is, as suggested by the Calcutta High Court, also necessary, for the sake of completeness, to reproduce the provisions of section 51 of that Act which preclude assignments where the insured has no subsisting interest in the property insured.

"The need for the enactment of provisions corresponding to section 79 of the Marine Insurance Act and for amending section 6 (e) of the Transfer of Property Act has also been represented to Government. On consideration of the opinions expressed by the Provincial Governments, High Courts, and leading commercial bodies Government has now reached the conclusion that this is desirable.

"It is recognised that, while legislation on the above lines would clarify the law of assignment and subrogation of marine insurance policies, the whole law of

marine insurance will not be put on a satisfactory basis, unless comprehensive legislation on the lines of the Marine Insurance Act, 1906 is enacted for British India. Such a project, however, must necessarily await the termination of the war.

GOVERNMENT OF INDIA (ADAPTATION OF INDIAN LAWS) ORDER, 1937.

[As modified by the Government of India (Adaptation of Indian Laws) Supplementary Order, 1937.]

AT THE COURT AT BUCKINGHAM PALACE.

(The 18th day of March, 1937)

* * * * *

1 This Order may be cited as the Government of India (Adaptation of Indian Laws) Order, 1937, and shall come into operation on the first day of April nineteen hundred and thirty-seven

* * * * *

3. The Indian Laws mentioned in the Schedules to this Order shall, until repealed or amended by a competent Legislature or other competent authority, have effect subject to the adaptations and modifications directed by those Schedules to be made therein or, if it is so directed shall cease to have effect

4 *(1)* Whenever an expression mentioned in the first column of the table herein-under printed occurs (otherwise than in a title or preamble or in a citation or description of an enactment) in a Central or Provincial Act or Regulation, whether an Act or Regulation mentioned in the Schedules to this Order or not, then, unless that expression is by this Order expressly directed to be otherwise adapted or modified or to stand unmodified or to be omitted, there shall be substituted therefor the expression set opposite to it in column two of the said table.

TABLE OF GENERAL ADAPTATIONS.

1	2
Governor-General of India in Council : Governor-General of India : Governor-General in Council : Governor General : Government of India.	Central Government.
Governor in Council : Governor (except in the expression "Governor's Province") : Lieutenant Governor in Council : Lieutenant Governor : Chief Commissioner (except in the expression "Chief Commissioner's Province") : Local Government : Local Administration.	Provincial Government.
Gazette of India : local official Gazette : local Gazette : any other expression denoting a gazette in which official notices of a Government are published, not being the gazette of a district or other sub-division of a Province.	Official Gazette.

Any reference to the Governor (or Lieutenant Governor) of a named Province in Council shall be treated for the purposes of this paragraph, as if it were a reference to the Governor (or Lieutenant Governor) in Council of that Province.

* * * * *

FIRST SCHEDULE.

Central Acts.

* * * * *

The Transfer of Property Act, 1882.
(IV of 1882)

Section 1.—In the third paragraph, after "Governor of Bombay in Council", insert "and," and omit "and the Chief Commissioner of British Burma," and for the fourth paragraph substitute "But this Act or any part thereof may by notification in the Official Gazette be extended to the whole or any part of the said territories by the Provincial Government concerned."

Section 6.—In paragraph (g) for "Government" substitute "the Crown."

Section 52.—For "Governor-General in Council" substitute "the Central Government or the Crown Representative."

Section 58.—In paragraph (f) after "Bombay" insert "and", omit "Rangoon, Moulmein, Bassein and Akyab," and for "Governor-General in Council" substitute "Provincial Government concerned."

Section 69.—In paragraph (a) for "the Local Government with the previous sanction of the Governor-General in Council" substitute "the Provincial Government"; in paragraph (b) for 'the Secretary of State for India in Council" substitute "the Crown"; in paragraph (c) omit "Rangoon, Moulmein, Bassein, Akyab" and for "Goveror.General in Council" substitute "Provincial Government."

Section 107.—Omit "with the previous sanction of the Governor.General in Council."

THE INDIAN INDEPENDENCE (ADAPTATION OF CENTRAL ACTS AND ORDINANCES) ORDER, 1948

(23rd March 1948.)

* * * * *

1. *(1)* This Order may be cited as the Indian Independence (Adaptation of Central Acts and Ordinances) Order, 1948.

(2) It shall come into force at once.

2 In this Order, the expression "Central Act" has the same meaning assigned to it by clause (8aa) of the General Clauses Act, 1897, and the expression "Ordinance" means any Ordinance made by the Governor.General under section 72 of the Government of India Act as set out in the Ninth Schedule to the Government of India Act, 1935.

3. *(1)* The Central Acts and Ordinances specified in the Schedule to this Order shall, until repealed or altered or amended by a competent Legislature or other competent authority, have effect subject to the adaptations directed by that Schedule and by paragraph (2) of this Article.

(2) Wherever the expression "the whole of British India" or the expression "British India" (otherwise than in the expression "the whole of British India") occurs in a Central Act or Ordinance, whether in an Act or Ordinance specified in this Schedule or not, then, unless that expression is by that Schedule expressly directed to

be otherwise modified, or to be omitted, there shall be substituted for the expression first-named the expression "all the Provinces of India," and for the expression second-named the expression "the Provinces":

(3) References in paragraph (2) of this Article and in the Schedule to this Order to any Central Act or Ordinance shall be construed as references to that Act or Ordinance as amended or modified by any subsequent Act or Ordinance and as in force in the Dominion of India immediately before the coming into force of this Order.

4. The provisions of this Order shall have effect notwithstanding anything to the contrary contained in the India (Adaptation of Existing Laws) Order, 1947.

THE SCHEDULE.

Central Acts.

* * * * *

The Transfer of Property Act, 1882.

(IV of 1882).

Section 1.— In the third paragraph, for the words from "the territories" to "Punjab" substitute "Bombay, East Punjab and Delhi": and in the fourth paragraph, for "said territories" substitute "said Provinces."

Section 3.— In the definition of "registered," for "British India" substitute a Province."

Section 5B.— Omit "or the Crown Representative."

Section 58.— In sub-section (f), for "Bombay and Karachi" substitute "and Bombay."

Section 69.— In clause (c) of sub-section *(1)*, omit "Karachi."

ADAPTATION OF LAWS ORDER, 1950.

Whereas by clause 2 of article 372 of the Constitution of India (hereinafter referred to as "the Constitution") the President is empowered by Order to make such adaptations and modifications of any law in force in the territory of India, whether by way of repeal or amendment as may be necessary or expedient for the purpose of bringing the provisions of such law into accord with the provisions of the Constitution, and to provide that the law shall, as from such date as may be specified in the Order, have effect subject to the adaptations and modifications so made.

Now, therefore, in exercise of the powers conferred by the Constitution and of all other powers enabling him in that behalf, the President is pleased to make the following Order, namely:—

1. (1) This Order may be called the Adaptation of Laws Order, 1950.
   (2) It shall come into force on the 26th day of January, 1950.

2. (1) In this Order—
   (a) "appointed day" means the 26th day of January, 1950.

* * * * *

FIRST SCHEDULE.

Central Acts.

* * * * *

The Transfer of Property Act, 1882

(IV of 1882).

Section 1.— For the third paragraph substitute—

"It extends in the first instance to the whole of India except Part B States, Bombay, Punjab and Delhi.";

and in the fourth paragraph for "the said Provinces" substitute "Bombay, Punjab or Delhi".

Section 3.— For "a Province" substitute "a Part A State or a Part C State".

Section 52.— For "in the Provinces or established beyond the limits of the Provinces" substitute "within the limits of Part A States and Part C States or established beyond such limits".

THE ADAPTATION OF LAWS (No. 2) ORDER, 1956.

In exercise of the powers conferred by clause (1) of article 372A of the Constitution, section 120 of the States Reorganisation Act, 1956 (37 of 1956) and section 44 of the Bihar and West Bengal (Transfer of Territories) Act, 1956 (40 of 1956) and of all other powers enabling him in that behalf, the President hereby makes the following Order, namely:—

1. (1) This Order may be called the Adaptation of Laws (No. 2) Order, 1956.

(2) It shall come into force on the 1st day of November, 1956.

3. As from the 1st day of November, 1956, the Central Acts, Regulation and Order mentioned in the Schedule to this Order shall, until repealed or amended by a competent Legislature or other competent authority, have effect, subject to the adaptations and modifications directed by the Schedule, or if it is so directed, shall stand repealed.

* * * * *

THE SCHEDULE

* * * * *

The Transfer of Property Act, 1882.

(IV of 1882).

Section 1. — In the third paragraph, for "Part B States" substitute "the territories which, immediately before the 1st November, 1956, were comprised in Part B States or in the States of".

In the fourth paragraph, for the "said States" substitute "the said territories".

Section 3. — In the definition of "registered", for "any State" substitute "any part of the territories".

THE
TRANSFER OF PROPERTY ACT
ACT IV OF 1882*

VOLUME I

Received the Assent of the Governor General on the
17th February, 1882.

AN ACT TO AMEND THE LAW RELATING TO THE TRANSFER OF PROPERTY BY ACT OF PARTIES.

WHEREAS it is expedient to define and amend certain parts of Preamble. the law relating to the transfer of property by act of parties; It is hereby enacted as follows :

For Statement of Objects and Reasons, *see* Gaz. of Ind., 1877, Pt. V, p. 171; for the Preliminary Report of the Select Committee, *see ibid*, 1878, Pt. V, p. 48; for the further Report of the Select Committee, *see ibid*, 1879, Pt. V, p. 106; for the third Report of the Select Committee, *see ibid*, 1881, Pt. V, p. 395.

For application and extension of the provisions of the Act, *see* foot-notes given under section 1.

Synopsis

1a. History of the Act.
1b. Amendments introduced in 1929, whether retrospective.
1. The Preamble.
2. The Act is not exhaustive.
3. Aliens.
4. Government grants.
5. Easements.
6. Construction of the Act.

1a. History of the Act. — Since its enactment in 1882, this Act has been amended, repealed in part and extended under many enactments. The chronological Table of Enactments given in this volume will show how the Act is affected by the various enactments mentioned therein. The most important set of amendments to this Act was introduced in 1929 by the Transfer of Property (Amendment) Act, XX of 1929. That Act amended more than 50 sections and introduced many new ones. All the changes brought about by this and other amending Acts are noted under the sections concerned.

1b. Amendments introduced in 1929, whether retrospective. — Section 63 of the Transfer of Property (Amendment) Act, XX of 1929, runs as follows :

"**63.** Nothing in any of the following provisions of this Act, namely, Ss. 3, 4, 9, 10, 15, *Saving clause.* 18, 19, 27, 30, cl. (c) of S. 31, Ss. 32, 33, 34, 35, 46, 52, 55, 57, 58, 59, 61 and 62 shall be deemed in any way to affect—

(a) the terms or incidents of any transfer of property made or effected before the first day of April 1930.

*For Statement of Objects and Reasons and the Final Report of the Select Committee, *see* pages 59 and 75.

(b) the validity, invalidity, effect or consequences of anything already done or suffered before the aforesaid date,

(c) any right, title, obligation or liability already acquired, accrued, or incurred before such date, or

(d) any remedy or proceeding in respect of such right, title, obligation or liability; and nothing in any other provision of this Act shall render invalid or in any way affect anything already done before the first day of April 1930, in any proceeding pending in a Court on that date; and any such remedy and any such proceeding as is herein referred to may be enforced, instituted or continued, as the case may be, as if this Act had not been passed."

It is clear from the section itself that the amendments introduced by the sections mentioned in it are not retrospective in operation. As regards other amendments, the Legislature has expressly laid down in the concluding portion of the above section, that they will not affect anything done before the 1st of April 1930 (the date on which the Act came into force) in any proceeding *pending* in a Court on that day. As to whether those amendments are retrospective in operation so as to apply to cases where the act was done before the 1st of April 1930, but the suit was instituted after that date, see Notes under the respective provisions amended.

1. The Preamble. — The Preamble to a statute is not the *operative* portion of the statute.(1) It is often no more than a recital of some of the inconveniences sought to be removed by the enactment.(2) As observed by Holt, C. J., in *Mills* v. *Wilkins*.(3) "the Preamble of a statute is no part thereof, but contains generally the motives or inducements thereof." The enabling words of the statute may be carried beyond the Preamble(4) and when a section operates beyond the ambit of the Preamble, the section must govern the case and not the Preamble.(5) Similarly, when the operative sections of the Act are *inconsistent* with the Preamble, they take effect against it. (6) This is a consequence of applying the cardinal rule of interpretation of statutes that the intention of an enactment should be gathered from the *language* employed by it and that where the language is *clear and unambiguous*, the interpretation should not be influenced by extraneous considerations.(7) Where therefore the operative part of an enactment is *clear and unambiguous* the Preamble which, as has been seen above, is not the operative part of the statute, cannot control or extend it.(8) But

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Preamble — Note 1

1. 1939 Oudh 131 (137) [A I R V 26] : 14 Luck 492 (FB).
[*See also* (1859) 28 L J Q B 252 (257) : 33 L T (O S) 327, Johnson v. Upham. (Title of the Act is no part of the law, but may show the object of the Legislature.)]

2. 1939 All 157 (157) [AIR V 26] : I L R (1938) All 1001 (DB).

3. (1703) 87 E R 822 (823) : 6 Mod Rep 62.

4. †1919 P C 52 (53) [A I R V 6] : 43 Mad 529 : 46 Ind App 302.
1939 All 157 (157) [AIR V 26] : I L R (1938) All 1001 (DB).

5. (1828) 108 E R 863 (870) : 6 L J K B (O S) 162.

6. 1940 Oudh 138 (140) [A I R V 27] : 15 Luck 229 (FB).

7. *See* A. I. R. Commentaries on the Code of Civil Procedure, 7th (1963) Edition Note 7 on the Preamble.

8. 1959 S C 960 (966) : [AIR V 46 C 134] : 1959 Cri L J 1223 : (1959) Supp (2) S C R 793. (Headings pre-fixed to sections in modern statutes are regarded as preambles to them.)
1940 Oudh 138 (140, 141) [A I R V 27] : 15 Luck 229 (FB).
1939 All 157 (157) [AIR V 26] : I L R (1938) All 1001 (DB).
1938 Cal 211 (214) [A I R V 25] : I L R (1938) 1 Cal 626. (It cannot be invoked for creating an ambiguity in the Act.)
1938 Nag 298 (300) [AIR V 25] : ILR (1939) Nag 526.
1938 Pat 607 (608) [AIR V 25] (DB).
1934 Cal 862 (864) [A I R V 21] : 61 Cal 1047 (DB).
1927 Cal 763 (765) [A I R V 14] : 55 Cal 67 (DB).
1919 Cal 551 (560) [AIR V 6] : 45 Cal 343 (FB).
1917 Cal 681 (685) [AIR V 4] (DB).
('13) 21 Ind Cas 538 (540) (DB) (Cal).
('89) 11 All 262 (266).
(1882) 31 W R (Eng) 369 (372) : 22 Ch D 511, Sutton v. Sutton.

where the language of the operative part of a statute is *not clear* the Preamble may be very usefully referred to in order to explain and elucidate it.(9) For, the Preamble is a key to the construction of the statute.(10) In *Nga Hoong* v. *The Queen*,(11) their Lordships of the Privy Council observed: "We must consider the Preamble as a key to the construction of the statute, though it would not, of course, control every provision, for we very often find that the subsequent provisions of a statute extend beyond the limits of the Preamble." The Preamble, whatever its value might be as aid to the construction of a statute, undoubtedly throws light on the intent and design of the Legislature and indicates the scope and purpose of the Legislature itself.(11a) In *Powell* v. *Kempton Park Racecourse Company*,(12) Lord Halsbury, L. C., said: "Two propositions are quite clear: one that a Preamble may afford useful light as to what a statute intends to reach, and another that if an enactment is itself clear and unambiguous no Preamble can qualify or cut down the enactment."

See also A. I. R. Commentaries on the Code of Civil Procedure, 7th (1963) Edition, Preamble, Note 10.

2. The Act is not exhaustive. — The general rule is that a Code must be taken to be exhaustive on all matters *specifically dealt with by it*. In *Gokul Mandar* v. *Pudmanand Singh*,(1) their Lordships of the Privy Council observed: "The essence of a Code is to be exhaustive on the matters in respect of which it declares the law, and it is not the province of a Judge to disregard or go outside the letter of the enactment according to its true construction." The words in the Preamble "define and amend *certain parts* of the law relating to the transfer" show, however, that the Act does not profess to deal with the whole law on the subject of transfer of property. The Preamble to the Indian Contract Act, 1872, is worded in terms similar to the Preamble of this Act.(2) In *Irrawaddi Flotilla Co.* v. *Bugwandas*,(3) which was a case under the Contract Act, their Lordships of the Privy Council observed that the said Act did not profess to be a complete Code dealing with the law relating to contracts, that it purported to do no more than to define and amend *certain parts* of that law and that the Legislature did not intend to deal exhaustively with the law relating to contracts.

It is thus clear that this Act is not exhaustive and does not contain the whole law on the subject of transfer of property.(4) Thus, it does not deal exhaustively with

[*See also* 1940 Rang 84 (90) [A I R V 27] : 1940 Rang L R 325 (SB). (A statement in the Preamble is not binding authority.)]

9. 1959 S C 960 (966) [A I R V 46 C 134] : 1959 Cri L J 1223 : (1959) Supp (2) S C R 798. (Heading prefixed to sections in modern statutes are regarded as preambles to them.)

1940 Oudh 138 (140, 141) [AIR V 27] : 15 Luck 229 (FB).

1919 Cal 551 (560) [AIR V 6] : 45 Cal 343 (FB).

1938 Cal 211 (214) [A I R V 25] : I L R (1938) 1 Cal 626.

1938 Nag 298 (300) [AIR V 25] : ILR (1939) Nag 526.

1928 Lah 35 (37, 38) [A I R V 15] : 9 Lah 260 (DB).

1917 Cal 681 (685, 686) [A I R V 4] (DB).

10. 1956 S C 246 (264) [AIR V 43 C 49] : 1955-2 S C R 1196.

1918 Pat 398 (400) [A I R V 5] : 3 Pat L Jour 1 (FB).

1939 All 305 (307) [AIR V 26] : I L R (1939) All 275 (DB).

1934 Cal 862 (864) [A I R V 21] : 61 Cal 1047 (DB).

('89) 11 All 262 (266). (Purpose for which Preamble is framed is to indicate what in general terms was the object of Legislature.)
[*See also* ('82) 8 Cal 637 (643) (DB).

11. † (1857) 7 Moo Ind App 72 (99) (PC).

11a. 1953 S C 274 (276) [AIR V 40 C 63] : 1953 Cri L J 1105 : 1953 S C R 677.

12. (1899) 68 L J Q B 392 (396) : 1899 App Cas 143.

Preamble — Note 2

1. ('02) 29 Cal 707 (715) : 29 Ind App 196 (PC).

2. These words are: "Whereas it is expedient to define and amend certain parts of the law relating to contracts."

3. ('91) 18 Cal 620 (628) : 18 Ind App 121 (PC).

4. 1953 Pat 193 (193) [AIR V 40 C 64] (DB).

the law relating to different forms of securities, and *inter alia*, it does not deal with pledges of decrees, tangible moveable property, government promissory notes, policies of insurance, etc.(5) It has been held that an *award* may create a valid mortgage without an instrument attested and registered.(6) (See also S. 5, Note 2.)

In cases not covered by the Act, a Court can administer the principles of equity as laid down in decided cases which are not distinctly prohibited by the statute.(7) The rule that Courts are authorised to act according to justice, equity and good conscience where there is no specific provision of law governing the case has been held to mean that the English law is to be applied if its application is found suited to Indian society and circumstances.(8) Thus, the principle "he who seeks equity must do equity" is applicable apart from the provisions of the Transfer of Property Act, to cases which are not distinctly provided for by the enactment.(9) But no equitable doctrine can be applied so as to override the express provisions of the statute.(10)

The assistance of such of the provisions of the Act which are a statutory recognition of the rules of justice, equity and good conscience can be taken in the case of transactions to which the provisions of the Act are not made applicable.(11)

('50) 86 Cal L Jour 198 (205). (Act provides for some and not all consequences of assignment of and reversion of the land.)
1942 Mad 558 (561) [AIR V 29] : 202 Ind Cas 697 (DB).
1940 Nag 163 (166) [AIR V 27] : ILR (1941) Nag 513 (DB). (Act is not exhaustive of all charges.)
1933 Cal 154 (161) [AIR V 20] : 59 Cal 1372. (Particularly on mortgages.)
1928 Nag 223 (224) [AIR V 15] (DB).
1926 Bom 31 (32) [AIR V 13] (DB). (High Court as a Court of equity is entitled to administer the principles of equity as laid down in decided cases which are not distinctly prohibited by statute.)
1924 Cal 990 (991) [AIR V 11]. (Hypothecation of moveables without possession is legal.)
1924 Sind 23 (24) [AIR V 11] : 17 Sind L R 178 (DB). (The Act is not exhaustive on the law of mortgages.)
1922 All 59 (60) [AIR V 9] (DB). (The Transfer of Property Act does not purport to consolidate the law relating to mortgages in India; it merely defines and amends certain parts of the law.)
1919 Cal 607 (611) [AIR V 6] (DB).
1919 Mad 1113 (1115) [AIR V 6] (DB). (Does not deal with transfer by an award.)
1917 Pat 268 (271) [AIR V 4] : 2 Pat L Jour 293 (DB).
('09) 34 Mad 442 (449) (DB).
†('10) 37 Cal 377 (382) (DB). (Act does not deal with cases of succession.)
('07) 34 Cal 223 (228) (DB).
('11) 12 Ind Cas 155 (158) (DB) (Cal).
[But see 1926 Mad 55 (56) [AIR V 13] : 48 Mad 821 (DB). (The Act is intended to be exhaustive and Courts are not at liberty to follow English Common Law rules.)]

5. ('09) 34 Mad 442 (449) (DB).

6. 1924 Sind 23 (24) [AIR V 11] : 17 Sind L R 178 (DB). (Note.—It is submitted that this view is not correct : See S. 59, Note 2.)

7. 1953 SC 228 (231) [AIR V 40 C 55] : 1953 S C R 1009.
1942 Mad 558 (561) [AIR V 29] (DB). (Principles of English law may be applied.)
1933 All 70 (71) [AIR V 20] : 54 All 1041 : 143 Ind Cas 409 (DB).
1929 All 12 (14) [AIR V 16] : 51 All 454 (DB).
†1926 Bom 31 (32) [AIR V 13] (DB).
1915 Mad 402 (404) [AIR V 2]. (It is an undoubted rule of equity that in taking the account between a mortgagee and a mortgagor, the former is entitled to be reimbursed all moneys properly and reasonably expended by him with reference to the mortgaged property. The payment of such expenses may be regarded as an implied term of the mortgage contract, or as a condition imposed by a Court of equity upon the party who has invoked its assistance, and the amount is added to the sum due on the security.)

8. †1919 P C 1 (4) [AIR V 6] : 42 Mad 589 : 46 Ind App 109.
†1930 P C 142 (143) [AIR V 17] : 11 Lah 251 : 57 Ind App 168.
('87) 11 Bom 551 (561) : 14 Ind App 83 (PC).
(1861-63) 9 Moo Ind App 303 (320) (PC).
('86) 9 Mad 399 (413) (FB).
('50) 86 Cal L Jour 198 (206). (Reference has to be made to the English decisions in cases where the Act is silent.)
1920 Nag 144 (145) [AIR V 7].
('81) 5 Bom 506 (527).

9. ('05) 15 Mad L Jour 210 (210) (DB).
('11) 12 Ind Cas 155 (158) (DB) (Cal).

10. 1942 Mad 558 (561) [AIR V 29] (DB).
1933 All 70 (71) [AIR V 20] : 54 All 1041 (DB).
1930 All 175 (177) [AIR V 17].
[*See also* 1933 Mad 293 (296) [AIR V 20] : 56 Mad 546 (DB). (It is a very dangerous thing to quote English cases in India without the very greatest care.)]

11. 1953 S C 228 (231) [AIR V 40 C 55] : 1953 S C R 1009.

3. Aliens. — The English law incapacitating aliens from holding real property to their own use and transmitting it by descent or devise has never been introduced into India so as to create a forfeiture of the land held by an alien.(1)

Acquisition or transfer of immovable property in favour of a person who is not a resident of the State of Jammu and Kashmir is completely prohibited and banned under the Laws of the State. A non-State subject cannot purchase immovable property in the name of a benamidar and then claim it as his own.(2)

4. Government grants. — It is a general principle of construction of statutes, applicable both in India and in England that the Crown is not affected by a statute unless specially named in it,(1) or unless bound by necessary implication.(1a) Thus if it can be affirmed that, at the time when the statute was passed and received the royal assent it was apparent from its terms that its beneficent purpose would be wholly frustrated unless the Crown were bound, then it may be inferred that the Crown has agreed to be bound.(1b) This principle has been given effect to by the Government Grants Act, XV of 1895, which repeals the Transfer of Property Act, so far as Government grants are concerned, with retrospective effect. Sections 2 and 3 of that Act provide as follows :

> "Section 2. Nothing in the Transfer of Property Act, 1882, contained shall apply or be deemed ever to have applied to any grant or other transfer of land or of any interest therein heretofore made or hereafter to be made by or on behalf of the Government to, or in favour of any person whomsoever; but every such grant and transfer shall be construed and take effect as if the said Act had not been passed.
>
> Section 3. All provisions, restrictions, conditions and limitations ever contained in any such grant or transfer as aforesaid shall be valid and take effect according to their tenor, any rule of law, statute or enactment of the Legislature to the contrary notwithstanding."

Clauses (b) and (c) of sub-s. (1) of S. 17 of the Registration Act, 1908, have been made inapplicable to grants of immovable property by Government. Section 90 of the same Act further provides that nothing in that Act shall be deemed to require, or to have at any time required, registration of sanads, inam title-deeds and other documents purporting to be, or to evidence grants or assignments by Government, of land or of any interest in land.

Government grants are thus exempted from the operation of the Transfer of Property Act(2) and of the Registration Act. Thus, a lease granted by the Government

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Preamble - Note 3

1. (1836) 1 Moo Ind App 175 (286) (PC).
[*See also* 1927 Oudh 278 (283) [AIR V 14] : 1 Luck 97. (Validity of gift by Taluqdar of estate property should be determined with reference to special provisions of Act 1 of 1869 without reference to general provisions of T. P. Act.)]

2. 1965 J & K 83 (84) [AIR V 52 C 28] (DB).

Preamble — Note 4

1. 1960 S C 1355 (1360) [AIR V 47 C 248] : 1960 Cri L J 1680 : (1961) 1 S C R 158. (Per Majority, Wanchoo J. Contra—Rule is still good law—1955 Cal 282 [AIR V 42] Reversed.).
('90) 14 Bom 213 (218) (DB).
('75) 1 Bom 7 (9) (DB).
(1876) 46 L J P C 1 (3) : (1876) 2 App Cas 102, Theberge v. Laundry.
(1887) 73 L J K B 114n(115n):(1904) 2 KB 165n, Gorton Local Board v. Prison Commissioners.
(1908) 24 T L R 834 (834) : 1908 App Cas, 448 Re Wi Matua's will. (Case from New Zealand.)
(1842) 152 E R 406 (408, 409) : 11 L J Ex 338, Attorney-General v. Donaldson.
[*See also* (1815) 115 E R 1455 (1458) : 1 Price 438, Attorney-General v. Newman.

1a. 1960 S C 1355 (1360) [AIR V 47 C 248] : 1960 Cri L J 1681 : (1961) 1 S C R 158. [Per Majority, Wanchoo J. Contra — Rule is still good law — 1955 Cal 282 [A I R V 42], Reversed.)
1947 P C 34 (35) [AIR V 34 C 7] : 73 Ind App 271 : I L R (1947) Kar (PC) 60. (Case under City of Bombay Municipal Act, 3 of 1888.)

1b. 1947 P C 34 (36) [AIR V 34 C 7] : ILR (1947) Kar (PC) 60 : 73 Ind App 271. (Case under City of Bombay Municipal Act, 3 of 1888.)

2. 1955 Nag 38 (39) [AIR V 42 C 10] : ILR (1955) Nag 538 (DB).

is outside the provisions of this Act. There is no difference between grants made by virtue of the Prerogative and grants made as mercantile transaction for profits.(3)

In *Sheo Singh* v. *Raghubans Kunwar*(4) it has been held by their Lordships of the Privy Council that the Government was empowered to create an estate descendible by any rule of inheritance other than that laid down by law. In *Dost Muhammad Khan* v. *The Bank of Upper India Ltd.*,(5) it has been held by the Allahabad High Court that where the Court is called upon to construe a grant by Government it shall construe such grant irrespective of the provisions of the Transfer of Property Act, and that therefore if there was a condition in the grant restricting the alienation by the grantee of the land granted to him, it would be valid under S. 3 of the Government Grants Act notwithstanding the provisions of S. 10 of this Act. It has been held in the undermentioned case(5a) by that High Court that S. 2 of the Government Grants Act under which when a Court is required to construe a grant by Government it has to construe it irrespective of the provisions of the Transfer of Property Act, does not render all the provisions of the Act inapplicable and therefore it could not be said that there was no holding over under S. 116 of the Act by reason of S. 2 of the Government Grants Act. See also the undermentioned cases.(6)

As to construction of Government grants, see the undermentioned cases.(7)

1939 All 263 (264) [AIR V 26] (DB). (Crown is not bound by any of the sections of T. P. Act or Contract Act.)

3. 1927 Pat 319 (322, 323) [AIR V 14] : 6 Pat 446 (DB)

4. ('05) 27 All 634 (653) : 32 Ind App 203 : 8 Oudh Cas 317 (PC).

5. ('06) 3 All L Jour 130 (131) (DB).

5a. 1965 All 326 (332) [AIR V 52]. (1958 All 879 [AIR V 35], Rel. on.)

6. 1955 Cal 601 (603) [AIR V 42 C 190] : 1955 Cri L Jour 1572 : ILR (1957) 2 Cal 1017 (DB). (The effect of S. 3 of the Crown Grants Act is to exclude the operation of not merely the Transfer of Property Act but of all laws— 42 C W N 81, Rel. on.)

1926 Mad 706 (711) [AIR V 13] : 49 Mad 349 (DB). (Restrictive covenant as to alienation not void.)

1939 All 263 (264) [AIR V 26] (DB). (Grant neither permanent not transferable — Violation of terms of grant by sale — Government can resume it even though Municipal Board sanctions such sale.)

1936 Sind 108 (113) :[AIR V 23] : 29 Sind L R 382 (DB). (Strict rule of construction against the subject and in favour of the Crown applies to Crown grants.)

('07) 2 Mad L Tim 55 (56) (DB). (Validity of grant by Crown cannot be questioned on ground that it created estate not recognised by Mahomedan law.)

('06) 3 All L Jour 628 (630) (DB). (The Crown Grants Act does not prohibit sale in execution of unconditional grants made by the Crown free from restrictions as to alienation.)

7. ('66) 11 Moo Ind App 295 (314) (PC).
('02) 24 All 1 (11) : 28 Ind App 169 (PC).
('12) 36 Bom 639 (656, 659): 39 Ind App 202 (PC).
1918 Mad 956 (957) [AIR V 5]: 40 Mad 268 (FB).
1938 Cal 211 (214) [AIR V 25] : ILR (1938) 1 Cal 626. (Crown Grants Act does not contemplate only Transfer of Property Act.)
1931 Pat 268 (270) [AIR V 18] : 10 Pat 203 (DB).
1926 Mad 706 (718) [AIR V 13]: 49 Mad 349 (DB).
1925 Bom 12 (14) [AIR V 12] : 49 Bom 99 (DB).
1914 Mad 552 (554) [AIR V 1] : 37 Mad 369n : 18 Ind Cas 294 (DB).
('12) 36 Bom 438 (442) (DB).
('10) 1910 Punj Re No. 20 : 5 Ind Cas 898 (900) (DB).
('09) 2 Ind Cas 641 (642, 643) (DB) (Cal).
('08) 32 Bom 432 (439) (DB).
('05) 28 All 104 (108) (DB). (If words are employed in the grant, which expressly, or by necessary implication indicate that the Government intends that so far as it may have any ownership in the soil, ownership shall pass to the grantee neither Government nor any person deriving title under the Government, subsequent to the grant can be permitted to say that the ownership did not so pass.)
('05) 29 Bom 480 (486) (DB).
('04) 27 All 310 (312) (DB).
('03) 5 Bom L R 983 (986) (DB).
('02) 26 Bom 271 (279) (DB).
('99) 22 All 96 (98) (DB): (In the case of a grant of land adjoining a highway or river the presumption is that it includes half of the road or half of the river.)
('99) 1 Bom L R 498 (499) (DB).
('91) 1891 Bom P J 234 (234) (DB).
('71) 8 Bom H C R (A C) 1 (5) (DB).
('69) 6 Bom H C R 191 (199) (DB).
('67) 4 Bom H C R A C 1 (23) (DB).
(1855) 14 E R 581 (590): 10 Moo P C 502, Doed. Devine v. Wilson. (Crown grants must be construed most favourably to the grantee.)

5. Easements. — It has been held by the High Courts of Calcutta(1) and Madras(2) that the provisions of the Transfer of Property Act have no application to the *creation* of easements for the reason that the Act was not intended to deal with that topic.

6. Construction of the Act. — As to the general principles of interpretation of statutes, see the A. I. R. Commentaries on the Code of Civil Procedure, 7th (1963) Edition Preamble, Note 7.

The Transfer of Property Act should be construed irrespective of the question whether the property referred to in any particular provision thereof is inside or outside India, or whether it is situate in a province to which the Act does not apply. The Court must give effect to the Act and must judge the particular transaction according to its provisions unless it is proved that by the law of the land where the property is situated the transaction is not valid.(1) Reference can be made to English decisions for a proper understanding of the provisions of the Act.(2) In construing the provisions of the Act the Court should put a rational construction upon them.(3)

Where the statute requires that a particular kind of transfer shall be effected by a particular kind of instrument such a provision must be enforced with strictness.(4)

As to the retrospective operation of this Act, see S. 2, Note 5.

CHAPTER I.

PRELIMINARY.

Short title. **1.** This Act may be called the Transfer of Property Act, 1882.

Commencement. It shall come into force on the first day of July, 1882.

Extent. [a][It extends in the first instance to the whole of India except [b][the territories which, immediately before the 1st November 1956, were comprised in Part B States or in the States of], Bombay, Punjab and Delhi.]

[c][But this Act or any part thereof may by notification in the Official Gazette be extended to the whole or any part of the [d][said territories] by the [A][State Government] concerned.][e]

[f][And any [A][State Government] may [g][* * *] from time to time, by notification in the [A][Official Gazette], exempt, either retrospectively or prospectively, any part of the territories administered by such [A][State Government] from all or any of the following provisions, namely :—

[h][Sections 54, paragraphs 2 and 3, 59, 107 and 123.]

[i][Notwithstanding anything in the foregoing part of this section, sections 54, paragraphs 2 and 3, 59, 107 and 123 shall not extend or be extended to any district or tract of country for the time being excluded from the opera-

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Preamble — Note 5

1. 1917 Cal 681 (685, 686): 34 Ind Cas 450(DB).
2. AIR 1929 Mad 79 (80) [AIR V 16]. (1917 Cal 651 [AIR V 4], foll.)

Preamble — Note 6

1.† 1932 Bom 642 (643, 644) [AIR V 19]: 57 Bom 234.
2. ('50) 56 Cal L Jour 198 (206).
3. 1956 Orissa 128 (128) [A I R V 43 C 39] (DB).
4. 1927 All 411 (412) [AIR V 14] (DB). (Observations of Piggott, J. in 1918 All 211 [AIR V 5] Approved.)

tion of the Indian Registration Act, i[1908], under the power conferred by the first section of that Act or otherwise.]

a. *Substituted* for the original third paragraph by A. L. O., 1950 [26-1-1950].

b. *Substituted* for the words "Part B States" by 2 A. L. O., 1956 [1-11-1956], Immediately before the 1st November 1956, following were Part B States — Hyderabad, Jammu and Kashmir, Madhya Bharat, Mysore, Pepsu, Rajasthan, Saurashtra and Travancore-Cochin.

c. *Substituted* for the original paragraph by A. O., 1937 [1-4-1937].

d. *Substituted* for the words "said States" by 2 A. L. O., 1956 [1-11-1956].

e. The Act has been declared to be in force in Panth Piploda by the Panth Piploda Laws Regulation, 1929 (I of 1929), S. 2. It is continued in force with modifications, in the territory transferred to Delhi Province by the Delhi Laws Act, 1915 (VII of 1915), S. 3 and Sch. III. It has been partially extended to Berar by the Berar Laws Act, 1941.

The Act has been extended to—

(a) the whole of the territories, other than the Scheduled Districts, under the administration of the Government of Bombay with effect from 1st January 1893 —*see* Bom. Rules and Orders, Vol. II, page 194 ;

(b) the new provinces and merged States by Act LIX of 1949, S. 3 [1-1-1950] ;

(c) the States of Tripura and Vindhya Pradesh with effect from 16-4-1950 by Act XXX of 1950, S. 3 ; and to Manipur with effect from 1-1-1957, by Acts XXX of 1950 and LXVIII of 1956, S. 3 (2A) ;

(d) the States merged in the States of Bombay by Bom. Act IV of 1950, S. 3 [30-3-1950], former Madhya Pradesh by M. P. Act XII of 1950, S. 3 (1) and Sch. II [3-4-1950] ; Madras by Mad. Act XXXV of 1949, S. 3 [1-1-1950] ;

(e) Shillong in the State of Assam by Asm. Act VIII of 1947, S. 3 and Sch. I ;

(f) State of Kerala, in so far as the Act relates to any matter enumerated in Sch. VII, List 2 of the Constitution of India, applicable to agricultural land by Trav-Co. Act XI of 1955, S. 2 ;

(g) transfer of agricultural land in the Saurashtra and Hyderabad areas of the State of Bombay; and the provisions of Bom. Act XIV of 1939, are also extended to those areas of the State of Bombay to which they did not extend immediately before the commencement of this Act, (i. e. Bom. Act LVII of 1959), Ss. 2 and 3 [14-10-1959] ;

(h) transfer of agricultural land in the then State of Mysore including Hyderabad area but except, Bellary District from 1-11-1951 by Mys. Act XXXII of 1951, S. 2 and Mys. Act X of 1962, S. 3 [2-10-1965].;

(i) the whole of the then State of Saurashtra with effect from 28-8-1951—*see* Notification No. LD/D/(3)-48 in Sau. Govt. Gaz., 1951, Extra., Pt. III, page 884 ;

(j) the Union territory of Goa, Daman and Diu by Reg. XI of 1963. Enforced in Goa area of the territory from 1-11-1965 and in Daman and Diu area from 25-4-1966—*see* Goa Gaz., 14-10-1965, page 312 and *ibid*, 14-4-1966, page 9, respectively ;

(k) the Union territory of Dadara and Nagar Haveli by Reg. VI of 1963, S. 2 and Sch. I [1-7-1965] ;

(l) the Union territory of Laccadive, Minicoy and Amindivi Islands by Reg. VIII of 1965, S. 3 (1) and Schedule ;

(m) to whole State of Travancore-Cochin w. e. f., 1-5-1952—*see* T.-C. Gaz., 1-4-1952, Pt. I, page 356 ;

(n) the whole of the State of Rajasthan with effect from 1-7-1952—*see* Notfn. No. F. 12 (1) Jud./52 in Raj. Gaz., 1952, Pt. IVA, page 185.

The Act as in Bombay State has been adapted in Gujarat with effect from 1-5-1960 by Guj. A. L. (State and Concurrent Subjects) Order, 1960, amended by Guj. A. L. (8th Amendment) Order 1961.

The application of this Act was barred in the Naga Hills District, including the Mokokchang Sub-Division, the Dibrugarh Frontier Tract, the North Cachar Hills, the Garo Hills, the Khasia and Jaintia Hills and the Mikir Hills Tract by notification issued under Assam Frontier Tracts Regulation, 1880 (II of 1880), S. 2. The Mizo District (Transfer of Land) Act, 1963 (Mizo Act I of 1964) [20-5-1964] provides for control over transfer of land in that district.

The Act has been *repealed* in its application to—

(a) Government grants by Act XV of 1895, S. 2 [10-10-1895];

(b) the City of Madras and to any municipal town or village to which the Act is extended to the extent necessary to give effect to the provisions of the Madras City Tenants Protection Act, 1921 (Mad. III of 1922) or modified—*see* S. 13 of that Act, as amended by Mad. Act XIX of 1955, S. 9. The Madras Act III of 1922 has so far been extended to the towns of Karur, Mayuraom, Tanjore, Devakottai, Karaikudi, Chidambaram, Cuddalore, Kumbhakonam, Salem and Nagapattinam.

(c) the Saurashtra area of the State of Bombay as adapted and applied to that area by the State of Saurashtra (Application of Central and Bombay Acts) Ordinance, 1948—*see* Bom. Act LVII of 1959, S. 5 [14-10-1959];

(d) State and Central Government grants in the State of Rajasthan by Raj. Act XX of 1961, S. 2 [19-7-1961].

f. *Substituted* for the original paragraph by the Transfer of Property Act (1882) Amendment Act, 1885 (III of 1885), S. 1.

g. The words "with the previous sanction of the Governor-General in Council" were *omitted* by the Devolution Act, 1920 (XXXVIII of 1920), S. 2 and Sch. I.

h. Sections 54, 107 and 123 have been extended from 1-4-1955 to the entire State of Punjab—*See* Punj. Gaz., dated 1-4-1955, Pt. I, page 372 and to the Pepsu area of the State with effect from 15-5-1957—*see* Punj. Gaz., 15-5-1957, Extra., page 633. Those sections and S. 129 have been extended to certain areas in the Union territory of Delhi—*see* Notfns. No. 189/38-III dated 30-5-1939, Gaz. Ind., 1939, Pt. I, page 918; No. 61/10-Judl. dated 16-11-1940, *ibid*, 1940, Pt. I, page 1639; and those sections except S. 129 have been extended to all the areas of the said Union territory to which they have not already been extended by Notification No. 189/38-III of 1939—*see* S. R. O. 1431 dated 7-5-1957, *ibid*, 1957, Pt. II, S. 3, page 924; and S. 129 and other provisions of the Act, except Ss. 54, 107 and 123, have been extended w. e. f. 1-12-1962 to all those areas of the Union territory of Delhi where they were not already in force—*see* Gaz. Ind., dated 17-11-1962, Pt. II, S. 3 (1), page 1852.

Paragraphs 2 and 3 of S. 54 and Ss. 59, 107 and 123, with respect to the transfer of property by registered instrument have been extended to every cantonment from the commencement of the Cantonments Act, 1924 (II of 1924)—*see* S. 287 of that Act. Provisions of S. 59 have been extended to the State of Haryana w. e. f., 5-8-1967 — *see* Haryana. Gaz., dated 5-8-1967, Pt. III, Ext., page 229.

i. *Added* by Act III of 1885, S. 2 [w. r. e. f. 1-7-1882].

j. *Substituted* for "1877" by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), S. 2.

The Central Government has exempted retrospectively with effect from 1st January 1950 the operation of paragraphs 2 and 3 of S. 54 and Ss. 59, 107 and 123 from all the territories in the State of Himachal Pradesh except (i) an area within the limits of a municipality, and (ii) a notified area as declared and notified under S. 241 of the Punjab Municipal Act, 1911, as applied to Himachal Pradesh—*see* S. R. O. 1873 in Gaz. Ind., 1951, Pt. II, S. 3, page 2040 read with S. R. O. 395, *ibid*, 1952, Pt. II, S. 3, page 370.

So far as transfer of ownership flats in the State of Maharashtra is concerned, this Act has been supplemented by the Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 (Maha. Act XLV of 1963), S. 16. The Act is to remain in force up to 31-3-1968. The Act has been extended to Poona and Thana.

SECTION 1A STATE AMENDMENTS

GUJARAT

In its application to the Saurashtra area of the State of Gujarat the amendment is the same as that given under Maharashtra—*see* Guj. A. L. (8th Am.) O., 1961.

MAHARASHTRA

In its application to the State of Bombay, after S. 1 *insert* the following new section, namely,—

"1A. *Application of Act to transfer of agricultural land in Saurashtra and Hyderabad areas of State of Bombay.* — Subject to the provisions of any special or local law relating to agricultural land for the time being in force in any area, this Act shall, on the commencement

of the Transfer of Property (Bombay Provisions for Uniformity and Amendment) Act, 1959, apply also to transfer of agricultural land in the Saurashtra and Hyderabad areas of the State of Bombay." —Bom. Act LVII of 1959, S. 4 [14-10-1959] and Maha. A. L. (Am.) O., 1961.

Synopsis

1. "The whole of India except ....."
2. Subsequent extension of the Act.
3. Civil and Miliary Station of Bangalore. *(Omitted.)*
3a. Berar.
4. Principles of provisions of the Act apply to territories to which Act is not applicable.
5. Principles of provisions of the Act applied to cases arising before the Act.
5a. Applicability of principles to matters expressly excluded from purview of the Act.
6. Repeal of Act by subsequent legislation.

1. "The whole of India except ...." — Formerly the Act was stated to extend in the first instance to the 'whole of British India' except certain territories. After India became independent and the Dominion of India was established in 1947, the expression 'whole of India' was replaced by the words 'all the provinces of India' which words were again replaced by the words 'the whole of India'. The present third paragraph is the result of amendments by A. L. O. (1950) and A. L. O. (No. 2) 1956. By Cl. (28) of S. 3 of the General Clauses Act as amended by the A. L. O. 1950, India has been defined as follows :

> "'India' shall mean—
>
> *(a)* as respects any period before the establishment of the Dominion of India, British India together with all territories of Indian Rulers and then under the suzereignty of such an Indian Ruler, and the tribal areas;
>
> *(b)* as respects any period after the establishment of the Dominion of India and before the commencement of the Constitution, all territories for the time being included in that dominion; and
>
> *(c)* as respects any period after the commencement of the Constitution, all territories for the time being comprised in the territory of India."

The expression 'British India' has been defined in the General Clauses Act, 1897, as amended by the India (Adaptation of Existing Laws) Order, 1947, as follows :

> "'British India' shall mean, as respects the period before the commencement of Part III of the Government of India Act, 1935, all territories and places within His Majesty's Dominions which were for the time being governed by His Majesty through the Governor-General of India or through any Governor or officer subordinate to the Governor-General of India, and as respects any period after that date and before the date of the establishment of the Dominion of India means all territories for the time being comprised within the Governors' Provinces and the Chief Commissioner's Provinces, except that a reference to British India in an Indian Law passed or made before the commencement of Part III of the Government of India Act, 1935, shall not include a reference to Berar."

Aden (1) and British Burma (2) were governed by His Majesty through Governors or other officers subordinate to the Governor-General of India and were thus within "British India". By virtue of Order in Council issued under S. 288, Government of India Act, 1935, Aden had ceased to be a part of British India from the 1st April 1937. By virtue of S. 46, sub-s. (2) of the said Act, Burma had ceased to be a part of British India from 1st April 1937.

The following territories did not fall within the scope of the definition of "British India"—

(1) Native States of India.(3)

Section 1 — Note 1

1. 1924 Bom 290 (293) [AIR V 11] (DB).
2. ('86) 13 Cal 221 (223) (DB).
3. ('06) 33 Cal 219 (253) : 33 Ind App 1 (PC). (Province of Kathiawar.)
('02) 29 Cal 400 (401, 402) (DB). (The tributary mahals of Orissa such as Mcurbhunj.)

(2) Lands ceded by Native Princes to the British Government for *limited* purposes,(4) e. g., Civil Stations and Cantonment areas and lands over which jurisdiction had been ceded for the purposes of railway administration.(5) Thus, the Cantonments of Wadhwan(6) and Secunderabad(7) and the Rajkot Civil Station(8) were not included in "British India". Where, however, *full sovereignty* had been ceded or a new territory had been acquired, such territory thereby became part of British India.

(3) Territories specially excluded from the term "British India" by legislative enactment. Thus, Singapore was not a part of "British India".

2. Subsequent extension of the Act.—The Act empowers the State Governments to extend the operation of the Act to places to which the Act has not been made originally applicable. Such provision must, in view of the decision of their Lordships of the Privy Council in *Empress* v. *Burah*,(1) be taken to be *intra vires* of the Indian Legislature. But the power to extend any part of the Act to territories to which it did not originally apply, does not authorise the State Government to extend *particular sections* of the Act, so as to give those sections a different operation from that which they had in the Act itself, read as a whole.(2)

As to the parts to which the Act has been extended by Provincial Governments since the passing of the Act, see the foot-notes under the section itself.

The Act does not apply to the Punjab and to that portion of the Province of Delhi which was taken from the Punjab. It applies to that portion of the Province of Delhi which was taken from the United Provinces of Agra and Oudh.(3-4)

The existing 'Extent' clause of the Act being para. 3 of S. 1 is not at all touched by Part B States (Laws) Act (1951). All that Act has done was to make it possible for Part B States to extend the Act to any part of their territory by notification.(5) But a contrary view, namely, that the Part B States (Laws) Act (1951) is not a recommendation to Part B States Governments to adopt laws given in the schedule but provided for the extension of certain laws to Part B States, has been taken in the undermentioned case.(6)

3. Civil and military station of Bangalore. — *[Omitted.]*

('88) 1888 Pun Re No. 191, p. 491 (499) (DB). (Faridkot State.)

4. ('12) 37 Bom 152 (155, 156) (DB).

5. ('97) 25 Cal 20 (33) : 24 Ind App 137 : 1897 Pun Re Cr No. 6 (PC). (Territory ceded for the limited purpose of railway administration.)

('94) 21 Cal 177 (179). (Secunderabad Cantonment.)

6. ('12) 37 Bom 152 (155, 156) (DB).

7. 1933 P C 134 (135) [AIR V 20] : 60 Ind App 167 : 56 Mad 405.

8. ('86) 10 Bom 186 (188) (DB).

Section 1 — Note 2

1. ('79) 4 Cal 172 (181) : 5 Ind App 178 (PC).

2. 1927 P C 22 (23) [A I R V 14] : 5 Rang 7 : 54 Ind App 23. (Rule of Mahomedan law requiring gift to be perfected by possession cannot be abrogated.)

3-4. 1930 Lah 920 (922) [AIR V 17] : 11 Lah 564 (DB).

[*See also* 1964 Punj 210 (211) [AIR V 51 C 52] : ILR (1963) 2 Punj 1 (DB). (Section 111 of the Act has no application to the Punjab. The provisions of this section have not been applied as a rule of equity, justice or good conscience by any of the High courts in the territories to which this provision is not made applicable under S. 1.)]

5. 1959 Punj 440 (447) [AIR V 46 C 133] : ILR (1959) Punj 384 (DB). (Actually, however, this was never done by Pepsu or Punjab and the Act is not as such in force there. Overruled on another point in 1963 S C 222 [AIR V 50].)

6. 1957 Madh Bha 133 (134) [A I R V 44 C 53].

3a. **Berar.**—The Transfer of Property Act was extended to Berar in 1907 by the Governor-General in Council under the power conferred by the Foreign Jurisdiction Act, 1890.(1) See now S. 2 of the Berar Laws Act, 1941 (IV of 1941) and S. 2 of the Berar Laws (Provincial) Act 1941 (C. P. Act XV of 1941).

4. **Principles of provisions of the Act apply to territories to which Act is not applicable.**—The general principles underlying the various provisions of this Act have been applied to cases arising in territories to which this Act has not been made applicable, as being in consonance with justice, equity and good conscience.(1)

Section 1 — Note 3a

1. 1949 Nag 34 (36) [A I R V 36 C 17]: I L R (1948) Nag 327 (DB). (But there was no intention to alter law of pre-emption in Berar by applying the Act.)
1938 Nag 142 (143) [AIR V 25]: ILR (1939) Nag 293.

Section 1 — Note 4.

1. 1947 Lah 1 (5, 6) [AIR V 34 C 1]: ILR (1947) Lah 449 (FB). (Punjab—Principle of S. 53-A applies.)
1957 Him Pra 46 (48) [AIR V 44 C 17]. (Although the provisions of the Transfer of Property Act were applied to the Bilaspur State on 29-7-1949, the principles underlying the sections of the Act being principles of justice, equity and good conscience were held applicable to the transactions before that date.)
1956 Orissa 95 (95, 96) [AIR V 43 C 29]. (Act not in force in Gangpur State prior to 1-1-1948).
('55) ILR (1955) Patiala 388 (393). (The Transfer of Property Act has no application in the State of Pepsu but the principles underlying the provisions of the Act do apply.)
1955 Punj 215 (217) [A I R V 42 C 80]: I L R (1955) Punj 988 (DB). (Principles are applicable to Punjab.)
1951 Punj 404 (407) [A I R V 38 C 119]: I L R (1950) Punj 271 (DB). (Though T. P. Act is not in force in East Punjab its provisions should be followed when applying principles of justice, equity and good conscience.)
1942 Pesh 88 (88) [AIR V 29]. (Principle of S. 8 applied.)
1942 Pesh 68 (70) [AIR V 29]. (Principle of S. 41 of T. P. Act were applied.)
1942 Pesh 43 (45) [A I R V 29]. (Principle of S. 52, T. P. Act, applied.)
1940 Lah 291 (292) [AIR V 27]. (The Punjab.)
1938 Lah 286 (287) [AIR V 25]. (Principles embodied in S. 101 were applied.)
1938 Lah 156 (157) [AIR V 25] (DB). (Punjab—S. 53 applied.)
1937 Pesh 58 (60) [AIR V 24] (DB). (N. W. F. P. —S. 53A applied.)
1937 Pesh 5 (5) [AIR V 24]. (N. W. F. P.)
1936 Lah 753 (755) [AIR V 23] (DB). (Do.)
1936 Lah 944 (945) [A I R V 23]. (Punjab—Section 6 applied.)
1936 Lah 405 (405) [AIR V 23] (DB). (Punjab—Section 41 applied.)
1936 Lah 366 (366) [A I R V 23]. (Punjab—Section 53A applied.)
1936 Pesh 43 (45) [A I R V 23] (DB). (N.W.F.P.)
1935 Lah 350 (354) [A I R V 22]: 16 Lah 881 (DB). (Punjab—Section 70 applied.)
1934 Pesh 101 (102) [A I R V 21]. (The North-West Frontier Province—Principle of S. 108 (b) applied.)
1934 Pesh 17 (18) [A I R V 21].
1933 Lah 374 (375) [AIR V 20] (DB). (Principle underlying S. 82 of T. P. Act is one of the general principles applicable to mortgages which must be held to be in force in the Punjab.)
1933 Lah 151 (152) [AIR V 20] (DB). (Punjab—Sections 58 (d) and 67 applied.)
1932 Lah 518 (519) [AIR V 19]. (Punjab—Principle of S. 6 applied.)
1930 Lah 1063 (1065) [AIR V 17] (DB). (Punjab —Section 101 applied.)
1930 Lah 620 (623) [AIR V 17] (DB). (Punjab — Principle of S. 101 applied.)
1930 Lah 356 (357) [A I R V 17]: 11 Lah 258 (FB). (Punjab—Principle of S. 52 applied.)
1930 Lah 136 (137) [A I R V 17]. (Punjab — Principle of S. 53 applied.)
('28) 112 Ind Cas 651 (652) (Lah). (Punjab — Principle of S. 116 applied.)
1925 Lah 575 (575) [A I R V 12]: 6 Lah 487. (The Punjab.)
1925 Lah 92 (93) [AIR V 12]. (Do.)
1925 Rang 13 (15) [A I R V 12]: 2 Rang 382. (Upper Burma.)
1924 Lah 281 (283). (Punjab — Section 111 (g) applied.)
1924 Lah 707 (707) [AIR V 11] (DB). (Do.)
1923 Lah 646 (646) [AIR V 10]: 4 Lah 439 (DB). (Punjab — In order to take advantage of the provisions of the Act it is necessary to show that a principle has been transgressed as opposed to non-observance of prescribed formalities.)
1923 Nag 88 (89) [AIR V 10]. (Case before T. P. Act was applied to Berar.)
1915 Lah 362 (363) [A I R V 2]: 1915 Pun Re No. 103 (DB). (Punjab — Principle of Ss. 60, 69 applied.)
('13) 20 Ind Cas 291 (293) (DB) (Lah). (Principle of S. 41 applied.)
('12) 1912 Pun Re No. 74 : 14 Ind Cas 232 (234) (DB). (Punjab—Principle of S. 53 applied.)
('12) 1912 Pun Re Rev No. 6 : 17 Ind Cas 991 (992). (Punjab—Section 114 applied.)
('11) 12 Ind Cas 849 (850) (Low Bur). (Pegu—Before the Act was extended to it.)
('08) 4 Low Bur Rul 222 (224). (Lower Burma —Before the Act was extended to it principles of Ss. 58, 67, 68 applied.)

But the technical rules embodied in such provisions, such as the requirements of registration etc., have been held not to be applicable.(2) It is however erroneous to suppose that every provision in the Act is based on principles of justice, equity and good conscience. Before applying any provision of the Act it has to be seen in every case whether the particular provision of the Act restates a known rule of equity.(2a) In the undermentioned case(3) *arising in Bombay* to which the Act was not then applicable, the High Court of Bombay applied the principles of English law which differed from the provisions of this Act. In the undermentioned case(4) it was held that the rights and liabilities of the parties which came into existence before this Act was applied to the State of Travancore-Cochin had to be determined in accordance with the principles of

('08) 1908 Pun Re No. 64, p. 309 (311) (DB). (The Punjab—Principle of S. 85 applied.)

('07) 1907 Pun Re No. 148, p. 687 (691) (DB). (Principles of Ss. 54 (4th b) and 57 (a), T. P. Act, applied to the Punjab.)

('07) 1907 Pun Re No. 2, p. 18 (22). (Punjab — Principle of S. 99 applied.)

('03) 1903 Pun Re No. 80, p. 345 (354) (FB). (Punjab—Principle of S. 52 applied.)

('02) 1902 Pun Re No. 85, p. 348 (350). (The Punjab—Principle of S. 66 applied.)

('01) 1901 Pun Re No. 6, p. 18 (23). (Principle of S. 53, T. P. Act, applied in the Punjab.)

('98) 1898 Pun Re No. 65, p. 225 (226) (DB). (Principle of S. 54 last paragraph applied to the Punjab.)

('99) 26 Cal 1 (6), 25 Ind App 241 (PC). (In Burma, before the Act was extended to it.)

('94) 1894 Pun Re No 12, p. 21 (23, 24). (Principle of S. 131, T. P. Act, applied.)

[*See also* 1950 Kutch 64 (65) [A I R V 37 C 53]. (Act not applicable in Kutch and could not be literally followed — Kutch Shirasta Sangraha (Collection of Customs) often prevailed over Indian Act in matter of transfer of property.)

('06) 3 Low Bur Rul 241 (241). (Case before T. P. Act was extended to the mofussil of Burma.)

('06) 3 Low Bur Rul 169 (170) (DB). (Case before T. P. Act was applied to Burma.)

('09) 4 Ind Cas 755 (756) : 1909 Upp Bur Rul 5. (Case before T. P. Act was extended to Upper Burma.)

1930 Lah 920 (922) [A I R V 17] : 11 Lah 564 (DB). (Delhi — Mortgage by deposit of title deeds recognized.)]

2. 1956 Orissa 95 (95, 96) [AIR V 43 C 29]. (Act not in force in Gangpur State before 1-1-1948 — S. 106 requiring notice to expire with end of month of tenancy need not be literally applied — Reasonable notice should suffice.)

1955 Punj 215 (217) [AIR V 42 C 80] : ILR (1955) Punj 988 (DB). (Rules of procedure are not applicable.)

1939 Lah 330 (338) [AIR V 26] (DB). (Technical provisions of S. 114A do not apply.)

1937 Pesh 5 (6) [AIR V 24]. (Registration.)

1936 Lah 547 (548) [AIR V 23]. (Punjab—Procedure for assignment of actionable claim not adopted.)

1936 Lah 390 (392) [AIR V 23] (DB). (Punjab—Right of subrogation can be conferred on lender even by oral agreement.)

1936 Pesh 158 (160) [AIR V 23] (DB). (Rule of procedure laid down in S. 53 of T. P. Act does not apply to N.-W. F. P.)

1933 Lah 821 (822) [AIR V 20]. (Punjab—S. 54 requiring registration not applied.)

1932 Lah 30 (31) [AIR V 19]. (The technical rule, requiring assignment to be made in writing which is contained in S. 130 is not applicable to a case of assignment of a promissory note.)

1928 Lah 148 (149) [AIR 15]. (There is no rule of law in force in the Punjab which requires bahi entry to be attested.)

1925 Lah 575 [AIR V 12 : 6 Lah 487. (Assignment of debt not in writing.)

1925 Lah 92 (93) [AIR V 12]. (Principle of S. 55 (2) not applied to case.)

('07) 3 Nag L R 72 (75). (Berar — Registration under S. 54.)

('07) 1907 Pun Re No. 9 p. 46 (53).

1926 Lah 39 (40) [AIR V 13]. (Sale of reversionary right in Punjab is not void—Principles of English law which differed from S. 6, T. P. Act applied.)

2a. 1953 S C 228 (232) [AIR V 40 C 55] : 1953 S C R 1009.

[*See also* 1964 Punj 210 (211) [AIR V 51 C 52] : ILR (1963) 2 Punj 1 (DB). (Section 111 of the Act has no application to the Punjab—The provisions of this section have not been applied as a rule of equity, justice or good conscience.)

1963 Raj 113 (116) [AIR V 50 C 37) : ILR (1963) 13 Raj 370. (Tenancy in question came into existence on 23-3-1948 in State of Udaipur where T. P. Act was not in force—Act held could not govern case and notice under S. 106 was not necessary : 1953 S C 228 [AIR V 40 C 55], Ref.)

('58) 24 Cut L T 433 (437, 438). (Transfer of Property Act was not extended to the former feudatory State of Kalahandi — Provision as to notice in S. 111 (g) is not based on any principle of justice, equity and good conscience—Provision could not be invoked — 1953 S C 228 [AIR V 40], Ref.)]

3. ('94) 18 Bom 160 (167, 168) (DB).

4. 1951 Trav-Co 17 (20) [AIR V 38 C 7] (DB).

common law which governed the mortgage transactions in the State prior to the passing of the Act.

5. Principles of provisions of the Act applied to cases arising before the Act. — The principles of the provisions of the Act have been applied by Courts even to cases arising before the Act came into force, in the absence of any rules prevailing then and in conflict with the Act.(1) Thus, it was held in the undermentioned case (2) where a mortgage was made prior to the Act, that it would be safe to apply rules in this Act in the absence of any rules prevailing then and in conflict with the Act. But every provision in the Act and every amendment effected cannot apply on the principle of justice, equity and good conscience. It has to be seen in every case whether the particular provision of the Act relied upon restates a known rule of equity or whether it is merely a new rule laid down by the legislature without reference to any rule of equity.(3)

5a. Applicability of principles to matters expressly excluded from purview of the Act. — Courts must apply the principles of justice, equity and good conscience to transactions to which the statutory provisions of the Transfer of Property Act are not made applicable.(1) It follows that such of the provisions of the Act which are but a recognition of the rules of justice, equity and good conscience will govern such transactions.(2) But every provision of the Act is not based on principles of justice, equity and good conscience. The assistance of the Act as a matter of guide on matters which have been excluded from the purview of the Act by express words should not be invoked, unless the provisions of the Act embody principles of general application.(3)

6. Repeal of Act by subsequent legislation. — The provisions of the Act may, of course, be repealed by subsequent legislation. But a subsequent local legisla-

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Section 1 — Note 5

1. ('99) 26 Cal 39 (45) : 25 Ind App 179 (PC). (Interest awarded after date fixed for payment under S. 88.)

1957 Him Pra 46 (48) [A I R V 44 C 17]. (Although the provisions of the Transfer of Property Act were applied to the Bilaspur State on 29-7-1949, the principles underlying the sections of the Act were held applicable to the transactions before that date.)

1928 All 381 (383) [AIR V 15] (DB). (Section 63 was applied to a mortgagee's claim to accessions under a mortgage of 1859.)

1925 Rang 13 (15) [AIR V 12] : 2 Rang 382. (Burma– Principle of S. 76 (i) applied.)

2. ('01) 24 Mad 47 (56) (FB). (Section 108 (h) has been applied to a kanomdar entitling him to remove trees planted by himself.)

3. 1953 S C 228 (231) [AIR V 40 C 55] : 1953 S C R 1009. (Provision in S. 111 (g) as to notice in writing as preliminary to suit for ejectment is not based on any principles of justice, equity and good conscience and cannot govern leases made prior to 1882 or prior to 1-4-1930 when Amending Act of 1929 came into force — 1951 Bom 283 [AIR V 38] and 1947 Mad 68 [AIR V 34], Overruled.)
[*See also* 1963 Raj 113 (116) [AIR V 50 C 37] : ILR (1963) 13 Raj 370. (Tenancy in question came into existence on 23-3-1948 in Udaipur State where T. P. Act was not in force — Act held could not govern case and notice under S. 106 was not necessary : 1953 S C 228 [AIR V 40 C 55], Ref.].)

('58) 24 Cut L T 433 (437, 438). (Act not extended to former feudatory State of Kalahandi —Provision as to notice in S. 111 (g) is not based on any principle of justice, equity and good conscience — Provision could not be invoked—1953 S C 228 [AIR V 40 C 55], Ref.)]

Section 1 — Note 5a

1. 1953 S C 228 (230) [AIR V 40 C 55] : 1953 S C R 1009.

2. 1953 S C 228 (230) [AIR V 40 C 55] : 1953 S C R 1009.

3. 1953 S C 228 (232) [AIR V 40 C 55] : 1953 S C R 1009.
[*See also* 1954 Bom 370 (378) [AIR V 41 C 107]: I L R (1954) Bom 615 (DB). (Relationship created by decree—Terms of S. 105 held could be invoked as matters of justice, equity and good conscience although S. 2 (d) excludes application of S. 105 in such case—Submitted not correct in view of decision in 1953 S C 228 [AIR V 40] in which it has been held that S. 105 gives statutory definition of lease and enunciates no principle of equity.)]

tion, such as the C. P. Tenancy Act, enacted for a particular purpose and with reference to a particular locality cannot operate as an implied repeal of a general statute such as Transfer of Property Act applicable to the whole of India.(1) The Transfer of Property Act has in no way been repealed by the U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947).(2)

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2. In the territories to which this Act extends for the time being the
Repeal of Acts. enactments specified in the schedule hereto annexed shall be repealed to the extent therein mentioned. But nothing herein contained shall be deemed to affect—

Saving of certain enactments, incidents, rights, liabilities, etc.

(*a*) the provisions of any enactment not hereby expressly repealed :

(*b*) any terms or incidents of any contract or constitution of property which are consistent with the provisions of this Act, and are allowed by the law for the time being in force :

(c) any right or liability arising out of a legal relation constituted before this Act comes into force, or any relief in respect of any such right or liability : or

(*d*) save as provided by section 57 and Chapter IV of this Act, any transfer by operation of law or by, or in execution of, a decree or order of a Court of competent jurisdiction :

and nothing in the second chapter of this Act shall be deemed to affect any rule of [a][* *] Muhammadan [b][* *] law.

a. After the words 'any rule of' the word "Hindu" was omitted by S. 3 of the Transfer of Property (Amendment) Act, 1929.

b. After the word 'Muhammadan' the words "or Buddhist" were omitted, *ibid.*

Synopsis

1. Scope of the section.
2. "Affect."
3. Clause (a) — Existing enactments not affected.
4. Clause (b) — Incidents of contract or constitution of property.
5. Clause (c).
6. Clause (d)—Transfer by operation of law or by or in execution of decree or order.
7. Escheat.
8. Government grants. See Note 4 on Preamble.
9. Muhammadan law.
10. Hindu law.
11. Buddhist law.

1. Scope of the section —This section repeals the enactments referred to in the schedule. In clauses (a), (b) and (c) it enacts that no provision of the Act shall affect any of the things referred to therein. In clause (d) it provides that no provision of the Act other than S. 57 and Chap. IV shall affect any transfer by operation of law or by, or in execution of, a decree or order of a Court. By the last sentence of the section it is provided that *nothing in Chap. II of the Act shall* affect any rule of Muhammadan law.

The expression "nothing *herein* contained" in the first part of the section is used in contradistinction to the words "nothing in the *second chapter* of the Act" used in

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Section 1 — Note 6

1. 1929 Nag 246 (249) [AIR V 16] : 25 Nag L R 19.

2. 1960 All 211 (212) [AIR V 47 C 43] : ILR (1959) 2 All 284 (DB).

the last sentence of the section, and must, therefore, be taken to refer to *all* the provisions of the Act and not merely this particular section.(1)

2. **"Affect."** — The provisions of an enactment may be said to be "affected" by this Act only when such enactments are *inconsistent* with a provision of this Act.(1) Where therefore there is no inconsistency or conflict between the provisions of this Act and the provisions of any other rule of law, the provisions of the Act will apply. Thus, the second chapter of the Act will apply to Muhammadans also in all matters in which there is no rule of Muhammadan law inconsistent with such provisions.(2) On the same principle the second chapter of the Act was applied to Hindus in matters in which there was no rule of Hindu law inconsistent therewith.(3)

It was observed by Maclean, C. J., in the undermentioned case(4) that the word "affect" means "validate or invalidate the transfer," that S. 111, clause (d) did not affect the *transfer* itself but merely stated the *result* of a transfer when made, and that therefore S. 111, clause (d) may be applicable to transfers by operation of law notwithstanding clause (d) of this section. This view has, however, not been followed in later cases(5) of the same High Court.

3. **Clause (a) — Existing enactments not affected.** — The Act does not affect the provisions of any enactment not *expressly* repealed by the Act. The enactments expressly repealed by this Act are referred to in the schedule.

The clause applies so as to save the provisions of existing enactments at the time the Act came into operation.(1) It does not operate to save *subsequent* enactments. In such cases, if the *subsequent* enactment is inconsistent with a provision of this Act, the principle *generalia specialibus non derogant* must be applied and the special provision will prevail over the general.(2)

The Act does not affect the provisions of the Bengal Patni Regulation 8 of 1819,(3) and the provisions of the Bombay Land Revenue Code.(4) The Act was extended to Rajasthan on 1-4-1951. The Act did not expressly repeal the Rajasthan Premises (Control of Rent and Eviction) Act 1950 and by virtue of this clause did not affect the provisions of that Act.(5)

Section 2 — Note 1

1. 1914 Cal 618 (621) [AIR V 1] (DB). (Mukarrari before T. P. Act — S. 111 does not apply by virtue of S. 2 (c).)
[*See also* ('09) 36 Cal 802 (806) (DB)].
[But see ('11) 9 Ind Cas 840 (840) (Cal)].

Section 2 — Note 2

1. *See* ('02) 25 Mad 244 (255, 256, 258) (FB).

2. ('07) 30 Mad 197 (198, 199) (DB). (Hence S. 51 applied to Mahomedans.)

3. 1923 Mad 67 (69) [AIR V 10] (DB). (Defeasance clause in gift deed—Clause not attempting to alter inheritance — Transfer governed by T. P. Act.)

4. ('01) 28 Cal 744 (747) (DB).

5. ('36) 163 Ind Cas 829 (830) (Cal).
1919 Cal 642 (643) [AIR V 6] (DB).
1914 Cal 618 (622) [AIR V 1] (DB).

Section 2 — Note 3

1. 1960 Andh Pra 465 (467) (Pr 14) [AIR V 47 C 153] : ILR (1960) 1 Andh Pra 81 (DB). (Section 59 of the T. P. Act does not come into play in regard to instruments falling within the purview of O. 21, R. 34, Civil P. C. If there is a conflict between the two, the former must yield to the latter by reason of Cl. (a) of S. 2.)
('02) 25 Mad 244 (255) (FB).

2. ('02) 25 Mad 244 (255) (FB).

3. 1925 Cal 962 (964) [A I R V 12] : 52 Cal 655 (DB).

4. 1916 Bom 59 (61) [A I R V 3] : 41 Bom 170 (DB).

5. ('55) ILR (1955) 5 Raj 575 (578) (DB). (The Rajasthan Act was a supplementary Act and the change that could be said to have come about when the T. P. Act was enforced was to make the provisions of S. 13 of the Rajasthan Act supplementary to the provisions of T. P. Act relating to ejectment.)

4. Clause (b)—Incidents of contract or constitution of property. — The terms or incidents of any contract(1) or constitution of property are saved by this clause, provided they are not inconsistent with the provisions of this Act and are allowed by the law for the time being in force. A right to a partition of joint property is an incident of such property(2) and though the exercise of that right is not provided for by this Act, there is nothing in the Act which is inconsistent with such a right. Such a right may, therefore, be exercised independent of the provisions of this Act as to writing being necessary in case of certain transfers.(3)

5. Clause (c).—It is a general principle of law that no statute should be construed so as to have a retrospective operation unless its language is such as plainly to require such a construction. In fact a statute which takes away or affects vested rights, imposes a new liability, or confers a new right must be *presumed* not to have a retrospective effect or operation.(1) In other words statutes are *prima facie* deemed to be *prospective* only—*nova constitutio, futuris formam imponere debet, non praeteritis.*(2) Provisions dealing with *procedure* constitute, however, an exception to the general rule and are always retrospective in the sense that their provisions will apply not only to proceedings commenced after the enactment but also to proceedings pending at the time of the enactment.(3) The reason is that no one can have any vested right in forms

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Section 2 — Note 4

1. 1915 Mad 402 (404) [A I R V 2]. (Right of mortgagee to a general account of the monies expended by him.)
('07) 3 Nag L R 97 (101).
[*See also* ('01) 28 Cal 293 (296) (DB).]

2. ('79) 4 Cal 56 (59) (DB). (Joint property subject to trust but not dedicated to idol, can be partitioned.)

3. ('63) ILR (1963) 13 Raj 963 (973). (Assignment of joint promissory note in partition — Instrument in writing not necessary—Partition not transfer as contemplated by T. P. Act—Transaction not affected by S. 120.)
('10) 34 Mad 72 (73) (DB). (Partition amongst members of a Hindu family may, even after the Transfer of Property Act, be oral.)
('98) 25 Cal 210 (213) (DB).
[*See also* 1924 Rang 155 (157) [A I R V 11] : 1 Rang 465 (DB).]
Also see Section 9, Note 10.

Section 2 — Note 5

1. *See* AIR Commentaries on the Code of Civil Procedure, 7th (1963) Edn., Preamble, Note 3.
1930 All 706 (709) [AIR V 17] : 52 All 886 (DB). (Right to appeal, substantive right.)
1929 All 745 (746) [AIR V 16].
1928 All 381 (383) [AIR V 15] (DB).
1928 All 168 (169) [AIR V 7].
1923 Oudh 156 (157) [AIR V 10]. (A judicially declared right of redemption is a valuable right. The rights of a mortgagor who has obtained a redemption decree under the Transfer of Property Act, Ss. 92, 93 are not mere matters of procedure and are not taken away by the repeal of those sections by the C. P. Code, 1908.)
† 1920 Cal 435 (437) [AIR V 7]: 47 Cal 1108 (DB).
1916 Nag 22 (23) [A I R V 3] : 13 Nag L R 165. (Case under S. 46, C. P. Tenancy Act.)
('11) 12 Ind Cas 631 (633) (DB) (All).
('10) 5 Ind Cas 82 (83) (DB) (All).
('10) 5 Low Bur Rul 148 (148) (DB). (Right of appeal is substantive right.)
1926 Rang 205 (205) [A I R V 13] : 4 Rang 221 (DB). (Do.)
('03) 26 Mad 445 (447) (DB). (Amending Act of 1899 to Contract Act not applicable to suits filed before that Act).
('06) 20 Bom 279 (289) (DB). (Transfer of Property Act, S. 93, conferring a new right to get an extension of time for redemption fixed by mortgage-decree not available in cases where decree was passed before the Act came into force in Bombay.)
('88) 1 Bom L R 849 (849) (DB).
('95) 19 Bom 80 (82) (DB).
[*See also* ('96) 20 Bom 565 (567) (DB). (See sections 31 and 32 of the Bombay Act VI of 1888—Taking away the right of the Talukdar to alienate talukdari property not applied to mortgage executed before that Act.)
('98) 25 Cal 909 (911) (DB).

2. (1850) 5 Moo Ind App 109 (126) (PC).
†('13) 20 Ind Cas 689 (691) (DB) (Mad).
('27) 1927 App Cas 126 (133) : 136 L T 258, Clement v. D. Davis & Sons Ltd.
†(1886) 31 Ch D 402 (408) : 54 L T 100, Reid v. Reid.

3. See Commentaries on the Code of Civil Procedure 7th (1963) Edn., Preamble, Note 3.
1930 All 561 (567) [AIR V 17] (DB). (The law of evidence is a law of mere procedure.)
1930 All 706 (709) [AIR V 17] : 52 All 886 (DB). (Right to pre-empt—Substantive right.)
1928 All 168 (169) [AIR V 15]. (Right of appeal substantive one — New Act giving that right should not be applied retrospectively.)
1927 All 657 (659) [AIR V 14] : 50 All 202 (DB).
('10) 5 Low Bur Rul 148 (148) (DB).

of procedure.(4) Section 6 of the General Clauses Act, 1897, is based on the same principle and provides, *inter alia*, that the repeal of any Act shall not, unless a different intention appears, affect any right, privilege, obligation or liability acquired, accrued, or incurred under any enactment so repealed.(5) In *Delhi Cloth and General Mills Co., Ltd.* v. *Income Tax Commissioner*,(6) their Lordships of the Privy Council observed as follows :

> "While provisions of a statute dealing merely with matters of *procedure* may properly, unless that construction be textually inadmissible, have retrospective effect attributed to them, provisions which touch a *right in existence* at the passing of the statute are not to be applied retrospectively in the absence of express enactment or necessary intendment".(7)

Clause (c) of this section is based on the principles stated above. The "right or liability" means a *substantive* right or liability and *not* a matter of *procedure*.(8) The' 'legal relation" may be constituted by *contract* of parties, by the general *Common* Law or by *enactment* in force prior to this Act and repealed by this Act. The Act will not affect any right or liability arising out of such relation or any relief in respect of any such right or liability. In other words, the Act is not retrospective in operation in so far as any *substantive* right or liability created by the legal relation is concerned,(9) but will

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[See however ('84) 1884 All W N 274 (274) (DB). (Decision, it is submitted, is not correct on this point.)]

4. See AIR Commentaries on the Code of Civil Procedure, 7th (1963) Edn., Preamble Note 3.
1927 P C 242 (244) [AIR V 14] : 54 Ind App 421: 9 Lah 284.
†1934 All 253 (255) [AIR V 21] (DB).
1930 All 561 (567) [AIR V 17] (DB). (The law of evidence is a law of mere procedure.)
1930 Cal 422 (423) [AIR V 17] : 57 Cal 148 (DB).
1929 Nag 282 (283) [AIR V 16]. (Amendment changing the forum but not taking away right to institute proceedings, relates to procedure.)
1929 Lah 761 (762) [AIR V 16] (DB).
1926 All 667 (668) [AIR V 13].
1924 Cal 983 (984) [AIR V 11] (DB).
1924 Mad 657 (657) [AIR V 11] : 47 Mad 384 (DB). (Criminal case.)
1923 Oudh 156 (157) [AIR V 10].
†('13) 20 Ind Cas 689 (691) (DB) (Mad). (Remedial rights relating to enforcement of substantive rights are affected by change in law subsequent to accrual of right but before steps are taken to enforce it.)
('10) 7 Ind Cas 982 (985) (DB) (Bom).
('88) 15 Cal 376 (382) (FB).
(1877) 46 L J Ch 121 (122) : 4 Ch D 750 (752), Warner v. Murdoch.
[*See also* ('83) 9 Cal 513 (514, 515) (DB). (Case under Criminal Procedure Code.)]

5. See also the undermentioned cases to the same effect :
1928 Lah 627 (630, 631) [AIR V 15]: 10 Lah 165 (FB). (In the absence of anything in enactment to show that it is to have retrospective effect, it should not be so construed to affect the existing law applicable to claim in litigation.)
(1900) 1900 Pun Re No. 12 p. 36 (39) (FB).
1930 Bom 55 (56) [AIR V 17] (DB). (Right extinguished under Limitation Act of 1871 was not revived according to the Limitation Act of 1877.)
1927 Cal 763 (765) [AIR V 14] : 55 Cal 67 (DB).
('10) 7 Ind Cas 982 (985) DB) (Bom).
('89) 2 C P L R 130 (131).
(1837) 112 E R 360 (363, 364) : 6 Ad & El 943 (951), Hitchcock v. Way.
(1905) 74 L J P C 77 (79) : 1905 App Cas 369, Colonial Sugar Refining Co. Ltd. v. Irving. (Right of appeal obtained cannot be taken away by subsequent repeal of enactment.)
[*See also* ('69) 6 Bom H C R (AC) 166 (169) (FB).
1927 Cal 748 (750) [AIR V 14] (DB).]

6. 1927 P C 242 (244) [AIR V 14] : 54 Ind App 421 : 9 Lah 284.

7. See also the following cases to the same effect :
('77) 2 Bom 148 (186) (FB).
1938 All 42 (43) [AIR V 25] : ILR 1938 All 53 (DB).
(1868) 37 L J Q B 80 (81) : 3 Q B 160, Kimbroy v. Draper.
(1860) 30 L J Ex 40 (42) : 3 L T 444, Wright v. Hale.
(1898) 67 L J P C 75 (77) : 1898 App Cas 469, Young v. Adams.

8. ('91) 13 All 432 (456) (FB). (A right to a relief arising from a jural relation existing between the parties is a matter of adjective law and parties are entitled when new remedy is provided by a new Act, at the time when relation subsists to take advantage of that remedy through a Court of law.)
('01) 25 Bom 101 (103) (DB). (Procedure under S. 93 applied to a suit on a mortgage executed before T. P. Act.)
†('86) 12 Cal 583 (589) (FB).
†('85) 11 Cal 582 (587) (DB).

9. 1919 P C 1 (3) [AIR V 6] : 42 Mad 589 : 46 Ind App 109.
†1935 All 706 (710) [AIR V 22] : 58 All 63 (FB). (An enactment which provides procedure applies to suits pending at its date.)

be retrospective in so far as the provisions relate to *procedure*.(10) The Act will of course apply to all legal relations created subsequent to the coming into force of the Act.

Illustrations.

(1) An *oral mortgage* before the date of the Act is valid and enforceable after the date of the Act.(11) So also an *oral sale* before the Act.(12) So also an *oral gift*.(13)

(2) A written mortgage executed before the Act is not rendered bad after the Act because it did not comply with the requirements as to attestation.(14)

(3) The incident of non-transferability which attached before the Act to ordinary tenancies of agricultural lands and to tenancies of homestead lands and the rights and liabilities flowing from such an incident are not affected by the Act.(15)

('87) 14 Cal 636 (640) (FB).
1937 Cal 207 (208) [AIR V 24] : ILR (1937) 2 Cal 54 (DB).
1934 Pesh 30 (31) [AIR V 21] (DB).
1932 Cal 198 (201, 202) [AIR V 19] (DB).
1928 Cal 808 (809) [AIR V 15] : 55 Cal 1355 (DB). (Affirmative Act giving new right does not destroy exising right unless Legislature apparently intends that the two rights should not co-exist together.)
†1915 Cal 64 (65, 66) [AIR V 2] (DB). (Legal relation proved to be created after the Act.)
('05) 7 Bom L R 618 (619) (DB).
†('07) 34 Cal 358 (370, 371) (DB). (Note.—Reversed on another point in 1917 P C 163 [AIR V 4].)
(1892) 3 Ch 402 (421) : 67 L T 275, *Lauri* v. *Renad*.
(1900) 70 L J Ch 3 (5) : 2 Ch 745, *Day* v. *Kelland*. (Terms of redemption settled by order before Act cannot be altered by an Act subsequently passed.)

10. 1948 All 261 (262) [AIR V 35 C 105] : ILR (1948) All 155 (FB). (Mortgage executed at time when Bengal Regulation 1 of 1798 was in force —After its repeal by T. P. Act such mortgage is not governed by Regulation 1 of 1798 — Regulation related only to procedure.)
('92) 15 Mad 290 (291) (DB). (Suit after the Act for principal and interest due on usufructuary mortgage executed before the Act — Defendant pleading accountability of mortgagee under S. 76—Question is one of procedure and S. 76 held applicable.)
†('89) 11 All 367 (371) (DB). (Usufructuary mortgage before Act — Suit after Act — S. 67 (a) applies.)
('84) 1884 All W N 269 (270) (DB). (Conditional mortgage before Act —Suit after Act — Decree must be passed in accordance with S. 86 of the Act for foreclosure.)

11. 1916 P C 41 (43) [AIR V 3] : 38 All 494 : 43 Ind App 264.
('88) 11 Mad 56 (60) (DB).
Also see Section 9, Note 1 and S. 59, Note 2.

12. ('02) 4 Bom L R 25 (27) (DB).

13. ('02) 12 Mad L Jour 387 (388) (DB).

14. ('11) 39 Cal 227 (230) (DB). (A turn of worship is not an interest in immovable property — S. 59, T. P. Act, not applicable.)
†('95) 17 All 252 (261, 262) (DB). (The law in the mofussil as to the validity of a mortgage created by a deposit of title-deeds with a creditor with intent to secure a debt, was not different from that prevalent in the Presidency towns in that behalf up to the 1st of July 1882 when the Transfer of Property Act came into force.)

15. 1937 Cal 373 (374) [AIR V 24]. (Tenancy created before Transfer of Property Act — Permanent structures standing on land for many years —Transfers in past—No change in rent—Tenancy is permanent and transferable.)
†1932 Cal 431 (432, 433) [AIR V 19] (DB).
1928 Pat 431 (433) [AIR V 15] : 7 Pat 341 (DB). (Non-permanent tenure created before the Act is not transferable.)
1927 Cal 373 (373) [AIR V 14] (DB). (Tenancy of homestead coming into existence before passing of T. P. Act — Act held not applicable.)
1927 Cal 39 (40) [AIR V 14] : 54 Cal 333 (DB). (In the absence of custom or contract to the contrary.)
†1924 Cal 1012 (1013) [AIR V 11] (DB). (Permanent tenancy created before the passing of T. P. Act can be transferred if it is for habitation and pucca buildings are erected with the consent of the landlord.)
1921 Cal 582 (584) [AIR V 8] (DB). (Even under the law as it stood before T. P. Act, if a man granted a tenure to other for living upon land tenure in the absence of contract was assignable.)
†1919 Cal 482 (482) [AIR V 6] (DB).
1918 Cal 163 (163) [AIR V 5] (DB).
†1916 Cal 827 (828) [AIR V 3] (DB). (Tenancies not transferable except by custom before T. P. Act came into force.)
1916 Pat 194 (195) [A I R V 3] : 1 Pat L Jour 253 (DB).
†1915 Cal 711 (711) [AIR V 2] (DB).
†1914 Cal 665 (666) [AIR V 1] (DB).
('13) 18 Ind Cas 379 (379) (DB) (Cal). (Non-agricultural holding such as tank not being part of homestead but held entirely separately as an annuity was transferable without custom or consent of landlord even before T. P. Act.)
('08) 7 Cal L Jour 553 (555) (DB).
('03) 7 Cal L Jour 309 (310) (DB).
('06) 7 Cal L Jour 107 (108) (DB).
†('05) 32 Cal 1023 (1030) (DB).
(1900) 4 Cal W N 574 (575) (DB). (Before T. P. Act was passed there was no distinction between agricultural land and non-agricultural land.)
[*See also* 1924 Pat 324 (324) [AIR V 11].]
Also see S. 108 (j), Notes 1 and 10.

(4) The assignment of a mortgage after the date of the Act will be governed by the provisions of the Act even though the mortgage itself was made prior to the Act.(16) The assignment in such a case creates a legal relation subsequent to the Act.

(5) A mortgage executed while the Bengal Regulation XVII of 1806 was in force, if sought to be enforced after the passing of this Act, must be enforced in accordance with the procedure under the Act and not as provided by the Regulation.(17)

(6) A mortgagee under a mortgage executed before the date of the Act, who had also obtained another money-decree against the mortgagor could not, after the date of the Act, attach and sell the mortgaged property in execution of the money-decree contrary to the provisions of S. 99 of the Act (now O. 34 R. 14 of the Civil Procedure Code).(18)

See also the undermentioned cases.(19)

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16. ('88) 11 Mad 56 (60, 61) (DB).
†('88) 12 Cal 505 (508) (DB). (An assignment of a mortgage after the Act is perfectly valid even though no notice to the mortgagor is given.)
[But see 1914 Low Bur 207 (207) [A I R V 1] (DB). (An equitable mortgage made prior to 1st January 1905 can be assigned by deposit after that date.)
†('09) 5 Low Bur Rul 93 (DB). (Do.)]

17. ('92) 14 All 405 (408) (FB).
†('84) 6 All 262 (266, 267) (FB).
1926 All 667 (668) [AIR V 13].
†1917 Mad 232 (232, 233) [AIR V 4] : 64 Ind Cas 475 (DB).
('95) 8 C P L R 65 (66).
('93) 16 Mad 64 (66) (DB).
('85) 11 Cal 582 (587) (DB).
[*See also* ('12) 17 Ind Cas 467 (468) (All). (Where right to apply for foreclosure had come to an end by efflux of time before the T. P. Act, the subsequent enactment of T. P. Act could not resuscitate that right.)
1924 Cal 240 (242) [AIR V 11] : 50 Cal 667.]

18. ('01) 4 Oudh Cas 231 (232).
('91) 14 Mad 74 (75) (DB).
('89) 12 Mad 325 (328) (DB).
('87) 10 Mad 129 (130, 131) (DB).

19. ('12) 35 All 48 (57) : 40 Ind App 31 (PC). (Implied covenant in S. 65 (a) not applicable to mortgage before Act although one of the further charges was subsequent to it.)
('87) 9 All 20 (23) : 13 Ind App 113 (PC).
('64) 1964 Ker L T 153 (154). (Mortgage — Redemption — Law prevailing at time when right of redemption comes into existence and not at the time when cause of action for suit for redemption arises governs case.)
('58) 1958 Ker L Jour 78 (79, 80). (Section 60 is not a mere matter of procedure. The provisions of the T. P. Act cannot affect a case where the mortgage sought to be redeemed came into existence before the Act became law in Travancore State.)
('55) Madh B L J 1955 H C R 522 (525). (The Transfer of Property Act does not apply to leases constituted before the Act came into force —Ss. 106 and 116 do not apply in such cases.)
1953 Sau 113 (118, 119) [A I R V 40 C 59] (DB). (A lease executed in the former Nawanagar State before the T. P. Act was made applicable to the territory comprised in that State will not be governed by the provisions of T. P. Act.)
1940 All 29 (33) [AIR V 27] : ILR (1939) All 990 (DB). (Mortgage before Act—Law then was that it could be redeemed before the date fixed in the deed for payment — Subsequent enactment in S. 60 of Act that redemption can be made only on expiry of the period, does not apply.)
1938 Cal 128 (129) [A I R V 25] (DB). (Tenures created before passing of T. P. Act—Acquisition of tenures by holder of superior right after the Act cannot merge them in superior right—S. 111 (d), T. P. Act, cannot be applied to such tenures.)
1935 Pat 508 (510) [A I R V 22] : I L R 15 Pat 8 (DB). (Lease created 10 years prior to the T. P. Act — Act is not applicable as it is not retrospective.)
1930 Mad 924 (925) [A I R V 17] (DB). (Mortgage prior to 1858 — Court to give effect to intention of parties at the time of execution of mortgage and not on any change in the law at the date when money was payable.)
1929 Cal 330 (331) [AIR V 16] (DB). (To a tenancy having its origin 80 or 85 years ago provisions of Transfer of Property Act or Bengal Tenancy Act are not applicable.)
1928 All 381 (383) [A I R V 15] (DB). (Mortgage executed on a date prior to T. P. Act — In absence of any direct guide as to the rule of law that prevailed in 1859 it would be safe to accept the rules prevailing at the present day as a sure guide.)
1926 Nag 168 (169) [A I R V 13]. (Section 90 (now O. 34, R. 6, C. P. C., 1908) not applied to execution of decree obtained before Act.)
1924 Bom 387 (388) [AIR V 11] (DB). (Mortgage when Regulation of 1827 was in force — Mortgagee's rights not affected.)
1919 Bom 34 (35) [AIR V 6] : 43 Bom 703 (DB). (Provisions of T. P. Act do not apply to a mortgage decree passed before the Act.)
('10) 10 Ind Cas 489 (489) (DB) (Cal).
('09) 34 Bom 128 (134) (DB). (Rights of a usufructuary mortgagee under Regulation V of 1827 remained unaffected.)
('09) 1 Ind Cas 362 (364) (DB) (Cal).
('04) 14 Mad L Jour 347 (349) (DB). (Mortgage by conditional sale before T. P. Act — Rights under it held governed by law before T. P. Act.)
(1900) 4 Cal W N 574 (575) (DB).
(1900) 23 Mad 114 (118) (DB). (Mortgage by conditional sale executed before T. P. Act —

Even in matters of procedure enacted in some sections of this Act,(20) such provisions cannot operate to revive rights which became extinct, or to take away rights which had been obtained before the Act. Thus, where the mortgagee's right to get possession under the Bengal Regulation XVII of 1806 became barred by limitation and *extinguished* before this Act came into force, it was held that it was not revived by the subsequent creation, by this Act, of a suit for foreclosure.(21) On the other hand where the mortgagee had started proceedings under the said Regulation and the notice under S. 8 thereof had been issued to the mortgagor before the date of this Act, the mortgagee was held to have acquired a substantive right which could not be affected by this Act and that, consequently, he was not bound to sue under S. 67 of this Act, but was entitled merely to sue for possession after the expiry of the year of grace, even though such *expiry* was after this Act came into force.(22) Similarly a decree for *sale* passed before the Act in a suit on a *usufructuary* mortgage was held not affected by the subsequent passing of the Act.(23) So also an *order for sale* which had been obtained before the Act by a mortgagee, in execution of a money decree obtained by him was held not bad by reason of S. 99 of the Act (now O. 34, R. 14, Civil Procedure Code).(24)

In so far as there was no enactment governing the particular case, the rights of parties before the date of the Act should be decided according to the Common law, if any, governing the case,(25) or in its absence according to justice, equity and good

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Rights under it held not affected by T. P. Act.)
('98) 21 Mad 139 (140) (DB). (A suit to recover principal and interest on hypothecation bond executed before T. P. Act, filed after 12 years from the date of bond, held time-barred. Article 132 and not Art. 147 of Limitation Act applies.)
('96) 20 Bom 759 (762) (DB). (Sections 111 and 116 not applied to a lease executed before T. P. Act, power to eject being a vested right and not a mere procedure.)
('93) 16 Mad 335 (337) (DB). (Mortgage before T. P. Act.)
('92) 19 Cal 760 (764) (DB). (Lease and merger both before the Act — Section 111 (d) does not apply.)
('89) 2 C P L R 130 (131). (Necessary proceedings under the Regulation XVII of 1806 to foreclose a mortgage — Legal effect not invalidated by repeal of Regulation by T. P. Act, the proceedings of foreclosure having commenced under the old Regulation.)
('88) 1 C P L R 178 (179). (Implied covenant under Act does not apply to transfers before Act.)
('87) 10 Mad 509 (516) (DB). (The Transfer of Property Act does not invest all prior hypothecations with the rights and liabilities arising from simple mortgages whether or not those transactions satisfy the requirements of the definition it contains of simple mortgage.)
('86) 8 All 402 (404, 405) (DB). (A mortgagor under a mortgage of 1846 was entitled by Bengal Regulation XXXIV of 1803 to have interest limited to 12 per cent. per annum and this right is an incident to his mortgage and is not disturbed by the Act.)
('86) 9 Mad 218 (222) (DB). (As the T. P. Act affects the Limitation Act by creating new rights and liabilities in the mortgagor and mortgagee, such rights and liabilities cannot have retrospective effect in cases of hypothecation created before T. P. Act.)

20. See Sections 88, 89, 99 of the Act as they existed prior to 1908 — They have now been repealed.

21. ('89) 16 Cal 693 (701 : 16 Ind App 85 (PC).
('13) 18 Oudh Cas 157 (159). (When right to sue on a mortgage was barred under Act IV of 1859 or Act IX of 1871, nothing contained in further Act of 1877 could revive it.)
† ('12) 17 Ind Cas 467 (468) (All).
[*See also* ('95) 8 C P L R 83 (85).
('95) 8 C P L R 65 (66).]

22. ('12) 8 Nag L R 136 (137).
('94) 1894 All W N 2 (2, 3) (DB).
† ('87) 15 Cal 357 (360, 361) (DB).
† ('87) 14 Cal 593 (604) (DB).
('87) 14 Cal 451 (456) (DB).
('85) 1885 All W N 130 (130) (DB).

23. 1914 All 350 (350) [AIR V 1] (DB).

24. † ('99) 23 Bom 119 (121) (DB). (Third person purchasing property under mortgage at a sale in execution of money decree of the mortgagee himself against mortgagor obtains a good title free from mortgage unless the sale is made subject to it.)
('05) 29 Mad 421 (423) (DB). (Mortgagee had purchased before the Act the right of redemption of the mortgagor in execution of his money decree—Sale not bad.)
('96) 19 Mad 382 (384) (DB).
('86) 12 Cal 436 (437) (DB).

25. † ('15) 30 Ind Cas 886 (887) (Cal).
1917 Cal 116 (117) [AIR V 4] (DB).

conscience which is generally regarded as meaning the rules of English law if found applicable to Indian society and circumstances.(26) The Courts may also apply the general rules of this Act to such cases as being guides to show what is justice, equity and good conscience in such cases (27) but not the special rules such as the requirement as to attestation or registration.

Retrospective effect of Amendments to Act

See the cases noted below (28) as to the retrospective effect of the amendments to the Act made in 1929.

6. Clause (d)—Transfer by operation of law or by or in execution of decree or order.—This clause provides that save as provided by S. 57 and Chap. IV of the Act, the provisions of the Act do not apply so as to affect transfers by operation of law, or by, or in execution of, a decree or order of a competent Court. A transfer "by operation of law" is not the same thing as a transfer "by or in execution of a decree or order." The former refers to transfers by succession, forfeiture, insolvency and escheat. The transfer in these cases is effected neither by the act of parties nor by the Court. A transfer by or in execution of a decree or order is an actual transfer made by the Court, but not being made by the act of parties, is excepted from the operation of the Act which is applicable to act of parties. See section 5

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26. † 1932 P C 158 (161) [A I R V 19] : 59 Ind App 236 : 7 Luck 257.
✠1935 Bom 41 (42) [A I R V 22] : 59 Bom 194 (DB).
1931 Pat 428 (432) [AIR V 18]: 10 Pat 630 (DB).
† 1919 Cal 529 (531) [AIR V 6] (DB).
† ('10) 37 Cal 815 (821) (DB). (Law of fixtures recognised by English Law does not find place in Common Law of India.)
('07) 30 Mad 61 (66) (DB).
('92) 15 Mad 230 (232) (DB).
('83) 6 Mad 327 (330) (DB).

27. ✠ 1919 P C 1 (3) [AIR V 6]: 42 Mad 589 : 46 Ind App 109. (The principle of S. 111 (g) of the Act applies as a rule of justice, equity and good conscience to a lease transaction before the T. P. Act.)
('99) 26 Cal 39 (45) : 25 Ind App 179 (PC).
('01) 24 Mad 47 (56) (FB).
('04) 28 Bom 361 (363) (DB). (Doctrine of lis pendens applied to execution sale.)
1927 Cal 561 (562) [AIR V 14] (DB). (In the case of a grant coming into existence prior to the T. P. Act no notice is necessary to eject a service tenant.)
('92) 15 Mad 290 (291) (DB).
†1928 All 381 (383) [AIR V 15] (DB).
('04) 27 Mad 211 (217) (DB). (Rule underlying S. 108 applied to lease executed before T. P. Act.)
('90) 3 C P L R 82 (84). (Principle of S. 101, applied.)
1914 Mad 706 (708) [AIR V 1] (DB). (Principle of S. 111 (g) applied but no act on the part of the landlord showing that he elects to take advantage of the forfeiture held necessary.)
1919 Mad 897 (899) [AIR V 6] (DB). (Leases granted before T. P. Act were also governed by principles in Ss. 105 and 111.)
1935 Mad 943 (944) [AIR V 22] (DB). (Principle of S. 111 (g) applied—Act by landlord showing intention to determine lease held necessary.)
('97) 24 Cal 440 (448).
('98) 2 Cal W N 292 (294) (SB).
('03) 26 Mad 157 (160) (DB). (Principle of S. 10 and S. 111 (g) applied to lease executed prior to T. P. Act.)
('05) 29 Bom 580 (603) (DB). (Provisions of S. 105, applied.)
('10) 37 Cal 815 (819) (DB). (The law of fixtures as embodied in the Act applied.)
1922 Pat 528 (529) [AIR V 9] : 1 Pat 363 (DB). (Provisions of S. 114, applied.)
1936 Pat 583 (584, 585) [AIR V 23] (DB). (Principles of Ss. 76 and 77, applied.)
[*See also* ('10) 10 Ind Cas 489 (490) (DB) (Cal). (Principle of S. 10, applied.)
('85) 7 All 516 (522) (DB) (Do).]
[But see ('10) 34 Mad 161 (163) (DB).]
1924 Mad 736 (741) [AIR V 11]. (Act codifies general principles of equity—English mortgage executed in 1874 but sought to be redeemed in 1921—Account to be taken in manner contained in S. 76 (h).)

28. 1944 Pat 77 (86) [AIR V 31] : 23 Pat 513 (DB). (The incident of a tenancy enacted under a lease executed long before 1929 cannot be governed by S. 111 of the Transfer of Property Act as amended in 1929. In the case of such a lease all that is necessary to constitute forfeiture is the disclaimer by the tenant and some act by the lessor indicating his intention to determine the lease.)
1933 Oudh 35 (36) [AIR V 20]: 8 Luck 190 (DB). (The amendment of S. 58 (d) of the Transfer of Property Act does not govern transactions entered into, and rights and liabilities created before the passing of the Amending Act.)

Where a party is adjudged an insolvent, his property vests in the Official Assignee or the Official Receiver, as the case may be, by *operation of law*. But a sale by the Official Receiver to a party is not one by operation of law. Nor can it be said to be one by or in execution of any decree or order of Court. It is a transfer by one party to another and is governed by the provisions of this Act.(1) Similarly, a transfer by the Official Liquidator of a company which has been wound up, is not one either by operation of law, or by or in execution of a decree or order of a Court.(2) In both these cases, the sale is sanctioned by the Court, but this does not make it a transfer in *execution* of any order of a Court. In some cases(3) a transfer by a court-sale has been referred to as a transfer by "operation of law." See also S. 54, Note 3.

A transfer under a compromise sanctioned by the Court is not a transfer "by a decree of Court" within this clause.(4)

It has been held that the expression "in execution" in this clause is not used in a narrow technical sense in which execution of a decree takes place under the provisions of Civil P. C., but means 'in obedience to,' 'in compliance with' or 'in accordance with.'(4a)

Illustrations of cases of transfers to which this Act does not apply by virtue of this clause:—

(1) Purchase of debt at an execution sale is not affected by S. 135.(5)

(2) Assignment by Court of a security bond executed in favour of a Court is a transfer by *order* of Court and is valid even if made without a registered instrument.(6)

(3) Purchase by legal practitioner at court sale of an actionable claim is not affected by S. 136.(7)

(4) A transferee of the lessor's interest at a court sale cannot claim apportionment of rent under S. 36.(8)

(5) A transfer in execution of a decree is not governed by S. 51 which occurs in Chapter II.(9)

See also the undermentioned cases.(10)

Section 2 — Note 6

1. 1942 Oudh 424 (424, 425) [AIR V 29] : 18 Luck 433 (DB). (1939 Oudh 55 [A I R V 26], Overruled.)

†1927 Mad 1 (2, 3) [AIR V 14] : 50 Mad 135 (FB). (Section 43 applied—Krishnan, J., dissenting.)

1935 Mad 55 (55) [AIR V 22] (DB).

2. 1917 Bom 151 (152) [AIR V 4] : 42 Bom 215 (DB).

3. 1964 Andh-Pra 514 (518) (Pr 24) [AIR V 51 C 134] (DB). (A reference to S. 2 (d) of the T. P. Act and the decided cases will show that a court-sale is, in fact, a transfer by operation of law.)

('93) 20 Cal 236 (239) (DB).

('81) 7 Cal 107 (118) : 8 Ind App 65 (PC).

4. 1916 Cal 644 (645) [AIR V 3] (DB). (The word "not" appears to have been omitted in the decision by a clerical mistake.)

4a. 1960 Punj 630 632) [AIR V 47 C 222] : ILR (1959) Punj 753 (DB). (Sale of minor's property under directions of Guardian Court—S. 54 does not apply.)

5. ('11) 9 Ind Cas 729 (730) (DB) (Mad).

('92) 15 Mad 382 (383) (DB).

6. 1943 Pat 218 (223) [AIR V 30] : 22 Pat 114 (DB)

1931 All 389 (390) [AIR V 18] : 53 All 786 (FB). (Hence neither S. 54 nor S. 58 applies.)

7. 1927 Cal 691 (692) [AIR V 14] (DB).
Also see Section 136, Note 5.

8. 1916 Mad 323 (325) [AIR V 3] : 39 Mad 283 (DB). (Neither S. 8 nor S. 36 applies to transfer of rights by execution sales.)

('06) 33 Cal 786 (788) (DB). (Transferee by operation of law.)

('94) 21 Cal 383 (386) (DB).

9. 1953 All 449 (451) [AIR V 40 C 208] (DB).

†1931 All 277 (283, 290) [AIR V 18] : 53 All 334 (FB).

Also see Section 51 Note 6.

10. 1966 Mad 26 (28) [AIR V 53 C 11] : ILR (1966) 1 Mad 182 (DB). (Banking Companies — Scheme of amalgamation — Scheme has the force of law — Suit for damages based on misfeasance and malfeasance instituted by transferor bank —Transfer of all assets, liabilities, rights and interest including rights of pending actions to transferee bank under the Scheme —

But though the Act does not in terms apply to transfers by operation of law or by or in execution of a decree or order of a Court, the principles underlying the provisions of the Act have in many cases been applied to such cases.(11)

The clause excepts S. 57 and Chapter IV of the Act from the operation of this clause. In other words, S. 57 and Chapter IV of the Act apply to transfers by opera-

Transfer of mere right to sue and limitations as to transferability and assignability—Applies to contractual transactions only — Transfer by operation of law (under the scheme), not affected.)

('64) ILR (1964) Cut 229 (233). (S. 105 has no application in terms to a compromise decree.)

1959 Mad 141 (142) (Pr 2) [AIR V 46 C 44] (DB). (Collusive and fraudulent decree and execution —Possession delivered to auction purchaser — S. 53 not applicable.)

1958 Pat 568 (570) (Pr 4) [AIR V 45 C 186]. (Expression "subsequent transferee" in S. 53 (2) does not include a purchaser at a court sale.)

1954 Bom 370 (378) [A I R V 41 C 107] : I L R (1954) Bom 615 (DB). (Section 2 (d) clearly excludes the application of the provisions of S. 105 to the relationship which has been created by a decree.)

1942 Mad 632 (633) [AIR V 29] : ILR (1943) Mad 47 (DB). (Sections 2 (d) and 5 prevent S. 53 operating in case of transfer under order or decree of Court.)

1939 Cal 23 (26) [AIR V 26] : ILR (1938) 2 Cal 312 (DB).

1931 Nag 116 (116) [AIR V 18] : 27 Nag L R 318. (Warranty of title under S. 55 (2) not implied in execution sales.)

1928 Mad 894 (895) [A I R V 15] : 51 Mad 688 (DB). (Covenant for title in S. 55 (2) not annexed to court sale.)

1924 Nag 222 (224) [AIR V 11]. (A general restriction against assignment placed on the powers of an owner does not apply to a sale under an execution.)

1924 Rang 365 (367) [AIR V 11]. (The provisions as to apportionment do not apply to dispute as to rent of land between auction purchaser and original landlord.)

1916 Mad 323 (325) [A I R V 3] : 39 Mad 283 (DB). (Section 8 does not apply to execution sales.)

('09) 33 Mad 102 (109) (DB). (Section 107 does not apply to leases created by decree or order.)

('08) 35 Cal 614 (617). (Transfer by sale certificates issued by the Collector as regards surplus lands acquired by Government under the Land Acquisition Act—Registration not necessary.)

('89) 2 C P L R 137 (138). (Registered conveyance is not necessary to give validity to a transfer by sale in execution of a decree.)

('81) 5 Bom 554 (560) (DB). (Decree for specific performance of a contract of sale of immovable property coupled with the payment of purchase money passes the ownership to the vendee and entitles him to the ownership of the property ; it is not necessary that any conveyance should be executed in favour of the decree-holder in order to pass ownership.)

11. ('64) ILR (1964) Cut 229 (233). (S. 105 can be invoked in the construction of a compromise decree as a matter of justice, equity and good conscience.)

1962 Orissa 147 (149) (Pr 8) [AIR V 49 C 56]. (Principle of S. 44 can be applied to involuntary sales as a rule of equity, justice and good conscience — 1948 Cal 61 [AIR V 35], Rel. on.)

1954 Mad 141 (142) [AIR V 46 C 44] (DB). (Collusive and fraudulent decree and execution — Possession delivered to auction purchaser — Held though S. 53 in terms did not apply suit for declaring decree to be null and void was maintainable — 1942 Mad 632 [AIR V 29] Rel. on.)

1954 Bom 370 (378) [A I R V 41 C 107] : I L R (1954) Bom 615 (DB). (S. 105 not applicable to relationship created by a decree — Provisions of the section would be invoked as matter of justice, equity and good conscience.)

1948 Cal 61 (62) [AIR V 35] (DB). (Principle of S. 44 applies to involuntary sales.)

1944 Mad 568 (568) [A I R V 31]. (Principle of S. 36 held applicable —1918 Mad 557 [AIR V 5] (FB) Foll.)

1942 Mad 632 (633, 634) [AIR V 29] : ILR (1943) Mad 47 (DB). (Principle of S. 53 applied.)

1935 Cal 39 (58) [AIR V 22] : 61 Cal 711 (DB). (Section 36 being rule of equity its principles applied.)

1934 Lah 460 (462) [A I R V 21] : 15 Lah 849 (DB). (Section 2 (d), T. P. Act, contains a highly technical provision which is not binding on the Courts in the Punjab and cannot be invoked to defeat a suit for declaration that transfer by debtor is to defeat or defraud creditor.)

1930 Rang 132 (133) [AIR V 17] : 7 Rang 734 (DB). (Doctrine of *lis pendens* applies to transfers under court sales independently of T. P. Act.)

1929 All 238 (239) [AIR V 16] : 51 All 595. (The principle of S. 36 and S. 53 has been applied to such transfers.)

(1901) 28 Cal 744 (747) (DB). (Principle of merger applies to transfer in execution of decree.)

(1900) 23 All 60 (62, 64) (DB). (Doctrine of lis pendens applies.)

† 1925 Oudh 496 (498) [A I R V 12] : 29 Oudh Cas 37 (DB). (Do.)

('03) 27 Bom 266 (270) (DB). (Do.)

('88) 15 Cal 94 (99) (DB). (Do.)

Also see Section 52, Note 31 and S. 53, Note 5.

[But see (1900) 3 Oudh Cas 170 (171). (Doctrine of lis pendens does not apply.)

('71) 15 Suth W R 308 (309) (DB). (The doctrine of lis pendens is not applicable to the case of purchaser at a sale in execution.)]

('12) 16 Ind Cas 686 (687) (DB) (Mad). (Principle of S. 132 applied to transferee of actionable claim under court-auction.)

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tion of law or by or in execution of a decree or order.(12) However it has been held in the undermentioned case(12a) that S. 59 does not apply to transfers within the meaning of S. 2 (d) although it is in Chapter IV, on the ground that the provisions dealing with procedure relating to such transfers were only intended to be applied. In the undermentioned case(13) under the Act as it stood before 1908 the question arose whether a court sale in execution of a mortgage decree under the old Ss. 88 and 89 of the Act could be set aside under the provisions of S. 310A of the Code of Civil Procedure (now O. 21, R. 89). It was held that Ss. 88 and 89 being in Chapter IV of the Act applied to court sales in execution of mortgage decrees, that if S. 310A of the Code was inconsistent with Ss. 88 and 89 of the Act, the former would not apply on the principle *generalia specialibus non derogant*, but that there was no inconsistency between the two Acts and consequently section 310A would apply to sales in execution of a mortgage decree.

7. Escheat.— On the death of a Hindu dying without heirs, his estate was held to escheat to the Crown as the Sovereign power in British India.(1) This is a transfer by operation of law and is not affected by any of the provisions of this Act save as provided by S. 57 and by Chapter IV of the Act.

8. Government grants. — See Note 4 on Preamble.

9. Muhammadan law. — Certain rules of Muhammadan law are inconsistent with Chapter II of this Act. In the case of such inconsistency, the section provides that the Muhammadan law will prevail over the rules in Chapter II. Thus, under the Muhammadan law a settlement may be made in perpetuity for the benefit of the descendants of the donor, provided there is an ultimate gift in favour of charity. Such a rule is inconsistent with Ss. 13 and 14 of this Act. In such a case, the latter sections will not affect the rule of Muhammadan law. See also the undermentioned cases(1) for other illustrations of rules of Muhammadan law being inconsistent with this Act. Where there is no rule of Muhammadan law inconsistent with the Act, the Act will apply.(2)

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12. 1965 S C 834 (838) [A I R V 52 C 130]. (Latter part of S. 100 includes auction sales notwithstanding the definition prescribed by S. 5 of the Act. 1943 All 115 [A I R V 30] (FB), Approved; 1940 Mad 701 [AIR V 27] and 1937 Cal 129 [AIR V 24], Overruled.)

1960 Punj 296 (297) (Prs 7, 9) [AIR V 47 C 102] (DB). (Reading Ss. 2 (d), 5 and 100, the expression 'transferred' in S. 100 is used in a wider sense and includes both a transfer by act of parties and a transfer by operation of law or by or in execution of a decree.)

1943 All 115 (121, 122) [AIR V 30] : ILR (1943) All 453 (FB). (1939 All 687 [AIR V 26] holding that S. 100 does not apply to auction sales, Overruled; 1940 All 456 [AIR V 27], Approved.)
† ('02) 25 Mad 244 (270) (FB).
[*See also* 1955 Trav-Co 130 (131, 132) [AIR V 42 C 47](DB). (T. P. Act not in force in Travancore—Decree in suit for possession and mesne profits held created mortgage on which plaintiff could file suit for redemption.)]

12a. 1960 Andh Pra 465 (467, 470) (Prs 14, 35) [A I R V 47 C 163] : ILR (1960) 1 Andh Pra 81 (DB).

13. ('02) 25 Mad 244 (255) (FB).

Section 2 — Note 7

1. (1860) 8 Moo Ind App 500 (523, 524) (PC). (But the escheat is subject to the trusts and charges previously affecting the estate.)

Section 2 — Note 9

1. ('13) 18 Ind Cas 185 (186) (DB) (Mad). (Interest in remainder cannot be conveyed under the Sunni School of Muhammadan law.)
('09) 36 Cal 431 (432). (Under the Muhammadan law, the creation of a life interest with a remainder over was void.)
('08) 11 Oudh Cas 48 (55) (DB). (Valid wakf — Section 14 does not apply.).
('05) 7 Bom L R 306 (307). (Rule inconsistent with S. 28, T. P. Act, upheld.)
('85) 9 Bom 158 (163). (Gift to unborn person invalid under Mahomedan Law though valid under T. P. Act.)

2. 1957 Ker L T 899 (905). (Mophlas governed by Marumakkathayam Law — Contingent gift providing for ulterior transfer to donee's brothers and sisters—S. 28 of the T. P. Act applies

Section 54 of the Act is not within Chapter II of the Act and therefore it overrides Muhammadan law.(2a) See also S. 54 Note 4.

The "Muhammadan law" means the Muhammadan law so far as the laws of India have directed it to be observed. In *Furman Khan* v. *Bhurut Chander*,(3) Peacock, C. J., said: "The Muhammadan law is not the law of British India. It is only the law so far as the laws of India have directed it to be observed. We are not bound by all the rules of the Muhammadan law which are in force under Muhammadan Governments."

10. Hindu law. — Under the section as it stood prior to 1929 the rules of Hindu law were also saved from the operation of the provisions in the second chapter of the Act. Where a rule of Hindu law was inconsistent with such provisions it prevailed over the provisions of this Act,(1) but where there was *no* rule in Hindu law inconsistent with such provisions, the Act was applicable.(2) Provisions of the Act *other* than those found in Chapter II of the Act were of course applicable even though such provisions were inconsistent with the rules of Hindu law.(3) One of the Hindu law rules which was inconsistent with the provisions of the second chapter of the Act was that a gift to an unborn person was void.(4) Another rule of Hindu law was that a transfer of property in favour of a *class* of persons with regard to *some* of whom the transfer failed on the ground that the transferee was an unborn person, did not fail as regards the whole class, but failed only as regards such unborn person.(5) This was inconsistent with section 15.

As regards the first mentioned rule, the Hindu Disposition of Property Act, XV of 1916, the Hindu Transfers and Bequests (City of Madras) Act, VIII of 1921, and the Madras Hindu Transfers and Bequests Act (Madras Act I of 1914) modified the Hindu law and enabled a transfer to be made in favour of unborn persons. As

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to the case and the gift is valid under that Section.)

† 1930 All 462 (465) [AIR V 17] : 52 All 710 (DB). (Provisions of S. 53 in no way offend any rule of Muhammadan law.)

1929 All 277 (278) [A I R V 16] (DB). (Section 53 does not infringe any rule of Muhammadan law, hence wakf executed as a device to defeat creditors is invalid.)

('87) 1887 All W N 84 (88) (DB).

Also see Section 53, Note 4.

2a. 1960 S C 1368 (1370) (Para 8) [AIR V 47 C 249] : (1961) 1 S C R 248. (1939 Nag 35 [AIR V 26] Overruled.)

3. ('70) 4 Beng L R 134 (169) (FB). (In this case Muhammadan law of pre-emption was not applied though the person claiming and the vendor were Muhammadans but purchaser was a Hindu.)

Section 2 — Note 10

1. 1925 Pat 625 (655) [AIR V 12] : 4 Pat 510 (SB). (Gift by Hindu to his wife does not under the Mithila School of Hindu law, carry with it the right to alienate—This was not affected by S. 8 of the Act.)

2. 1930 All 687 (690) [AIR V 17] : 52 All 716 (DB). (Section 6 (a) of the Act was applied to Hindus as there was no rule of Hindu law inconsistent with it:— That rule of law prohibits the transfer of a mere contingency.)

3. ('03) 26 Mad 662 (671) (DB). (Damdupat rule deemed abrogated by Rules in old Ss. 86, 87 of the Act.)

4. ('89) 16 Cal 71 (80) : 15 Ind App 149 (PC).

† ('72) Ind App Sup Vol 47 (70) (PC). (The rule in this case that bequests and transfers in favour of unborn persons are wholly void, was in conflict with Ss. 13, 14 and 20. The Hindu law on this subject had been modified by the Hindu Disposition of Property Act, XV of 1916, Madras Act I of 1914 and Act VIII of 1921 which validated such transfers. These Acts have been amended by Ss. 11, 12 and 13 of Act XXI of 1929 and the effect of the amendments is that subject to the limitation in Chap. II of this Act and in Ss. 113, 114, 115 and 116 of the Indian Succession Act, 1925, no transfer inter vivos or by will of property by a Hindu shall be invalid by reason only that any person for whose benefit it may have been made was not born at the date of such disposition. The Act is in consonance with these amendments and so the word 'Hindu' is omitted in this section.)

Also see S. 13, Note 5 and S. 122, Note 4.

5. ('84) 6 All 560 (574) : 11 Ind App 164 (PC).

regards the other rule of Hindu law mentioned above, S. 15 has been amended now so as to be in accord with the rule of Hindu law.

11. Buddhist law. — Before the amendment of 1929, the last clause saved *Buddhist law also* from the operation of Chapter II of the Act. It was held in the undermentioned case,(1) that as in the case of Muhammadan law, the Buddhist law means such law as was recognised and enforceable by the State and not all the rules laid down in the Vinaya.

Interpretation clause.

3. In this Act, unless there is something repugnant in the subject or context,—

"immoveable property" does not include standing timber, growing crops or grass :

"instrument" means a non-testamentary instrument :

[a]["attested," in relation to an instrument, means [b][and shall be deemed always to have meant] attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgment of his signature or mark, or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant ; but it shall not be necessary that more than one of such witnesses shall have been present at the same time, and no particular form of attestation shall be necessary :]

"registered" means registered in [c][[d][any part of the territories] to which this Act extends] under the law[e] for the time being in force regulating the registration of documents :

"attached to the earth" means—

(a) rooted in the earth, as in the case of trees and shrubs ;

(b) imbedded in the earth, as in the case of walls or buildings ; or

(c) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached :

[f]["actionable claim" means a claim to any debt, other than a debt secured by mortgage of immovable property or by hypothecation or pledge of moveable property, or to any beneficial interest in moveable property not in the possession, either actual or constructive, of the claimant, which the Civil Courts recognize as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional or contingent :]

[g]["a person is said to have notice" of a fact when he actually knows that fact, or when, but for wilful abstention from an inquiry or search which he ought to have made, or gross negligence, he would have known it.

Section 2 — Note 11

1. 1929 Rang 354 (358, 362) [AIR V 16] : 7 Rang 677 (FB).
See also S. 13 of Burma Laws Act, XIII of 1898.

Explanation I.—Where any transaction relating to immoveable property is required by law to be and has been effected by a registered instrument, any person acquiring such property or any part of, or share or interest in, such property shall be deemed to have notice of such instrument as from the date of registration or, [h][where the property is not all situated in one sub-district, or where the registered instrument has been registered under sub-section (2) of section 30 of the Indian Registration Act, 1908, from the earliest date on which any memorandum of such registered instrument has been filed by any Sub-Registrar within whose sub-district any part of the property which is being acquired, or of the property wherein a share or interest is being acquired, is situated] :

Provided that—

(*1*) the instrument has been registered and its registration completed in the manner prescribed by the Indian Registration Act, 1908, and the rules made thereunder,

(2) the instrument [i][or memorandum] has been duly entered or filed, as the case may be, in books kept under section 51 of that Act, and

(3) the particulars regarding the transaction to which the instrument relates have been correctly entered in the indexes kept under section 55 of that Act.

Explanation II. — Any person acquiring any immoveable property or any share or interest in any such property shall be deemed to have notice of the title, if any, of any person who is for the time being in actual possession thereof.

Explanation III. — A person shall be deemed to have had notice of any fact if his agent acquires notice thereof whilst acting on his behalf in the course of business to which that fact is material :

Provided that, if the agent fraudulently conceals the fact, the principal shall not be charged with notice thereof as against any person who was a party to or otherwise cognizant of the fraud.][*]

a. This definition was *inserted* by S. 2 of the Transfer of Property (Amendment) Act, 1926 (XXVII of 1926).

b. These words were *inserted* by S. 2 and Schedule I of the Repealing and Amending Act, 1927 (X of 1927).

c. *Substituted* for "a Part A State or a Part C State" by the Part B States (Laws) Act, 1951 (III of 1951), S. 3 and Sch. [1-4-1951].

d. *Substituted* for "any State" by 2 A. L. O., 1956. [1-11-1956].

e. See the Indian Registration Act, 1908 (XVI of 1908).

f. This paragraph was *inserted* by S. 2 of the Transfer of Property Act, 1900 (II of 1900).

g. This paragraph with the Explanations and provisos was *substituted* for the original paragraph by S. 4 of the Transfer of Property (Amendment) Act, 1929 (XX of 1929).

h. These words were *substituted* by S. 2 of the Transfer of Property (Amendment) Act, 1930 (V of 1930).

i. These words were *inserted* by S. 2 of the Transfer of Property (Amendment) Act, 1930 (V of 1930).

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* The old clause was :

"A person is said to have 'notice' of a fact when he actually knows the fact, or when, but for wilful abstention from an inquiry or search which he ought to have made, or gross negligence, he would have known it, or when information of the fact is given to or obtained by his agent under the circumstances mentioned in the Indian Contract Act, 1872, section 229."

STATE AMENDMENT

MYSORE

In its application to the State of Mysore except Bellary District but including the Hyderabad area, the terms "property" and "immoveable property" in the Transfer of Property Act, 1882, shall include "agricultural land." —Mys. Act XXXII of 1951, S. 2 [1-11-1951.] & Mys. Act X of 1965, S. 3 (1) [2-10-1965].

Synopsis

1. Interpretation clause.
2. Immovable property.
3. Standing timber.
4. Growing crops.
5. Grass.
6. Attached to the earth.
7. Permanently fastened to anything attached to the earth.
8. Rooted.
9. Imbedded in the earth.
10. Attached to what is so imbedded.
11. "Attested."
11a. Each of whom has seen the executant sign.
12. "Sign".
13. Acknowledgment of signature need not be express.
14. "In the presence of the executant".
15. Onus of proof of attestation.
16. Form of attestation.
17. Party as attestor.
18. Scribe as a witness.
19. Sub-Registrar and persons identifying before Sub-Registrar, as witnesses.
20. Registered.
21. Actionable claim.
22. Debts.
23. Debt ripened into a decree.
24. Beneficial interest in moveable property.
25. Civil Courts.
26. "Accruing."
27. Conditional and contingent debt.
28. Notice.
29. Wilful abstention from enquiry.
30. Gross negligence.
31. Attestation of deed, if notice of contents.
32. Notice of deed.
33. Question of wilful abstention or gross negligence, if one of law or fact.
34. Notice by registration of instrument.
35. "Any person acquiring such property," etc.
36. Date of registration.
37. Date of filing memorandum.
38. Proviso to Explanation I.
39. Possession as notice.
40. Possession is not notice to person who has contracted to purchase the property.
41. Notice to agent—Explanation III.
42. "Agent."
43. "Whilst acting on his behalf in the course of business to which that fact is material."
44. Effect of agency ceasing after notice.
45. Principal, an infant — Notice to agent.
46. Principal, the Government—Notice to agent.
47. Fraud of agent.
48. Lis pendens and decree as notice.
49. Fraudulent party cannot plead constructive notice.
50. Onus of proof as to notice.

1. Interpretation clause. — The object of an interpretation clause is to declare that certain words used in the Act shall have the meaning given to them by the Legislature.(1) The definition in the Act may include in the connotation of the word defined, certain things which the Legislature, under certain circumstances, intends to include, but which may not fall within the ordinary acceptation of the term.(2)

The meaning assigned to a word or expression by the interpretation clause is the meaning of the word wherever it occurs in the Act.(3) *unless there is anything repugnant in the subject or context.*(4)

Section 3 — Note 1

1. 1926 Sind 58 (61) [AIR V 13] : 25 Sind L R 345 (FB).

2. 1926 Sind 58 (61) [AIR V 13] : 25 Sind L R 345 (FB).
('11) 35 Bom 412 (417) (DB).

3. 1926 Sind 58 (61) [AIR V 13] : 25 Sind L R 345 (FB).
('85) 12 Cal 430 (433) (DB). ('Tenure'—Bengal Act 10 of 1871.)

4. ('09) 2 Ind Cas 632 (632) (DB) (All).

Where a definition is intended to be exhaustive of the signification of the word, the Legislature as a rule, uses the word "means" or the words "means and includes".(5) But where the definition is not intended to be exhaustive of the things denoted by it but is merely enumerative the word "includes" is used.(6) In other words, the word "includes" is a word of extension and is generally used to *enlarge* the meaning of the word.(7) By including certain things in the definition, others are not thereby excluded.(8):

Section 3 of the General Clauses Act, 1897, gives a list of definitions to be applied in all Central Acts and Regulations made after the commencement of that Act unless there is anything repugnant in the subject or context. The Transfer of Property Act is not one made *after* the commencement of the said Act and consequently the definitions in that Act cannot, by virtue of S. 3 itself, apply to this Act. But S. 4 of that Act provides that certain words referred to in sub-s. (1) thereof and defined by S. 3 shall apply to all Central Acts made after 3rd January 1868, and certain other words referred to in sub-s. (2) thereof and defined in S. 3 shall apply to all Central Acts and Regulations made after 14th January 1887, unless there is anything repugnant in the subject or context. The definitions of the expressions referred to in S. 4, therefore, will apply to this Act unless there is anything repugnant thereto in the subject or context. Thus, the expression "immovable property" is defined by S. 3 (26) and referred to in S. 4 of the General Clauses Act. It has also been defined by this Act, but the definition in this Act excludes standing timber, growing crops and grass.(9) The definition given by the General Clauses Act, 1897, would, therefore, apply to the expression used in this Act except as modified by the definition in this section.(10) As a result of the combined operation of these provisions immovable property for the purpose of this Act becomes *almost* the same as under the Registration Act.(11)

2. Immovable property.—"Property" can be defined to be "the unrestricted and exclusive right to a thing; the right to dispose of a substance of a thing in every legal way; to use and exclude every one else from interfering with it".(1a) The Legislature of this country has adopted the division of property into movable and immovable, and not the technical division into *real* and *personal* property recognised by the English law. In *Futtehsangji Jaswantsangji* v. *Dessai Kullianraiji*,(1) which

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5. ('01) 1901 All W N 10 (10) (DB).
('78) 2 Mad 5 (7) (DB).

6. ('78) 2 Mad 5 (7) (DB).

7. ('06) 30 Bom 558 (566) : 4 Cri L Jour 23 (31) (DB).

8. ('96) 22 Bom 235 (237, 238) (DB). (Magistrate includes Magistrate in Native States.)
('78) 4 Cal 483 (493) (FB). (Court includes Judge and Jury.)

9. † 1931 All 392 (393) [AIR V 18] (FB).
('83) 5 All 564 (565) (FB).
1926 All 164 (164) [AIR V 13].
('86) 8 All 467 (473) (DB).

10. 1958 S C 532 (536) [AIR V 45 C 79] : 1959 S C R 265.
('88) 13 Bom 87 (89) (SB)
1942 Pat 120 (125) [AIR V 29] (DB).
1940 Rang 102 (103) [AIR V 27] : 1940 Rang L R 7. (Rent and profit of land is immovable property.)
1929 All 161 (163) [AIR V 16] : 51 All 494 (DB). (Simple mortgagee's interest is immovable property.)
('12) 15 Ind Cas 32 (32) (All).
('95) 5 Mad L Jour 27 (28).

11. 1960 Cal 331 (335) [AIR V 47 C 87]. (Such incidents as "hereditary allowances, rights to ways, light, ferries, fisheries" which are expressly mentioned by the Registration Act but not in this Act can also be probably brought under the term 'immovable property' by virtue of S. 8 of this Act.)

Section 3 — Note 2

1a. 1957 Pat 515 (528) [AIR V 44 C 159] : 36 Pat 557 (DB). (Passage benefit provided to a member of the I. C. S. is not property.)

1. ('74) 1 Ind App 34 (52) : 13 Beng L R 254 (PC).

was a case arising under the Limitation Act of 1859 their Lordships of the Privy Council observed as follows :

> "Their Lordships cannot think that the former term (that is, immovable property) is identical with 'lands or houses'. They conceive that the word 'immovable' was used as something less technical than 'real', and that the term 'immovable property' comprehends certainly all that would be real property according to English law, and possibly more."

Thus, a leasehold interest in land would be personal property in England (2) but would be immovable property in this country.(3)

[The definition of the expression "immovable property" in this section is a negative definition and is neither comprehensive nor exhaustive.(4) It merely excludes standing timber, growing crops and grass. In *Sukry Kurdeppa* v. *Goonda Kull Nagireddi*,(5) Mr. Justice Holloway said :

> "Moveability may be defined to be a capacity in a thing of suffering alteration of the relation of place. Immovability, incapacity for such alteration. If, however, a thing cannot change its place without injury to the quality by virtue of which it is, what it is, it is immovable."

This definition has reference only to *physical* objects, and does not furnish an exhaustive test of what is, and what is not, immovable property. Section 3, sub-section (26) of the General Clauses Act, 1897, which applies to this Act, except as modified by the definition in this section, defines immovable property as including "land, benefits to arise out of land and things attached to the earth, or permanently fastened to anything attached to the earth." Even this definition is not exhaustive of all that would constitute immovable property. An *interest* in immovable property(6) would be immovable property within the meaning of the term. Thus, the right of a mortgagee(7) or of a

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2. (1882) 21 L J Ch 843 (844) : 91 R R 339, Turner v. Turner.
(1758) 28 E R 642 (642), Whitaker v. Ambler.
(1729) 24 E R 955 (956), Davis v. Gibbs.

3. 1960 Cal 609 (617) [AIR V 47 C 167] (DB).
1951 Bom 127 (129) [AIR V 38 C 25] : ILR (1951) Bom 692 (DB).
('04) 30 Bom 250 (263). (Lease for building purposes.)

4. 1953 Hyd 14 (16) [AIR V 40 C 9] : ILR (1952) Hyd 495 (DB).
1933 All 50 (51) [AIR V 20] : 54 All 437. (Fruit bearing trees mortgaged — Immovable property.)

5. ('71) 6 Mad H C R 71 (73) (DB). (Trees so long attached to land immovable; on severance moveable.)

6. 1965 Ker 147 (148) [AIR V 52 C 56].
1958 Andh Pra 713 (715) [AIR V 45 C 208] : ILR (1957) Andh Pra 429. (Agreement between parties to grow trees on land of one of the parties and to share them equally or to share sale proceeds of the tress when cut and sold creates an interest in land.)
1951 Bom 127 (129) [AIR V 38 C 25] : ILR (1951) Bom 692 (DB). (Benefit to arise out of land is an interest in immovable property and therefore immovable property.)
('50) 1950 Bur L R (H C) 80 (86, 87).
1934 Rang 250 (258, 259) [AIR V 21] : 12 Rang 370 (FB). (Interest of mortgagee in mortgaged property.)
1931 Cal 223 (227) [AIR V 18] : 58 Cal 136 (DB).
('89) 13 Mad 54 (55) (DB). (The term 'immovable property' includes tangible immovable property as well as incorporeal rights therein.)
See also 1959 S C 735 (740, 741) [AIR V 46 C 100] : 1959 Supp (2) S C R 339. (Agreement conferring rights not merely to tendu leaves in forest but also to the soil for making bricks and for erecting buildings on and occupying land for a number of years cannot be called a contract of sale of goods *simpliciter*.)
1936 Pat 80 (82) [AIR V 23] (DB). (For the purpose of the exercise of a power of disposal by Hindu widow, mortgage debt is movable property.)]

For the purposes of determining the karnavan's power of disposal over the property of the tarwad a mortgage debt is movable property :
1931 Mad 726 (728) [AIR V 18].

Under the Civil Procedure Code, for the purposes of execution, a simple mortgage debt is treated as movable property. A usufructuary mortgage debt is treated for that purpose as immovable Property — *See* AIR Commentaries on the Civil Procedure Code, 7th 1963, Edn., O. 21, R. 46, N. 4.

7. 1952 Bom 454 (457) [AIR V 39] : ILR (1952) Bom 1090 (DB). (Usufructuary mortgagee's interest.)
('50) 1950 Bur L R (H C) 80 (87). (A mortgage is no less a transfer of immovable property than is a sale.)

lessee(8) in immovable property or a vested remainder(9) in immovable property is itself immovable property.

Where the question concerns the rights of Hindus, the words "immovable property" must be taken to include whatever the Hindu law classes as immovable property, although not such in the ordinary acceptation of the word.(10) Thus, the right to the assessment of *dhara* is a *nibandha* in Hindu law and is therefore immovable property.(11) See also the undermentioned case.(12)

In accordance with the principles stated above, the following have been held to be immovable property :

(1) A *jalkar* right.(13)

—1938 All 577 (579, 580) [AIR V 25] : I L R (1938) All 904 (SB). (In the case of a usufructuary mortgage, the mortgagee holds possession of the land and receives the usufruct of the land and clearly that usufruct would come under the words 'benefit to arise out of land.' In the case of a simple mortgage the matter is different because there is the right of the mortgagee to recover his debt which is a right to sue and there is no doubt a transfer of an interest in immovable property for the security of the debt.)

1936 Rang 152 (155) [AIR V 23] : 14 Rang 494 (DB). (Overruled on another point in 1938 Rang 306 [AIR V 25] (FB).)

1935 Rang 483 (483) [AIR V 22]. (Transfer of sub-mortgage is transfer of immovable property.)

1934 Lah 143 (145) [AIR V 21]. (Sale of mortgagee right — Suit for pre-emption is maintainable.)

1933 Lah 210 (211) [AIR V 20].

1931 Cal 223 (225) [AIR V 18] : 58 Cal 136 (DB).

†1929 All 161 (163, 164) [AIR V 16] : 51 All 494 (DB).

1927 Lah 373 (375) [AIR V 14] (DB). (A mortgage with possession is an interest in land.)

1922 Mad 344 (345) [A I R V 9] : 44 Mad 965 (DB). (Mortgage of immovable property is itself immovable property whatever form of mortgage may be.)

1921 Lah 137 (137) [AIR V 8] : 7 Lah 273 (DB).

†1921 Mad 137 (138) [A I R V 8] : 44 Mad 196. (Gifts of mortgages are gifts of immovable property.)

1918 Cal 411 (413) [AIR V 5] (DB). (Mortgage-debt.)

('13) 18 Ind Cas 318 (318) (Lah). (Mortgage debt charged on immovable property is itself immovable property.)

('04) 28 Bom 181 (186) (DB). (Bombay Minors Act (XX of 1864) — Minor's right as mortgagee is immovable property.)

('99) 1899 Pun Re No. 58, p. 263 (264). (Right of mortgagee sub-mortgaged is right in immovable property.)

[*See also* 1921 Mad 681 (681) [A I R V 8] (DB). (Mortgage debt can be validly sold only in accordance with S. 54, 1921 Mad 137 [AIR V 8], Followed.)]

[But see 1922 Bom 387 (389) [A I R V 9] (DB). (Usufructuary mortgage in favour of husband — Mortgage right vesting in wife after death of husband represents only movable property — Mere fact of her possession as mortgagee would not make those rights immovable property in law.)]

8. 1965 All 496 (498) [AIR V 52 C 138] : I L R (1965) 1 All 221. (Tenancy right in a building.)

('64) 1964 B L J R 875 (878).

1960 Cal 609 (617) [AIR V 47 C 167) (DB).

1951 All 608 (609) [AIR V 38 C 157]. (Lease of crop of mango trees for a period of five years entitling lessee to the grass — Lease creates interest in land and is therefore of immovable property.)

1948 All 396 (399) [AIR V 35 C 152] : ILR (1948) All 562 (DB). (Transfer of trees for a period during which transferee is entitled to appropriate produce is a lease of immovable property.)

See also cases cited in foot-notes 2 and 3.

[See however 1938 Nag 377 (381) [AIR V 25] : ILR (1939) Nag 432 (DB). (Note. — This case seems to suggest that a right granted under a "lease," to enjoy immovable property, is not immovable property.)]

9. 1939 Mad 802 (803) [AIR V 26] (DB).

10. ('74) 1 Ind App 34 (50) : 13 Beng L R 254 (PC). (Toda Giras Haq is an interest in immovable property.)

11. ('10) 34 Bom 287 (290) (DB).

12. ('11) 34 Bom 349 (352) (DB). (Tastik or cash allowance payable to one temple from the property of another is nibandha or immovable property.)

13 1956 S C 17 (19) [AIR V 43 C 6] : (1955) 2 S C R 919 : I L R (1956) Cut 425. (Right to catch and carry away fish is profit a prendre which is regarded as a benefit which arises out of land and as such is immovable property.)

1965 Ker 147 (148) [A I R V 52 C 56]. (Right in favour of *A* as owner of land *X* to fish prawns in the portion of the channel running through the lands of *B* and *C*.)

1958 Cal 114 (117) [AIR V 45 C 19].

('57) ILR (1957) Cut 621 (624) (DB). (Exclusive right of fishery without any interest in the land or water.)

('92) 19 Cal 544 (547) (FB). (But not for the purpose of S. 9, Specific Relief Act.)

(2) The equity of redemption.(14)
(3) A right of ferry.(15)
(4) Rights and interests of a grove-holder in a grove.(16)
(5) A right to slag and earth before separation from the soil.(17)
(6) A right of easement.(18)
(7) Advertisement hoardings fixed in a substantial manner in the land.(19)
(8) A hereditary office under Hindu law.(20)
(9) A pension or other periodical payment or allowance granted in permanence.(21)
(10) A right to vatan.(22)
(11) A right to *jagir* income.(23)

1927 Nag 147 (149) [AIR V 14] : 23 Nag L R 16. (Grant of lease for fishing creates interest in immovable property.)

1921 Bom 93 (100) [AIR V 8]. (A several fishery is an incorporeal hereditament and would normally be considered real or immovable property.)

† 1917 Nag 37 (38, 39) [A I R V 4] : 14 Nag L R 35. (Right of fishing is an interest in immovable property.)

† ('97) 24 Cal 449 (453, 454) (DB). (Suit for rent of fishery is one for immovable property.)

('93) 20 Cal 446 (448) (DB). (It is a benefit arising out of land covered by water.)

('87) 12 Bom 221 (224) (DB).

('76) 2 Bom 19 (46, 47) (DB).

[*See also* ('84) 10 Cal 50 (55) (DB). (There is no such broad proposition of law as that settlement of jalkar implies no right in the soil.)]

14. ('06) 3 Nag L R 72 (74).

('97) 21 Bom 226 (228) (DB).

† ('94) 22 Cal 33 (41, 42) (DB). (Second mortgage is also mortgage of specific immovable property.)

('93) 18 Bom 739 (745) (DB).

(1737) 26 E R 377 (379) : 1 Atk 603, Casborne v. Scarfe.

[*See also* 1919 Cal 107 (107) [A I R V 6] (DB). (Purchase of equity of redemption can be effected only by registered instrument.)

1921 Oudh 124 (125) [A I R V 8] : 24 Oudh Cas 155. (Sale of equity of redemption under S. 54 requires registration.)

1917 Bom 287 (288) [AIR V 4] (DB). (Do.)

1923 Bom 473 (476) [A I R V 10] : 47 Bom 621 (DB). (Document in suit held did not amount to actual transfer of equity of redemption and therefore was admissible in evidence without registration.)]

15. ('90) 13 Mad 54 (55) (DB).

16. 1914 All 162 (163) [AIR V 1] (DB).

[*See also* ('89) 12 Mad 203 (210) (FB). (A holder of a tree patta is an owner of occupier of land within the meaning of S. 6, Forest Act, Madras.)]

17. (1909) 1 K B 357 (364, 365) : 78 L J K B 187 (190, 191), Morgan v. Russell & Sons.

† 1932 Mad 734 (735) [A I R V 19] : 56 Mad 169 (DB).

18 1965 Ker 147 (148) [AIR V 52 C 56].

1917 Cal 681 (685) [AIR V 4] (DB). (Section 3, T. P. Act, does not expressly exclude rights of easement.)

('75) 24 Suth W R 300 (300) (DB).

19. (1909) 2 K B 344 (348) : 78 L J K B 702 (706), Provincial Bill Posting Co. v. Low Moor Iron Co. Ltd.

20. 1953 S C 125 (130) [AIR V 40 C 34] : 1953 S C R 503. (Shebaitship.)

† 1932 Cal 791 (795, 813) [AIR V 19] : 60 Cal 452 (FB). (Hereditary office of shebait.)

('82) 6 Bom 512 (514, 515) (FB). (Balute hak of watandar Mahars.)

† ('72) 9 Bom C R 99 (113) (FB). (Fees payable to the imcumbent of hereditary office of a village Joshi.)

1921 Bom 209 (210) [AIR V 8] : 45 Bom 234 (DB). (Hereditary priesthood vested in particular family.)

('69) 6 Bom H C R 137 (139). (Office of a priest in a temple.)

[*See* 1915 Mad 597 (599) [AIR V 2] (DB). (Purohitam though an office is not hereditary office and is not immovable property.)]

21. ('82) 6 Bom 546 (559) (FB). (Pension or other periodical payment or allowance granted in permanence by sanad.)

† ('05) 33 Bom 373 (375). (Tipnis pansare right —The right to levy a certain toll on all imports into and exports from a State is under Hindu law 'Nibandha' and hence immovable.)

('99) 23 Bom 22 (26, 30) (DB). (Varshasan allowance charged on property.)

[But see ('97) 21 Bom 387 (390) (DB). (Payment for expenses of a temple to be continued in perpetuity — Not immovable property within the meaning of Art. 4 or 13 of Sch. II of the Small Cause Courts Act.)]

22. ('85) 1885 Bom P J 130 (DB). (But money paid in respect of such right is personal property.)

23. (1900) 1900 Pun Re No. 2, p. 5 (7) (DB). (Jagir income is immovable property so long as it remains unrealised.)

('94) 1894 Pun Re No. 4, p. 6 (7) (DB).

(12) A right to use water of a perennial stream of water.(24)
(13) A right to take produce of inam land free from assessment.(25)
(14) A *hat*.(26)
(15) A *toda giras haq*.(27)
(16) A right to collect rents and profits of land(28) but the right of a person to arrears of rent of the land sold to him cannot be said to be a benefit to arise out of land and cannot constitute immovable property.(29) A contrary view has, however, been taken in the undermentioned case.(30)
(17) A right to possession and management of *saranjam* land.(31)
(18) A right to sever and collect leaves of the *tendu* tree.(32)
(19) A right to collect lac from the *parsa* or *palas* tree.(33)
(20) A right to tap cocoanut trees and obtain toddy.(33a)
(21) Coal land.(33b)

The following have been held not to constitute immovable property :
(1) A right to *sayer* compensation.(34)
(2) A copyright.(35)
(3) A royalty payable to the owner of the soil.(36)
(4) A right to turn of worship.(37)

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24. ('98) 1898 Pun Re No. 11, p. 18 (19).

25. ('74) 11 Bom H C R 1 (2) (DB).

26. ('58) 37 Pat 302 (305) (DB).
1931 Oudh 110 (112) [AIR V 18] : 5 Luck 504 (DB). (Right to hold market on land.)
('95) 22 Cal 752 (755) (DB). (Suit for rent of a hat.)

27. ('73) 21 Suth W R 178 (181) (PC). (Interest of hakdar is "interest in immovable property.") [*See also* (1859) 8 Moo Ind App 1 (39, 40) (PC).]

28. 1936 P C 230 (233, 234) [A I R V 23] : 14 Rang 400 : 63 I A 340 (PC).
1952 Orissa 116 (116, 117) [AIR V 39] (DB). (Lease of a right to collect rents such as Mustajir lease in Orissa is a lease of immovable property.)
1942 Pat 120 (125) [AIR V 29] (DB).
1940 Rang 102 (103) [AIR V 27].
1938 Mad 746 (747) [AIR V 25]. (Right to collect the fees of slaughter houses and fish bazaars amounts to a profit arising out of land and falls within the definition of immovable property as given in S. 3 (25), General Clauses Act.)
1938 Pat 16 (17) [AIR V 25] (DB).
1929 Bom 467 (468) [AIR V 16] : 53 Bom 773 (DB).
('12) 15 Ind Cas 32 (32) (All).
('10) 34 Mad 64 (67) (DB). ('Future rent' is "benefit to arise out of land" — Hence immovable property.)
('99) 23 Bom 1 (11).
('95) 19 Bom 663 (667) (DB). (Assignment of "vahivat of assessment.")
('95) 5 Mad L Jour 95 (99).

29. ('10) 34 Mad 64 (67) (DB).

30. 1936 Nag 217 (217, 218) [AIR V 23].
Also see S. 132 Note 2.

31. ('91) 16 Bom 247 (256) (DB). (Case decided under Limitation Act.)

32. 1938 Nag 377 (382) [AIR V 25] : ILR (1939) Nag 432 (DB). (Such a right when conferred on another is a benefit to arise out of land — Tendu leaves are used for bidi purposes. 1937 Nag 116 [AIR V 24], Dissented from.)
[*See also* 1959 S C 735 (740, 741) [A I R V 46 C 100] : (1959) Supp (2) S C R 339. (Agreement conferring rights not merely to tendu leaves in forest but also to the soil for making bricks and for erecting buildings for business cannot be said to be sale of goods *simpliciter*.)]

33. ('09) 5 Nag L R 21 (23).
[*See also* 1955 Pat 402 (404) [A I R V 42 C 103] (DB).
1952 Pat 201 (203) [AIR V 39] (DB). (Right to rear lac bearing trees and to appropriate the lac is no immovable property but is only an interest in immovable property.)]

33a. 1949 Mad 148 (150) [AIR V 36 C 63] (DB). (The right is a benefit arising out of land.)

33b. 1957 Cal 128 (133) [AIR V 44 C 40] : ILR (1957) 2 Cal 587 (DB).

34. ('92) 19 Cal 8 (12) (DB). (Right does not partake of the nature of "malikana.")

35. 1939 All 305 (307) [AIR V 26] : ILR (1939) All 275 (DB).

36. 1922 Pat 36 (37) [AIR V 9] (DB).

37. † 1927 Pat 7 (8) [A I R V 14] : 6 Pat 245 (DB).
1919 Cal 671 (672) [AIR V 6] : 46 Cal 455 (DB).
('11) 39 Cal 227 (230) (DB).
[*See also* 1920 Cal 448 (453) [AIR V 7] : 47 Cal 990 (DB). (The palas (turns of worship) seem to have been treated as not connected with the immovable property.)]

(5) A right to *parasaipan* in the Central Provinces which is similar to *pala* or a turn of worship.(38)

(6) A right to obtain the specific performance of an agreement to sell or to lease immovable property.(39)

(7) The temporary right of a tenant-at-will to reap the produce of the land.(40) See also the undermentioned case.(40a)

(8) A right to recover future maintenance allowance even though charged on immovable property.(41-42)

(9) A right to recover mesne profits from a person in wrongful possession of property.(43)

(10) Brit jajmani books.(44)

(11) Sludge in sedimentation tanks.(44a)

(12) Interest of a partner in the partnership.(44b)

Before the Transfer of Property (Amendment) Supplementary Act, 1929, amended S. 17 (1) of the Registration Act there was a conflict of opinion on the question whether a decree for sale on a mortgage debt was immovable property. The High Court of Allahabad (45) and the High Court of Calcutta,(46) held that such a decree was not an immovable property, and its transfer did not operate to create an interest in immovable property. The Bombay High Court(47) however took a contrary view. The Amendment Act by the addition of clause (e) to S. 17 (1) of the Registration Act settled this controversy in favour of the Bombay view with the result, that, under the law as it is now, a mortgage decree is clearly an immovable property.(48)

3. Standing timber.—Trees rooted in the earth are things "attached to the earth" and are, therefore, immovable property as defined by the General Clauses Act, 1897.(1) Where, however, such trees constitute *standing timber*, they are excepted, by

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38. 1929 Nag 81 (81) [AIR V 16].

39. 1929 Rang 184 (185) [A I R V 16] : 7 Rang 144 (DB). (Right to get lease executed.)

40. 1920 Lah 310 (311) [AIR V 7] : 1 Lah 567 (DB).

40a. 1954 Mad 949 (953) [A I R V 41 C 331] : I L R (1955) Mad 159. ("Interest in land" in Madras General Sales Tax Act—Meaning of — Contract merely conferring right to collect arecanuts with the accessory right to enter land — No interest in land is created thereby – This expression in the Act cannot be construed on the basis of the definition of immovable and movable property in the T. P. Act or the Registration Act.)

41-42. 1929 All 281 (285) [AIR V 16] : 51 All 612 (DB).
[See however ('72) 9 Bom H C R 222 (225, 228) (DB). (The test to see whether an allowance payable periodically is or is not immovable property is "Is or is not the allowance a charge on land or other immovable property.")]

43. (1864) 1 Suth W R 65 (66).

44. 1946 All 476 (480, 481) [A I R V 33 C 124] (DB). (Brit jajmani books are not immovable property—Brit jajmani payable to Panda of Muttra is not nibandha and is not immovable property.)

44a. 1960 Cal 123 (130, 131) [AIR V 47 C 32]: ILR (1960) 2 Cal 754.

44b. 1950 Nag 89 (90) [AIR V 37 C 29] : I L R (1950) Nag 355.

45. ('13) 35 All 524 (526) (DB).
('91) 13 All 89 (91) (DB).

46. ('08) 12 Cal W N 625 (627) (DB).
('02) 6 Cal W N 5 (6) (DB).
('95) 23 Cal 450 (453) (DB).

47. ('76) 1 Bom 267 (268) (DB).

48. 1949 Cal 549 (553) [AIR V 36 C 147] : ILR (1945) 2 Cal 526.
1940 Mad 140 (141) [AIR V 27] : ILR (1940) Mad 306 (DB).

Section 3 — Note 3

1. 1958 S C 532 (536) [A I R V 45 C 79] : 1959 S C R 265.
1938 Nag 377 (381) [AIR V 25] : ILR (1939) Nag 432 (DB).
† 1929 Rang 200 (203) [AIR V 16] : 7 Rang 703 (DB). (Palm trees.)
1921 Pat 482 (482) [AIR V 8].
('09) 5 Nag L R 21 (23). (Palas or Parsa tree is not standing timber but is immovable property and transfer of a right to collect lac from these

this section, from the connotation of the term "immovable property".(2) The question, therefore, arises as to the meaning of the word *timber*. In England the word "timber" is used to denote trees, the wood of which is intended to be used in the building and repairing of houses according to the custom of the locality in which the trees are situated,(3) provided they have attained a certain age and size.(4) The same meaning must, it is conceived, be given to the word as used in this Act also,(5) with perhaps the addition, that trees, the wood of which is intended to be used for *industrial* purposes also should be regarded as timber.(6) A tree which is intended to be cut down and used as *firewood* cannot be ranked as timber.(7)

(The test to find out whether particular trees constitute "standing timber", will thus depend upon the intention of the parties. If the intention is to enjoy the trees or the fruits thereof without cutting them down, they are not standing timber but would be immovable property.(8) But if the intention is to cut down the trees sooner or later and utilise them for construction or other industrial purposes they are standing timber.(9) Thus, a fruit bearing tree such as a mango tree may or may not be timber according to the circumstances of the case.(10) If the intention is to use it only for the

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trees is a transfer of an interest in immovable property.)
(190-) 7 Cal L Jour 152 (166) (DB).
('02) 5 Oudh Cas 228 (230).
('9-) 11 C P L R 89 (90). (Plantain trees.)
† ('95) 19 Bom 207 (208) (DB).
('84) 1884 Pun Re. No. 112, p. 320 (320).
('67) 2 Agra 300 (301) (DB).
(1827) 148 E R 724 (725) : 1 Y & J 396, Sorell v. Boxall.
[*See* ('67) 11 Moo Ind App 295 (313) (PC). (Case before the General Clauses Act was passed.)]
[*See also* 1952 All 310 (312) [A I R V 39]. (For purposes of Limitation Act (1908) immovable property would include trees attached to land.)
('95) 22 Cal 742 (750) (DB). (Trees are part of land on which they stand.)]

2. 1958 S C 532 (536) [AIR V 45 C 79] : 1959 S C R 265.
1952 Mad 59 (59) [AIR V 39].
† 1938 All 115 (116) [AIR V 25] (DB). (Grove of Shisham and Nim trees.):
('11) 9 Ind Cas 478 (478) (All).
[*See also* 1963 All 214 (216) [A I R V 50 C 63] : ILR (1963) 1 All 734 (FB). (What is meant by 'standing timber' is a standing timber tree.)
('05) 28 All 277 (278). (Case under S. 3, Registration Act.)
('8-) 1886 Bom P J 130 (DB). (Case under Registration Act.)
('15) 29 Ind Cas 16 (17) (DB) (All). (Mango-trees — Case under U. P. General Clauses Act.)]

3. 1958 S C 532 (537) [A I R V 45 C 79] : 1959 S C R 265.:
[*See* 1916 Oudh 211 (214) [AIR V 3].]

4. *See* Halsbury's Laws of England, Vol 1, Page 296.

5. *See* (1900) 24 Bom 31 (33) (DB). (Case under Registration Act.)
1926 All 350 (351) [AIR V 13] (DB). (Do.)

6. 1946 Oudh 106 (107, 108) [A I R V 33] : 21 Luck 48. (Having regard to uses to which it is put in this country, babul tree would come within 'timber.')
1928 Mad 392 (393) [AIR V 15]. (Karuwela and velvela trees are timber.)
1926 Oudh 136 (138) [AIR V 13].
† 1916 Oudh 211 (214) [AIR V 3] (DB).

7. See Shepherd and Brown, Transfer of Property Act, 7th Edn, Page 15.

8. 1956 All 680 (683) [AIR V 43 C 223] (DB).
1948 All 396 (399) [AIR V 35 C 152] : I L R (1948) All 562 (DB). (Transfer of trees for a period—Transferee entitled to appropriate produce—Transfer is lease of immovable property—Timber trees are movable property only if they are transferred with the object of being cut and removed within a reasonable time.)
1936 Pat 66 (67) [AIR V 23]. (Palm and date trees.)
† 1933 All 50 (52, 53) [AIR V 20] : 54 All 437.
1928 Pat 652 (653) [AIR V 15] : 7 Pat 646 (DB). (Mango trees. Case under Registration Act.)
1927 Pat 1 (2) [A I R V 14] : 5 Pat 765 (DB). (Mango trees. Affirming 1926 Pat 125 [A I R V 13] on this point.)

9. 1958 S C 532 (537) [A I R V 45 C 79] : 1959 SCR 265.
1956 All 680 (683) [AIR V 43 C 223] (DB).
1948 All 396 (399) [AIR V 35 C 152] : ILR (1948) All 562 (DB).
('96) 20 Mad 58 (64) (FB).
1933 All 50 (53) [AIR V 20] : 54 All 437.
1929 Oudh 93 (94) [AIR V 16] (DB).
1926 All 350 (351) [AIR V 13] (DB).
1926 Oudh 136 (138) [AIR V 13].
1916 Oudh 211 (214) [AIR V 3].
1915 Oudh 75 (76) [AIR V 2] : 18 Oudh Cas 122.
(1908) 7 Cal L Jour 152 (166) (DB).
('06) 29 Mad 353 (356, 357) (DB).

10. (1912) 10 All L Jour 516 (517). (A fruit tree does not necessarily fall under definition

purpose of enjoying its fruits it would be immovable property.(11) But if the intention is to cut it down sooner or later for the purpose of utilising the wood for building or other industrial purposes it would be timber.(12) In the undermentioned cases,(13) the trees in a grove were not considered standing timber. In the undermentioned Allahabad case(13-a) it was held by a Full Bench of three Judges, all of them agreeing on the point, that Sisham and Nim trees fell within the meaning of the term "timber trees". But on the question of the proper test to be applied for determining whether certain trees are timber trees or not there was a difference of opinion between Desai C. J. and Ramabhadran J. on the one hand and Beg J. on the other. The former expressed the opinion that the question "whether a tree is a timber tree or not depends upon its nature and the use to which it is generally put and not upon whether there is a present intention of cutting it down sooner or later." But Beg J. disagreed with this view and held that the question should be determined only with reference to the intention of the parties as determined from the circumstances of each case and the primary nature of the tree itself could not be made the determining factor. It is submitted that there does not seem to be any real difference between the two tests. As held by the majority a standing tree can never be used for timber and a timber tree is meant to be cut down. Therefore when it is said that the nature of a tree is such that it can be used as timber there is an implied intention that it is to be cut down. In *Ali Saheb* v. *Mohidin*,(14) it was held by the Bombay High Court that trees intended to be cut and converted into *charcoal* were standing timber within the meaning of this Act. In *Sivdayal* v. *Putto Lal*,(15) it was assumed that a tree intended to be cut down and used as *firewood* would not be *timber* but would, nevertheless, not be immovable property because the intention of the parties was to cut and sever it from the soil. In other words, it was assumed that there might be trees which, though not timber, would still be not immovable property. It is submitted that neither of the decisions referred to above is correct. Things rooted in the earth are clearly within the general definition of immovable property as defined by the General Clauses Act and the only exceptions recognized are-standing timber, growing crops and grass. A tree which is not timber and therefore within the exception must necessarily fall within the general definition of immovable property.

4. Growing crops. Growing crops are, by the definition, excluded from immovable property. In England also, a sale of growing crops is regarded as a sale of chattels only.(1) The expression "growing crop" includes all vegetable growths whether in the form of fruit, leaf, bark or roots.(2) There is a clear distinction between trees

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of standing timber.)
('06) 31 Bom 183 (197) (DB).
† (1900) 24 Bom 31 (33) (DB).

11. 1956 All 680 (683) [AIR V 43 C 223] (DB).
('12) 17 Ind Cas 910 (911) (All).
[*See* 1927 All 254 (255) [AIR V 14] : 49 All 330 (DB). (Case under S. 193, Agra Tenancy Act.)]

12. 1956 All 680 (683) [AIR V 43 C 223] (DB).
1926 Oudh 136 (138) [AIR V 13].
(1900) 24 Bom 31 (33) (DB).
[*See also* 1957 Cal 350 (355) [AIR V 44 C 100] : ILR (1958) 1 Cal 55. (A sale of wood standing in a forest is merely a sale of goods.)]

13. 925 Oudh 108 (108) [AIR V 12]. (Grove of mahua trees.)
1916 Oudh 211 (214) [AIR V 3] (DB).
1915 Oudh 75 (76) [AIR V 2] : 18 Oudh Cas 122. (No intention that trees were to be severed.)]

13a. 1963 All 2, 4 (217, 221) [AIR V 50 C 63] : ILR (1963) 1 All 734 (FB). (1915 Oudh 195 [AIR V 2], Overruled; 1956 All 680 [AIR V 43], Criticised.)

14. ('11) 12 Ind Cas 375 (377) (DB) (Bom).

15. 1933 All 50 (52) [AIR V 20] : 54 All 437.

Section 3 — Note 4

1. Halsbury's Laws of England, Vol. 1, Page 293.

2. 1959 S C 735 (740, 741) [A I R V 46 C 100] : 1959 Supp (2) S C R 339. ("Growing crop" might include tendu leaves but not "Adjat timber," bamboo or even the tendu trees.)

and shrubs which have a recognised existence apart from any produce which they may bear, and plants which have a recognised existence apart from any produce which they may bear, and plants which have no existence apart from their produce; the latter are a growing crop. The mere fact that crop lasts for a long period does not make any difference. Thus, *pan creepers*, though they last for three years, are growing crops.(3) It has been held, however, in the undermentioned case(4) arising under the Registration Act of 1877, that *pan-mala* and fig trees are not "standing crops" but constitute part of the property itself. In a case under the Registration Act it was held by the Calcutta High Court that the juice of date trees being produced at the season of growth annually, falls within the definition of 'growing crops'.(5)

A "growing crop" means, however, a crop which is in *existence* and which is in process of coming to fruition.(6) It follows that a right to crops that may be raised in the future on land is not a right to a *growing* crop. In fact a right to future crops on the land would be a benefit to arise out of land and, therefore, would be immovable property.(7) It has been held in the cases noted below(8) that a mortgage of future crops that may be grown upon a certain plot of land does not come within the purview of the Transfer of Property Act and does not constitute a pledge of specific movable property, but that it is a mortgage of movable property that may come into existence in future and, therefore, not governed either by the Transfer of Property Act or by the Contract Act.

5. **Grass.**—The adjective "growing" must be taken also along with the word "grass," so that it is *growing* grass that will constitute an exception to immovable property. The right to grass that may grow hereafter on the land would be a right to a benefit to arise out of land and would constitute an interest in the immovable property.(1-a) In England a sale of growing grass for the purpose of being mown and made into hay by the purchaser has been held to be a sale of an interest in land.(1) This view seems to have been followed in the undermentioned case(2) where the

1959 Madh Pra 120 (125) [AIR V 46 C 42] (DB). (Agreement to pluck and take fruits away—Transaction relates to sale of growing crop and is not a lease.)
[*See* 1938 Nag 377 (381) [AIR V 25] : ILR (1939) Nag 432 (DB). (While holding that "growing crops" would include leaves (e. g. tobacco leaves), it was doubted whether that expression would include "fruits" or even tea crop.)]

3. ('98) 11 C P L R 87 (88).

4. ('85) 1885 Bom P J 151 (DB).

5. ('69) 12 Suth W R 366 (367) : 3 Beng L R A C 394 (DB).

6. 1937 Nag 289 (290) [AIR V 24] : ILR (1933) Nag 31.

7. 1959 Madh Pra 120 (125) :[A I R V 46 C 42] (DB).
1951 All 608 (609) [AIR V 38 C 157]. (A lease of the crop of mango grove for a period of 5 years is in respect of immovable property.)
[*See* ('92) 5 C P L R 6 (8).
(1900) 1900 Pun Re No. 66.
('12) 15 Ind Cas 234 (239) (DB) (Mad).]
[*See also* AIR 1959 SC 735 (740, 741) [AIR V 46 C 100] : (1959) Supp (2) S C R 339. (Under agreement petitioner *inter alia* entitled to get tendu leaves from such trees as might grow in future—Held, agreement could not be said to be contract of sale of goods *simpliciter*.)]

8. 1940 Mad 929 (930) [AIR V 27] (DB).
1924 All 833 (833, 834) [A I R V 11]. (It is in the nature of an agreement to mortgage moveable property that may come into existence in future and as such it creates an equitable charge which is valid and enforceable.]
† ('86) 13 Cal 262 (264) (DB).
[*See also* 1957 Cal 350 (355) [AIR V 44 C 100] : I L R (1958) 1 Cal 55. (A sale of wood that would come into existence within a specified date cannot be considered as a transfer of any interest in the trees themselves or the forest or the land in the absence of anything to show that there was any sale of the growing trees themselves.)]
Also see Section 5, Note 7.

Section 3 — Note 5

1a. 1951 All 608 (609) [A I R V 38 C 157] (Lease for five years entitling lessee to grass which might grow on land leased.)

1. Halsbury's Laws of England, Vol. 1, Page 293.

2. ('96) 20 Mad 58 (64) (FB).

Chief Justice observed that an agreement for sale and purchase of growing grass, growing timber or underwood or growing fruit not made with a view to their immediate severance and removal from the soil and delivery as chattels to the purchaser, is a contract for the sale of an interest in the land. It is submitted that this observation cannot be accepted as correct. The definition makes it quite clear that growing grass, standing timber and growing crops are *not* to be considered as immovable property.

6. Attached to the earth. A thing attached to the earth is immovable property as defined in the General Clauses Act, 1897. Things attached to the earth correspond to what are known as 'fixtures' in English law. The law governing fixtures in England is, however, not in all respects the same as the law governing things attached to the earth in this country.

The law governing fixtures in England is enunciated by the maxim *quicquid plantatur solo solo cedit*—whatever is affixed to the soil becomes part of the soil.(1) The application of this principle differs according as the claim to the fixtures arises between landlord and tenant, the heir and personal representative of the owner, or the tenant of a particular estate and remainderman or the reversioner. As between landlord and tenant the general rule is that property annexed to the land by the tenant immediately belongs to the free-holder and the tenant cannot sever it without the landlord's consent. There are some exceptions, however, recognised to the above rule. They are, that fixtures affixed by the tenant, for purposes of trade or manufacture, or for the purpose of ornament and convenience or for agricultural purposes may be removed by the tenant. As between the heir and personal representative, a fixture will generally pass with the free-hold to the heir. But fixtures put up for ornament, domestic use, or trade will devolve to the personal representative provided they can be easily removed and are not essential to the enjoyment of inheritance. As between the tenant of a particular estate and remainderman or the reversioner a similar rule applies as in the last case but the right is more favourably construed.(2)

In this country, the maxim *quicquid plantatur solo solo cedit* has been held to have only a limited application.(3) A thing attached to the earth does not necessarily become *part* of the land to which it is attached even though it may, by virtue of its being attached to the land, be immovable property. Thus, a superstructure on land is immovable property even though the land on which it stands belongs to a third

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Section 3 — Note 6

1. Broom, *Legal Maxims*, 10th Edition, Page 262.

(1808) 103 E R 555 (564) : 9 East 215, *Horn* v. *Baker*.

(1845) 8 E R 1426 (1432): 12 Cl & Fin 312, *Fisher* v. *Dixon*.

(1851) 155 E R 554 (559) : L R 6 Ex 295, *Hellawell* v. *Eastwood*.

(1866) 1 Q B 241 (250) : 13 L T 704, *R.* v. *Lee*.

2. Wharton, *Law Lexicon— See* Fixtures.

3. 1929 P C 163 (164) [AIR V 16] : 56 Ind App 259 : 53 Bom 589. (Maxim held inapplicable to facts of the case.)

† 1927 P C 135 (137) [AIR V 14] : 54 Ind App 218 : 54 Cal 669.

1965 Mad 185 (186, 187) [AIR V 52 C 64] : ILR (1965) 1 Mad 624 (DB). (Mortgage by person having life interest — Mortgage deed expressly stating that structures which will be erected by mortgagor would form part of the security —Right of mortgagee does not terminate on death of mortgagor — Structures do not become part of land and pass on to remainderman).

1961 Ker 147 (148) [AIR V 48 C 52] : ILR (1960) Ker 115 (DB).

1960 Cal 331 (336) [AIR V 47 C 87].

1953 Hyd 14 (16) [AIR V 40 C 9] : ILR (1952) Hyd 495 (DB).

1936 Rang 68 (69) [AIR V 23] (DB). (B, a licensee, building a house on the land of S with his permission allowed to remove it when on insolvency of S the property was taken over by the receiver).

1923 Rang 145 (148) [AIR V 15] : 6 Rang 87, (The application of the maxim is not excluded altogether; it will apply unless there is any custom or law to the contrary.)

1940 Mad 527 (528) [AIR V 27].

1933 Oudh 468 (469) [AIR V 20] : ILR 9 Luck 149.

person(4) and even though it may, as in the case of a tenant who has put it up, be removable by him.

A shed resting by its own weight on the foundation prepared for it is not "attached to the earth".(5) It has been held that Pators which constitute a sort of structures resting on stone pieces, which are usually dug into the ground and usually support the slabs which make a roofing, cannot be said to be "attached to the earth".(6) But a kham house has been held to be immovable property as its walls though kham would be permanently fixed in the earth.(7)

7. **Permanently fastened to anything attached to the earth.** — A thing though not attached to earth, will, under the general definition of immovable property, be immovable property if it is *permanently* fastened to anything which is attached to the earth.(1) The amount of degree of annexation is one of the tests which will be taken into account in coming to a conclusion whether it is a permanent fixture. If the degree of annexation is such that the fixture cannot be taken away without destroying the principal, it would be regarded as a permanent fixture.(2) Another test is the object of annexation and this is more important than the first. Thus, a machinery permanently fastened to anything attached to the earth would be immovable property.(2a) But where a person erects machinery on the land of another he must be assumed to have erected it only as a licensee or a temporary tenant and not with the intention that the machinery should become a part and parcel of the immovable property to which it has been attached by him for the time being.(3) See also the undermentioned cases.(4)

8. **Rooted.** — Trees rooted in the earth are attached to the earth and are therefore immovable property.) See Note 3.

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4. 1927 Lah 373 (375) [AIR V 14] (DB).
[*See also* 1955 Punj 34 (36) [AIR V 42 C 12] : ILR (1955) Punj 94 (DB). (If a trespasser puts up a structure on a plot of land belonging to another without the permission of the owner, the structure becomes the property of the owner of the land.)
('75) 8 Mad H C R 100 (102) (DB). (A mortgage of the superstructure of a house, though expressed to be "exclusive of the land beneath," creates an interest in immovable property.)]

5. ('05) 29 Bom 323 (343) (DB).
[*See also* (1836) 111 E R 1016; (1018) : 4 Ad & El 884, *Wansborough* v. *Maton*.]

6. ('47) 1947 Jaipur L R 136 (141) (DB).

7. ('48) 1948 Jaipur LR 25 (29, 30) (DB).

Section 3 — Note 7

1. *See* ('01) 25 Bom 659 (666) (DB). (Case under Registration Act.)
[*See also* 1927 P C 172 (172) [AIR V 14] 54 Cal 582 : 54 Ind App 187. (Case under Land Acquision Act, 1894 — Expression 'permanently' is used as antithesis to 'temporarily'.)]

2. ('64) 1964 B L J R 875 (878).
1960 Cal 331 (335) [AIR V 47 C 87].
1953 Hyd 14 (17) [AIR V 40 C 9] : I L R (1952) 495 (DB).
1953 Nag 224 (226) [AIR V 40 C 88] : ILR (1953) Nag 488 (DB).
See 1927 Lah 373 (374) [AIR V 14] (DB). (*Held*, there was no evidence to show that machinery was immovable property in the sense of being attached to the earth or permanently fastened to anything attached to the earth.)

2a. 1953 Hyd 14 (15) [A I R V 40 C 9] : I L R (1952) Hyd 495.
[*See also* 1959 Cal 461 (462) [AIR V 46 C 128] (DB). (In the absence of any averment as to the nature of machinery installed in the workshop the machinery cannot be said to be permanently fixed or fastened to earth.)

3. ('64) 1964 B L J R 875 (878) (DB).
1960 Cal 331 (335) [AIR V 47 C 87].
1953 Hyd 14 (15) : [AIR V 40 C 9] : I L R (1952) Hyd 495 (DB).
1953 Nag 224 (225) [AIR V 40 C 88] : ILR (1953) Nag 488 (DB).

4. 1965 Raj 15 (18) [AIR V 52 C 7] : ILR (1964) 14 Raj 1006 (DB). (Owner of premises and machinery of printing press in the premises granting lease of both —Lessee permitted by the agreement to remove the press to some other place of his choice subject to a liability to return the machinery at the end of the term of lease — Held machinery cannot be considered as being permanently fastened to anything which is attached to earth.)
1955 Mad 620 (621) [AIR V 42 C 188] : 1955 Cri L Jour 1369 : ILR (1955) Mad 1032 (FB). (Equip-

9. Imbedded in the earth. — A thing imbedded in the earth is immovable property. The question whether a thing is imbedded in the earth is a question which depends upon the circumstances of each case.(1aa) The test as to whether a thing would be regarded as being imbedded in the earth is whether or not it rests by its own weight on earth and whether it can or cannot change places and hands and be removed from one place to another.(1a) Thus, a house or a hut built on a site with foundations laid in it is imbedded in the earth and is thus immovable property(1) and cannot be considered as split up into its component parts.(2) But a hut which merely rests by its own weight on earth,(3) or a flour mill which can change hands and can be removed from one place to another(4) cannot be considered to be immovable property. A sugar cane press imbedded in the ground would be immovable property.(5) So also, brick pillars erected on land would be immovable property.(6) A well is imbedded in the earth and must be considered immovable property.(7) Where machinery is imbedded in the earth like walls and buildings it would be immovable property.(8) A platform erected over a drain cannot be considered, apart from the drain, to be immovable property.(9) (See also Note 7.)

10. Attached to what is so imbedded. — A thing attached to what is imbedded in earth will be a thing "attached to the earth" and so, immovable property, only if it is so imbedded for the *permanent beneficial enjoyment* of that to which it is attached. The word "permanent" is used as an antithesis to the word "temporary".(1) Doors, windows and window-shutters of a building form part of a building to which they are attached.(2) But machinery, to shelter and protect which a building has been erected, cannot be said to be attached to the building for its beneficial enjoyment and is, consequently, not immovable property.(3) So also distillery vats placed in a building cannot be said to be so placed for the beneficial enjoyment of the building(4) and are not immovable property. The test in all such cases is, with what intention

ment of touring cinema which is collapsible and capable of being removed is not immovable property.)

Section 3 — Note 9

1aa. 1953 Pat 298 (301) [AIR V 40 C 104] (DB).
1a. 1953 Hyd 14 (16) [AIR V 40 C 8]: ILR (1952) Hyd 495 (DB).
1. 1959 J & K 32 (34) [AIR V 46 C 16] (DB).
1938 Nag 377 (381) [AIR V 25] : ILR (1939) Nag 432 (DB).
1926 Mad 343 (344) [AIR V 13].
('11) 9 Ind Cas 1 (1) (Cal).
('04) 31 Cal 340 (342). (Tiled huts.)
(1900) 4 Cal W N 470 (472) (DB).
[*See* ('75) 8 Mad H C R 100 (102) (DB).
2. 1960 Cal 484 (488) [AIR V 47 C 129].
1923 Lah 150 (151) [AIR V 10] (Sale of materials of standing house is sale of immovable property.)
3. See Note 6.
4. *See* 1936 Lah 242 (243) [AIR V 23] (Case under Registration Act.)
5. 1914 All 176 (176) [AIR V 1].
6. (1835) 173 E R 145 (146) : 7 C & P 327, Leach v. Thomas.
7. ('68) 1888 Bom P J 125 (DB).
8. 1965 Andh Pra 457 (461) [A I R V 52 C 110] (DB). (Factory building and machinery embedded therein.)
1960 Cal 331 (335) [AIR V 47 C 87].
9. 1954 Pat 249 (253) [AIR V 41 C 90]: 32 Pat 887 : 1954 Cri L Jour 664 (DB).

Section 3 — Note 10

1. *See* 1927 P C 172 (172) [A I R V 14] : 54 Ind App 187 : 54 Cal 582. (Case under Land Acquisition Act, 1894, S. 3A.)
2. 1916 Mad 859 (862) [A I R V 3] : 38 Mad 18 (DB). (The doors and windows of a house.)
('91) 14 Mad 467 (469) (DB). (Doors and windows.)
('90) 13 Mad 518 (520) (DB). (Doors.)
('85) 11 Cal 164 (166) (DB).
3. 1924 All 365 (368, 369) [A I R V 11] : 46 All 286 (DB).
[*See also* 1965 Raj 15 (18) [AIR V 52 C 7] : ILR (1964) 14 Raj 1006 (DB). (Plaintiff owning premises and machinery therein leasing out both for purpose of running a printing press— Lessee given option to shift press to a place of his choice — No question of the plaintiff having erected the machinery as a measure of permanent beneficial enjoyment of the premises arises.)]
4. 1944 Mad 492 (495) [AIR V 31] : ILR (1945) Mad 304 (DB). (Machinery of Mill fixed to cement platform and attached to iron pillars fixed in ground held immovable property.)
1924 Mad 187 (188, 189) [AIR V 11].

were the articles put into the building: whether they were put in for the more beneficial enjoyment of the building, or with the object of improving the value thereof by making it more artistic, or whether they were put in for a collateral purpose.(5) It has been held in the undermentioned case(6) that machineries fixed to their bases with bolts and nuts, although easily removable, were not movable property when they had been set up with the definite object of running an oil mill (that is to say, to use the building as a factory) and not with the intention of being removed after a temporary use. So also a machinery which is fixed and imbedded in the factory building for the beneficial use of the building as a factory is immovable property.(7) Where a tenant running a factory in the premises of another instals machinery in the premises his intention would be presumed to be to remove it when he vacates the premises and therefore the machinery will not be immovable property.(8) (See also Note 7.)

11. "**Attested.**"—The object of attestation is to ensure that there is no fraud or vitiating circumstances in the execution of a document.(1a) Under the English law 'attest'' means that the persons purporting to attest an instrument shall be present and see what passes and bear witness to the fact of its execution.(1) Before the decision of the Privy Council in *Shamu Pattar* v. *Abdul Kadir Rowthan*,(2) there was a difference of opinion in this country as to whether an attestation made on the admission of *execution* by the executant without the attestor having seen the executant sign the document was a valid attestation within the meaning of this Act. One view was that it was valid.(3) Another view was that it was not.(4) According to a third view, it was valid where the executant was a *pardanashin* lady.(5) This conflict of opinion arose in view of the fact that under S. 50 of the Indian Succession Act, 1865 (now S. 63, Succession Act, 1925) attestation included attestation on a personal acknowledgment

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5. † 1940 Mad 827 (529) [AIR V 27].
1924 Mad 187 (188) [AIR V 11].

6. 1959 All 247 (249) [AIR V 46 C 67].

7. 1965 Andh Pra 457 (461) [AIR V 52 C 110] (DB).
('64) 1964 B L J R 875 (878) (DB).
1960 Cal 331 (335) [AIR V 47 C 87].

8. 1953 Hyd 14 (16, 17) [AIR V 40 C 9] : I L R (1952) Hyd 495 (DB).
1953 Nag 224 (226) [AIR V 40 C 88] : ILR (1953) Nag 488 (DB).
[*See also* 1965 Raj 15 (18) [AIR V 52 C 7] : ILR (1964) 14 Raj 1006 (DB). (Defendant obtaining lease of premises and machinery from plaintiff to run a printing press — Tenancy agreement allowing option to defendant to shift printing press to a different premises of his choice — This term clearly shows that plaintiff did not erect the machinery for a permanent beneficial enjoyment of the premises.)]

Section 3 — Note 11

1a. 1965 S C 1738 (1739-1740) [A I R V 52 C 297] : 1966 (1) S C R 153.
1954 Mad 126 (127) [AIR V 41 C 48].

1. (1850) 163 E R 1330 (1331) : 2 Rob Ecc 315, Bryan v. White.
(1882) 9 Q B D 139 (143) : 51 L J Q B 558 (560), Fort v. Kettle. (The ordinary form of attestation is "signed, sealed, and delivered" by the person who executes in the presence of the attesting witness — The thing must be done in the presence of the man who in the future will be able to testify that it was done.)
[*See also* 1922 Pat 49 (50) [AIR V 9] : 6 Pat L Jour 473 (DB). (Attestation does not consist merely in seeing the execution of a document —It requires a further act, that is subscribing the name of the witness on the document as having seen the execution.)]

2. ('12) 35 Mad 607 (615, 616) : 39 Ind App 218 (PC).

3. ('09) 3 Ind Cas 905 (906) (DB) (All).
('03) 26 All 69 (71) (DB).
('03) 27 Bom 91 (95) (DB).
('96) 1896 All W N 89 (89) (DB).

4. ('12) 16 Ind Cas 207 (207) (DB) (Mad).
('10) 37 Cal 526 (537, 538) (DB).
('10) 6 Nag L R 152 (153, 154).
('10) 8 Ind Cas 887 (888) (Mad).
('09) 33 Bom 44 (49) (DB).
('09) 5 Nag L R 3 (4).
*('08) 31 Mad 216 (219) (DB). (Confirmed by Privy Council in 35 Mad 607, referred to above.)
('06) 33 Cal 861 (863) (DB).
('03) 7 Cal W N 160 (161, 162) (DB).
('01) 5 Cal W N 454 (455).
† (1900) 27 Cal 190 (195) (DB).
† ('99) 26 Cal 246 (248, 249) (DB).
('98) 26 Cal 78 (79, 80, 81) (DB).

5. ('10) 37 Cal 526 (538, 539) (DB).
('09) 3 Ind Cas 311 (313) (DB) (Cal).

by the testator of his signature. In *Shamu Pattar's case*, however, it was held by their Lordships of the Privy Council that S. 50 of the Succession Act, 1865, could not be a guide to the interpretation of the word "attest" as used in the Transfer of Property Act and that it must have the meaning which it had in English law, namely, that the person must have seen the executant sign and then subscribed his name in token of what he has seen.(6) Subsequent to the said decision in *Shamu Pattar's case*, the Courts (7) followed the view expressed by the Privy Council and, in regard to documents which had been executed already relying on the contrary view, Act XXVI of 1917 was passed validating transfers made prior to 1st January 1915 which had been attested on admission of execution.(8)

The present definition with the exception of the words "and shall be deemed always to have meant," was inserted by Act XXVII of 1926, thus departing from the view expressed by the Privy Council and the cases following it. But a fresh difficulty arose, and that was, whether the amendment was retrospective; the High Courts of Allahabad and Calcutta and the Chief Court of Oudh(9) taking the view that it was not retrospective, the High Court of Madras and the Judicial Commissioner's Court of Nagpur taking the view that it was retrospective.(10)

In order to settle this difference of opinion, Act X of 1927 was passed inserting in the definition the words "and shall be deemed always to have meant," thus making it clear that the definition is retrospective.(11)

Under the present definition, in order to constitute the signature of a person, a valid attestation, it is essential that—

(1) he must have signed either *after seeing* the executant sign the docu-

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6. *See also* 1925 P C 203 (204) [A I R V 12] : 5 Pat 58 : 52 Ind App 362. (16 Ind Cas 250 (PC), followed.)
1912 P C 3 (4) [AIR V 5] : 45 Cal 748 : 45 Ind App 94. (16 Ind Cas 250 (PC), followed.)

7. 1927 Sind 118 (119) [A I R V 14] : 19 Sind L R 322.
† 1924 Cal 415 (416, 418) [AIR V 11] (DB).
1923 Nag 45 (46) [AIR V 10].
† 1922 Pat 514 (524) [AIR V 9] : 2 Pat 52 (DB).
1921 Upp Bur 1 (1) [AIR V 8] : 4 Upp Bur Rul 78.
1920 Bom 333 (334) [AIR V 7] : 44 Bom 231 (DB). (Section 123—Deed of gift.)
† 1920 Bom 249 (250) [A I R V 7] : 44 Bom 405 (DB).
1919 All 24 (25) [AIR V 6] (DB).
1919 Pat 195 (196) [AIR V 6] (DB).
1918 Low Bur 62 (62) [AIR V 5] 9 Low Bur Rul 159 (DB).
1916 Bom 123 (124) [A I R V 3] : 41 Bom 384 (DB).
1916 Cal 884 (885) [AIR V 3] (DB).
1916 Pat 210 (211) [AIR V 3] (DB).
1914 Nag 32 (33) [AIR V 1] : 10 Nag L R 81.
('13) 35 All 353 (358) (DB).
('13) 21 Ind Cas 83 (83) (All).
[*See* 1926 All 725 (726, 727) [A I R V 13] (DB). 1929 Sind 235 (236) [AIR V 16]. (But effect was given to Act 27 of 1925.)]
[*See also* 1917 All 16 (16) [AIR V 4] (DB). (Where a mortgage deed purports to have been executed by the executant affixing his mark to the same, it must be proved not merely that the mark is that of the executant but also that it was affixed to the deed in the presence of witnesses.)]

8. 1929 All 680 (682) [AIR V 16] (DB).
1919 Oudh 340 (342) [AIR V 6] (DB).

9. 1927 All 1 (6, 8, 9, 16) [A I R V 14] : 49 All 25 (FB). (Overruling 1926 All 725 [AIR V 13].)
1927 Cal 763 (765) [A I R V 14] : 55 Cal 67 (DB). (The words "attest means" in S. 2 of the Amending Act cannot be held to mean the words "attest always meant" so as to make it clear that retrospective operation was intended.)
1927 Oudh 565 (566) [AIR V 14].

10. 1927 Mad 85 (88) [AIR V 14].
1928 Nag 70 (70) [AIR V 15]. (1927 Mad 85 [AIR V 14] followed.)

11. 1939 P C 117 (119) [AIR V 26] : ILR (1939) Kar (PC) 222.
1929 Mad 1 (2) [AIR V 16] : 52 Mad 123 (FB).
1934 Nag 1 (12) [AIR V 21] : 30 Nag L R 62.
1933 Oudh 365 (367) [AIR V 20] : 9 Luck 12 (DB). (Reversed on another point in 1936 P C 207 [AIR V 23]).
('31) 134 Ind Cas 531 (531) (DB) (Cal).
1931 Nag 95 (96) [AIR V 18].
1930 All 223 (223, 224) [A I R V 17] : 52 All 434 (DB).
1929 All 680 (682) [AIR V 16] (DB).
1929 Cal 123 (125) [AIR V 16] 56 Cal 598 (DB).
1928 Bom 16 (16) [AIR V 15] (DB).
1928 Bom 267 (268) [AIR V 15] (DB).
1928 Rang 101 (102) [AIR V 15] : 5 Rang 772.
1928 Sind 93 (94) [AIR V 15]

ment (11a) or affix his mark thereto or some other person sign the instrument in the presence and by the direction of the executant, or *after receiving from the executant a personal acknowledgment* of his signature or mark or of the signature of such other person;(11b)

(2) he must have signed *in the presence of the executant* (See Note 14);

(3) he must have signed *as a witness* and not for any other purpose.(12)

A person signing a document who has neither seen the executant sign nor received any acknowledgment of his signature from the executant is not an attesting witness.(13) Where a person puts his signature in order to give approval to the transaction and not as a witness, he is not an attesting witness.(14) But a person signing *as a witness* cannot be looked upon as signing in any other capacity, e.g., as a member of a Municipal Committee.(15)

For a valid attestation it is not necessary that the attesting witnesses should be able to identify the signature of each other or even to know each other.(15a)

Where the evidence of the attesting witnesses is not specific but vague or doubtful or even conflicting upon the same material facts the Court may take into account the surrounding circumstances of the case and judge from the same whether the requirements of the statute as to attestation have been complied with.(16) It cannot be laid down as a matter of law that because the witnesses have not stated in their examination-in-chief that they signed in the presence of the executant there is no due attestation. The question whether the witnesses had signed in the presence of the executant or not is a pure question of fact which depends on an appreciation of the evidence of circumstances elicited in the case.(17)

[But see 1928 Mad 773 (774) [AIR V 15] (DB). (Submitted wrong.)]
1930 All 669 (672) [AIR V 17] (DB) (Do.)]

11a. 1951 S C 477 (481) [AIR V 38 C 64]: 1952 S C R 116 : 30 Pat 1210. (Attestation of document before it is signed by executant is not attestation in the eye of law.)
(1909) 13 C W N 40 (42, 43) (DB).

11b. 1956 Andhra 1 (4) [AIR V 43 C 1] (DB).
1944 Oudh 40 (41) [A I R V 31] : 19 Luck 443. (It is not necessary that he should be able to point out the signature or mark of executant in order to prove execution.)
(1938) 67 Cal L Jour 31 (34).
(1931) 53 Cal L Jour 326 (328).

12. 196 All 570 (576) [AIR V 53 C 158] : ILR (1965) 1 All 483 (DB).
1959 Cal 243 (246) [AIR V 46 C 61] : ILR (1959) 1 Cal 43[illegible] (DB). (Person merely signing as identifier of executant not an attesting witness AIR 1929 Mad [illegible] (FB) *Dissented from.*)
1958 Pat 566 (567) [AIR V 45 C 185].
1956 Him Pra 58 (59) [AIR V 43 C 27].
1946 Cal 168 (171, 173) [AIR V 33 C 41] : I L R (1944) 2 Cal 3[illegible]8.
[illegible]1931 Oudh 146 (150, 151) [AIR V 18] : 6 Luck 619 (DB).
1929 Cal 123 (125) [A I R V 16] : 56 Cal 598 (DB).
(1949) 1949-2 All E R 90 (94) : 1949 P. 414, Re Gibson. (Attestation by blind man — Case under English Wills Act (1837), S. 9).
1925 Oudh 737 (738) [AIR V 12]. (Scribe purporting to sign as attesting witness must sign as a witness.)
[*See also* ('05) 2 Cal L Jour 70n. (Where a deed of mortgage contained at the foot the names of three or four persons as witnesses, all of whom were illiterate, and who did not say that their marks were attached to the document at their desire, the deed was not validly attested as required by S. 59, T. P. Act, and is not a mortgage deed.)]

13. †1939 P C 117 (119) [A I R V 26] : I L R (1939) Kar P C 222.
1938 Cal 702 (703) [AIR V 25].
1931 All 411 (412) [AIR V 18] (DB).
1931 Oudh 146 (148) [AIR V 18] : 6 Luck 619 (DB).

14. 1925 P C 89 (91) [AIR V 12].
1922 Pat 49 (51) [A I R V 9] : 6 Pat L Jour 473 (DB).
[*See* 1927 P C 248 (250) [A I R V 14] : 55 Ind App 1 : 2 Luck 640. (Case under Succession Act.)]

15. 1938 Mad 90 (91) [AIR V 25] (DB).

15a. 1963 All 570 (576) [AIR V 53 C 158] : ILR (1965) 1 All 483 (DB).

16. 1953 Cal 462 (464) [AIR V 40 C 170] : ILR (1955) 1 Cal 94 (DB).

17. 1956 Him Pra 58 (60) [A I R V 43 C 27]. (Mere endorsement "Ishadi Lekhak" is not sufficient to establish that he signed in the presence of the executant.)
1955 S C 363 (367) [AIR V 42 C 64]: 1955 S C R 1035.

11a. Each of wnom nas seen the executant sign.—In the case of deeds executed by *pardanashin* ladies, it has been held that it is not necessary that the attesting witnesses should actually see the *pardanashin* lady sign the deed. It is sufficient if the witnesses sitting outside pardah subscribed their names after satisfying themselves as to the identity of the person executing the deed.(1) A mortgage deed was executed by two *pardanashin* ladies. The attesting witnesses saw the hand of each executant when she signed the document seated behind a curtain, and though they could not see the faces of the executants, they heard them speak and recognised their voices. It was held by their Lordships of the Privy Council that the deed was duly attested.(2)

In the case noted below(3) arising under the Succession Act, 1865, it has been held that it is not necessary for the witnesses to actually see the fingers move as the signature is made. It is sufficient if the witnesses had a clear view of the testator when he was in the act of signing.

Where a document is required by law to be attested by at least two witnesses, no valid attestation can be said to have been proved unless there is evidence that two attesting witnesses, one of whom is examined in the case, have signed the document after witnessing the signature of the executant or receiving from him a personal acknowledgment of his signature.(4) Where an attesting witness deposes that he had attested the document executed by A in favour of B and that the other attestors also witnessed its execution, it is a sufficient evidence of valid attestation.(5) Where the attesting witness is a blind man it cannot be claimed that it has been attested by a person who has seen the executant sign and therefore in his presence and hence it is not a valid attestation.(6)

12. "Sign" — Section 3, sub-section (56) of the General Clauses Act, 1897, provides as follows :—

Section 3 — Note 11a

1. 1920 Nag 164 (164) [A I R V 7] : 16 Nag L R 196.

1920 Pat 772 (772) [A I R V 7]. (Where it is proved that the witnesses to a mortgage deed did not see the executant who was a pardanashin lady but saw her signing the deed and impressing it with her seal through a pardah, which was hanging between them and the executant, and that one of the witnesses knew her by her voice, this is sufficient proof of proper attestation.)

1918 Pat 356 (358) [A I R V 5] (DB). (In the case of a mortgage deed executed by a pardanashin lady it is not necessary that the witnesses should be actually inside the pardah and they are deemed to be present at the time of the execution of the document in such a case although they may be screened off from the executant by a pardah. Where the witnesses were on the other side of the pardah and after the deed was signed by the pardanashin ladies one L. H. who was present in the pardah when it was signed by the ladies took the bond outside to the witnesses and signed it himself as a guardian of a third executant 'S' and then the attesting witnesses signed the bond it was held that the bond was properly attested.)

1916 Cal 884 (885) [AIR V 3].

2. 1915 P C 21 (22) [AIR V 2] : 37 All 474 : 42 Ind App 163.

3. 1920 Oudh 87 (92) [A I R V 7] (DB). (The attesting witnesses were in a place where they could see the testator writing. They could not see what he was writing and they were not in a position to see whether he initialled his additions or corrections. When he had completed what he was doing he sent for the attesting witnesses and they signed. It was held that the will was validly executed and attested.)

4. 1952 Trav-Co 195 (197) [A I R V 39] (DB). (Both attesting witnesses need not be called to prove attestation.)

1949 Nag 149 (151) [AIR V 36 C 61] : ILR (1948) Nag 621 (DB). (It is not enough if an attesting witness merely states that the executant signed in his presence and he witnessed the execution of the document. There must in addition be some more evidence to show that the other attesting witness was also present at the time when the executant signed the document in token of execution or at least he attested the document after he had received from the executant a personal acknowledgment of his signature or mark, etc.)

5. 1954 S C 316 (319) [A I R V 41 C 76] : 1954 S C R 919 : 33 Pat 313.

6. 1949-2 All E R 90 (94).

"Sign" with its grammatical variations and cognate expressions, shall, with reference to a person who is unable to write his name, include 'mark,' with its grammatical variations and cognate expressions."(1)

This definition will apply to this Act if there is nothing repugnant to it in the subject or context. There has been a difference of opinion as to whether the fact that the present definition draws a distinction between *signature* and *mark*, in terms similar to that found in S. 50 of the Succession Act, 1865 (now S. 63 of the Succession Act, 1925), constitutes such repugnancy. It was held by the High Courts of Calcutta(2) and of Bombay (3) and in the undermentioned case of the High Court of Madras(4) that a signature did not, for the purpose of these Acts, include a mark and that, consequently, a witness who affixed his mark could not be said to have validly attested the document. The said decision of the High Court of Madras has been, however, reversed on appeal on the ground that the fact referred to above does not constitute any repugnancy in the subject or context and that, therefore, a document may be validly attested by the attesting witness putting a mark as a witness.(5) See also the undermentioned cases(6) which have held the same view as the last mentioned Madras case.

An *initial* is equivalent to a signature. In other words a signature need not be a full signature.(7)

It has been held that it is sufficient if the attesting witness gets his signature affixed for him by another with his consent.(8)

It cannot be said that there is no execution of a document merely because the executant has signed it at the beginning or middle. In such cases the question would always be, whether the party, not having signed it regularly at the end, yet meant to be bound by it as it stood. If it is ascertained that he meant to be bound by the document as a complete contract, the signature, wherever it is found on the document, would be sufficient for the purposes of its execution.(9)

See also the undermentioned case.(10)

13. Acknowledgment of signature need not be express.—The acknowledgment of the signature by the executant need not be *express*. It is sufficient if it can

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Section 3 — Note 12

1. For 'Signed' see also Note 31 on Section 18 of the Authors' Commentaries on the Limitation Act, 4th (1964) Edition.

2. ('85) 11 Cal 429 (432) (DB). (Case under Succession Act.)

3. ('79) 3 Bom 382 (384) (DB). (Case under Succession Act.)

4. 1932 Mad 272 (274) [AIR V 19]. (Case under T. P. Act.)

5. 1935 Mad 178 (181) [A I R V 22] : 58 Mad 220 (DB).

6. 1953 Nag 266 (267) [AIR V 40 C 113]. (Illiterate person can be an attesting witness.)
1936 All 576 (578) [A I R V 23] : 58 All 1064 (FB). (Case under Succession Act.)
1944 All 61 (62) [A I R V 31] : I L R (1944) All 186. (An illiterate person may attest by putting his mark.)
† 1937 Rang 293 (297) [AIR V 24] (DB).
1914 All 306 (307) [AIR V 1].
('05) 1 Nag L R 14 (16, 17). (A mark of attesting witness can be proved by other evidence.)
('98) 2 Cal W N 603 (605) (DB). (Attesting witness need not be literate. A mark made by an illiterate man is sufficient attestation.)

7. 1920 Oudh 87 (91) [AIR V 7] (DB).
('92) 15 Mad 261 (264) (DB). (Case under S. 50, Succession Act, X of 1865.)

8. 1957 Pat 485 (486) [A I R V 44 C 146] (DB). (A document can be attested by an illiterate person, signature being affixed by the scribe.)
1951 Pat 368 (369) : 28 Pat 158 (DB). (Affixture of a mark by the witness himself is not necessary.)
† 1931 All 101 (102) [AIR V 18] : 53 All 1 (DB). (Signatures of Registering Officer and identifying witnesses — Overruled on another point in 1932 All 527 [AIR V 19] (FB).)
1927 Oudh 510 (511) [A I R V 14] : 3 Luck 113 (DB).
† ('06) 33 Cal 861 (863, 864) (DB).

9. 1955 Raj 91 (92) [A I R V 42 C 30] : I L R (1955) 5 Raj 427 (DB).

10. ('55) 59 Cal W N 580 (590). (Attestation clause stating that document was signed by one *R* in the presence of the attesting witnesses —

be inferred from the conduct of the executant at the time of the signing of the document by the attesting witness.(1)

14. "In the presence of the executant." — For a valid attestation it is necessary that the attestor should have signed *in the presence of the executant.*(1) It was held in the undermentioned case(2) following *Brown* v. *Skirrow*(3) that the expression "in the presence" means actual visual presence. In *Lala Kundan Lal* v. *Mt. Musharrafi Begam*,(4) it was held by their Lordships of the Privy Council that the question whether an attesting witness signed his name in the presence of the executant is, in each case, a question requiring full consideration of the whole circumstances and that it is not necessary that the executant should actually see the witnesses sign the document but that, if their signatures were made under circumstances that the executant, if he was minded to see the witnesses sign, could have done so, it was sufficient. Where the executant is *pardanashin* and the attestor signs the document when the executant is behind the *purdah* and cannot see the witnesses, it must be held that the attestor has not signed in the presence of the executant.(5) But where the executant, a lady who did not observe strict *purdah*, was inside the room while the attesting witnesses were outside in the adjoining verandah and there was no curtain in the door of the room and the witnesses signed the instrument in the verandah, the witnesses were held to have signed the instrument in the presence of the executant.(5a) A scribe can be an

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Held it could not be said that attesting witnesses identified some other person than *R*.)

Section 3 — Note 13

1. 1957 Raj 180 (181) [A I R V 44 C 71] : I L R (1955) 5 Raj 971 (DB).
1951 Kutch 84 (85) [AIR V 38 C 56]. (Testator reading out his will and asking witness to attest it — Is an implied acknowledgment of execution.)
1937 All 646 (650) [AIR V 24] : I L R (1937) All 723 (DB).
1924 All 256 (257) [A I R V 11]. (Note by attesting witness that he attested at the request of executant implies that executant had admitted the genuineness of his signature to him.)
(1877) 1 Bom 557 (560). (It is sufficient acknowledgment of his signature by the executant to his will if he makes the attesting witnesses understand that the paper which they attest is his will, though they do not see him sign it, or observe any signature to the paper which they attest, provided that the Court is satisfied that the testator's signature was on the will when the witnesses attested it.)

Section 3 — Note 14

1. † 1939 P C 117 (121) [AIR V 26] : ILR (1939) Kar P C 222.
1961 Orissa 178 (179) [AIR V 48 C 73] (DB).
('58) 24 Cut L T 461 (463).
('55) Madh B L J 1955 H C R 1546 (1548) (DB).
1954 Nag 11 (13) [AIR V 41 C 2] : ILR (1953) Nag 281 (DB).
(1938) 67 Cal L Jour 31 (34).
1948 Nag 155 (158) [AIR V 35 C 57] : ILR (1947) Nag 649 (DB). (Executant signing in presence of two attesting witnesses — Evidence of witnesses signing in presence of each other — No evidence that execution and attestation was not done at same sitting — Witnesses must be held to have signed in presence of executant.)
1937 Sind 47 (50) [AIR V 24] (DB). (Registrar is a receiving officer and cannot be an attestor.)
1931 All 411 (412) [AIR V 18] (DB).
[*See also* 1939 All 486 (488) [AIR V 26] (DB). (Statement by attesting witness that attesting witnesses signed after document was read out and explained to executant and he signed it — Implies that attesting witnesses signed in presence of executant.)]
2. 1931 Oudh 146 (151) [AIR V 18] : 6 Luck 619 (DB).
3. (1902) 85 L T 645 (645) : 18 T L R 59.
4. † 1936 P C 207 (210) [AIR V 23] : 63 Ind App 326 : 11 Luck 346. (1933 Oudh 365 [AIR V 20] Reversed — Valid attestation depends upon the full consideration of circumstances.)
[*See also* 1954 Nag 11 (13) [AIR V 41 C 2] : ILR (1953) Nag 281 (DB). (Definition does not insist that executant must have seen the attesting witness sign the instrument — 1936 P C 207 [AIR V 23], *Foll.*)
1937 All 273 (275) [AIR V 24] (DB). (Valid attestation can be proved by other evidence.)
('89) 16 Cal 19 (24, 25) (DB). (Case under Succession Act, 10 of 1865, S. 50.)]
5. 1931 Mad 140 (141, 145) [AIR V 18] : 54 Mad 163 (DB).
† 1931 Mad 335 (337) [AIR V 18] (DB).
1931 Oudh 146 (151) [AIR V 18] : 6 Luck 619 (DB). (Pardanashin lady unaware of the fact of witnesses putting their signatures.)
5a. 1954 Nag 11 (13) [AIR V 41 C 2] : ILR (1953) Nag 281 (DB).

attesting witness but from the mere fact that he signed at the end of the document it cannot be presumed that he must have signed in the presence of the executant.(5b) Where at the time of attestation of a will the testator was insensible, it was held that the attestation could not be said to have been made in the presence of the executant.(6) Where a presumption of the execution of a will is drawn under S. 90, Evidence Act, it necessarily amounts to a finding that the attesting witnesses signed in the presence of the testator.(6a)

The fact that the signatures of the witnesses appear to be written with different ink or pens from that used to write the body of the document does not necessarily show that the witnesses were not present when the document was executed.(7)

15. Onus of proof of attestation. — Where a document purports to be attested by a person, it may, in the absence of anything to suggest the contrary, be assumed that the ordinary requirements of law were complied with. Thus, it may be assumed that he signed the document after seeing the executant sign or after receiving the acknowledgment from the executant of his signature, and that the attestation was in the presence of the executant.(1) It may also be assumed that the executant signed first and the attesting witness afterwards.(2) Where the attestation of a document is not specifically challenged and the witness is not cross-examined regarding the details of attestation his statement that the document was attested is sufficient to show that the attestation was made according to law.(3)

16. Form of attestation. — There is no particular form for attestation. An attesting witness need not be formally described as such on the face of the document.(1) Nor is it necessary to have any formal attestation clause; ordinarily a string of signatures towards the end of an instrument or somewhere on the instrument without any explanation would be quite sufficient to show that the persons put their signatures by way of saying that they had seen the document executed or had received an acknowledgment to that effect.(2) Thus there can be sufficient and adequate attestation notwithstanding witnesses signed against the signature of the mortgagor where he has signed the receipt clause and not where he has executed the document.(2a) But if it is proved that a person signed the document before the executant executed it, he cannot be said

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5b. 1957 Raj 180 (181) [AIR V 44 C 71] : ILR (1955) 5 Raj 971 (DB).

6. (1799) 99 E R 157 (159) : 1 Doug (KB) 241, Right d carter v. Price.

6a. 1947 Pat 449 (451) [AIR V 34 C 148] (DB).

7. 1925 Lah 430 (431) [AIR V 12] (DB).

Section 3 — Note 15

1. 1964 Raj 39 (41) [AIR V 51 C 11] : ILR (1964) 14 Raj 259.
1958 Assam 56 (62) [AIR V 45 C 17] (DB). (Signatures by attestors in the presence of executant can be legitimately inferred from circumstances disclosed in the evidence.)
('58) 1958 W L R 462 (463). (Will—Signatures of two persons on the reverse side—Signatures not explainable otherwise than as attestation — *Held* maxim *omnia praesumuntur rite esse acta* applied and the document was valid.)
1953 Cal 462 (464) [AIR V 40 C 170] : ILR 1955) 1 Cal 94 (DB).
1926 Oudh 209 (209, 210) [AIR V 13].

2. (Case of will.) 1953 Cal 462 (464) [AIR V 40 C 170] : ILR (1955) 1 Cal 94 (DB).
1931 Cal 806 (807) [AIR V 18].
1926 Oudh 209 (209, 210) [AIR V 13].

3. 1964 Raj 39 (41) [AIR V 51 C 11] : ILR (1964) 14 Raj 259.
1963 Madh Pra 286 (288) [AIR V 50 C 100].
1950 Nag 83 (84) [AIR V 37 C 26] : ILR (1950) Nag 321 (DB). (Party wanting to challenge, should, quite apart from raising it in his pleadings, cross-examine the witness.)

Section 3 — Note 16

1. 1959 Cal 243 (246) [AIR V 46 C 61] : ILR (1959) 1 Cal 431 (DB).
1916 Bom 123 (124) [AIR V 3] : 41 Bom 384 (DB).

2. 1929 Cal 123 (125) [AIR V 16] : 56 Cal 598 (DB).

2a. 1944 Bom 25 (26) [AIR V 31] : ILR (1944) Bom 388.

to be an attesting witness.(3)

17. Party as attestor. — A *party* to a deed, such as a co-executant, cannot be an attesting witness of that deed.(1) Nor can a person who signs on behalf of an illiterate executant also sign as attestor.(2) The reason is that a person cannot be an attesting witness to his own act.(3) The definition of attestation implies that the attesting witness is a person other than the person who executed the document.(4) But where a deed such as a mortgage is executed *benami*, the real owner though he may be considered a party to the transaction is not a party to the deed as it stands and can validly attest the deed.(5) But the case of an agent executing a deed on behalf of his principal is different, because in such a case the principal is in law the executant and thus being a party to the deed cannot validly attest it.(5a)

Where the executant himself makes a mark in token of his signature, the scribe of the document who writes an explanatory note to the mark which would otherwise be unintelligible, cannot be considered to have signed "on behalf of the executant" and is not precluded from attesting the document as a witness.(6) So also, where the executant merely puts a mark and a person thereafter signs on behalf of the executant, he is to be regarded as a competent attesting witness.(6a)

A person who is *interested* in the money advanced under a deed of mortgage but who is not himself a party to the deed, can validly attest the deed.(7)

18. Scribe as a witness. — It has been seen in Note 11 that unless a person signs with the intention of signing as a witness his signature would not amount to an attestation for the document. Where a person signs the document describing himself as a scribe and there is no indication that he intended to sign it as a witness also he

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3. 1951 S C 477 (481) [AIR V 38 C 64] : 1952 S C R 116 : 30 Pat 1210.
1926 Cal 637 (638) [AIR V 13] (DB).
1923 Nag 45 (46) [AIR V 10].
1916 Oudh 185 (186) [AIR V 3] (DB).
('09) 5 Nag L R 3 (4).
('80) 5 Cal 738 (739) (DB).
[See however 1920 Cal 784 (785) [AIR V 7] (DB). (A mortgage deed consisted of three sheets of paper. The mortgagor signed the second sheet in the presence of two witnesses, who also signed at the foot of the sheet as having witnessed the signature of the mortgagor. Then some addition was made and a third sheet was added including other properties in the mortgage. The third sheet was signed by the mortgagor in the presence of the same witnesses who had signed the second sheet — *Held* that there was a sufficient compliance with S. 59, T. P. Act, and to validate the third page of the mortgage deed, it was not necessary for the two witnesses to sign the third page of the deed.)]

Section 3 — Note 17

1. 1965 S C 1738 (1739, 1740) [AIR V 52 C 297]: 1966 (1) S C R 153.
1931 Oudh 285 (286, 287) [AIR V 18] : 7 Luck 41 (FB). (Benami mortgage—Real mortgagee can be attesting witness.)
1954 Mad 126 (128) [AIR V 41 C 48].
('10) 7 Ind Cas 735 (736) (Cal).
✠('10) 37 Cal 526 (535) (DB).
(1881) 7 Q B D 516 (519) : 50 L J Q B 316 (317), *Seal* v. *Claridge*.

2. 1958 Pat 566 (568) [AIR V 45 C 185].
1932 Mad 272 (274) [AIR V 19].
1927 Sind 118 (120) [A I R V 14] : 19 Sind L R 322. (Scribe of the document can attest.)
1925 Oudh 737 (737) [AIR V 12].
1922 Cal 168(169, 170) [AIR V 9]:49 Cal 438(DB).
1921 Cal 276 (276) [AIR V 8] (DB).
1919 Cal 550 (551) [AIR V 6] 46 Cal 522 (DB).
[*See also* ('74) 11 Bom H C R 87 (89). (Case under Succession Act 1865.)]

3. 1925 Oudh 737 (737) [AIR V 12].

4. 1931 Oudh 285 (287) [AIR V 18] : 7 Luck 41 (FB). (Attestation of benami mortgage by real lender is valid.)
† 1932 Mad 272 (274) [AIR V 19].
('10) 7 Ind Cas 735 (736) (Cal).

5. 1931 Oudh 285 (287) [AIR V 18] : 7 Luck 41 (FB).

5a. 1954 Mad 126 (128) [AIR V 41 C 48].
1954 Pat 360 (363) [AIR V 41 C 127] (DB).

6 1958 Pat 566 (568) [AIR V 45 C 185].
1926 Oudh 209 (210) [AIR V 13] (1922 Cal 168 AIR [V 9], Distinguished.)

6a. 1954 Pat 360 (363) [AIR V 41 C 127] (DB).

7. 1965 S C 1738 (1739, 1740) [AIR V 52 C 297]: 1966 (1) S C R 153. (Lender of mortgage amount not party to mortgage deed can validly attest the same.)
('11) 12 Ind Cas 531 (531) (DB) (Bom).

cannot be deemed to be an attesting witness. (1) It cannot, however, be said as a matter of law that a scribe cannot be an attesting witness. It is a question of fact which must be determined on the facts and circumstances of each case. (2) Where the circumstances show that he was present and witnessed the execution of the document and intended to sign also as a witness, he would be an attesting witness. (3) Of course a scribe who signs expressly as an attesting witness is clearly an attesting witness. (4) The mere fact that a person is the scribe or that he puts the word "scribe" after his

Section 3 — Note 18

1. 1925 P C 89 (91) [AIR V 12]. (A person signing to signify his approval of the transaction is not attesting witness.)
1952 Punj 237 (238) [AIR V 39]. (Person signing before signatures of testator and attesting witness on will stating that the will was in his hand and that it had been read out to the testator and understood by him — Held he was acting as a scribe and not as attesting witness.)
1942 Bom 291 (296) [A I R V 29] (DB). (There were two columns in the document one for signature of witnesses and another for executants. The witnesses before their signature prefixed the word Sakshi (witness). The scribe also having left no place for his signature signed in the witnesses' column by pre-fixing the word Li i.e., Likhitan before his signature — *Held*, scribe had not signed as a witness.)
† 1940 Rang 134 (135) [A I R V 27] : 1940 Rang L R 199. (Scribe can perform the dual role of a scribe and attesting witness.)
1930 All 223 (223) [A I R V 17] : 52 All 434 (DB).
1926 Rang 145 (145) [AIR V 13].
1925 Oudh 737 (738) [AIR V 12].
1921 Upp Bur 1 (2) [AIR V 8] : 4 Upp Bur Rul 78. (Where the writer of the document signed it and added the words "writer under license No. 20," and the mortgagee also signed his name under the word "mortgagee," held that neither of them acted in the capacity of attesting witness.)
1920 Bom 249 (250) [A I R V 7] : 44 Bom 405 (DB).
1920 Low Bur 173 (173) [AIR V 7] (DB).
1919 Pat 411 (412) [AIR V 6] : 4 Pat L Jour 511 (DB).
1916 Pat 210 (211) [AIR V 3] (DB). (Scribe describing as attestor of document — Fact should be established.)
† ('13) 35 All 254 (256) (DB).
('12) 8 Nag L R 17 (18).
† ('10) 6 Nag L R 152 (155). (Attestation is not a matter of spirit and intention but of form.)
[*See also* 1917 Oudh 31 (32) [AIR V 4]. (Scribe writing deed is not attesting witness even if it is executed in his presence.)]

2. 1957 Raj 180 (181) [A I R V 44 C 71] : I L R (1955) 5 Raj 971 (DB). (Scribe's signature found at end of document—Fact is not sufficient to presume that he must have signed in the presence of executant.)
1956 Him Pra 58 (60) [AIR V 43 C 27].
1953 Cal 462 (463) [AIR V 40 C 170] : ILR (1955) 1 Cal 94 (DB).
('50) 1950-2 Mad L Jour 262 (264). (Decision in 1918 Mad 491 [AIR V 5] : 41 Mad 535 held unaffected by 1925 P C 89 [A I R V 12]).
1940 Oudh 83 (84) [A I R V 27] : 15 Luck 285 (DB). (Scribe cannot become an attesting witness by his mere statement in writing that the money was paid in his presence.)
1940 Rang 134 (135) [A I R V 27] : 1940 Rang L R 199.
1926 Cal 150 (151) [AIR V 13] (DB).
('13) 19 Ind Cas 589 (590) (DB) (Mad).
('97) 1897 All W N 146 (146) (DB).

3. 1950 Cal 401 (405) [A I R V 37 C 149] : ILR (1951) 1 Cal 34 (DB).
† 1940 Rang 134 (135) [A I R V 27] : 1940 Rang L R 199.
1927 Sind 118 (120) [A I R V 14] : 19 Sind L R 322.
1924 Rang 139 (140) [AIR V 11] : 1 Rang 557.
1921 Cal 208 (208) [A I R V 8] : 48 Cal 61 (DB). (Attesting witness under S. 68, Evidence Act has the same meaning as that under S. 59 of this Act.)
† 1918 Mad 491 (491) [A I R V 5] : 41 Mad 535 (DB).
1917 Mad 473 (474) [A I R V 4] : 39 Mad 1035 (DB).
1917 Low Bur 139 (140) [AIR V 4].
('97) 1897 All W N 146 (146) (DB). (A scribe is not necessarily an attesting witness to the deed written by him — If the scribe has signed a mortgage deed with a view to testify to the fact of the execution of the deed by the executant he is an attesting witness to the deed within the meaning of S. 59.)
('01) 5 Cal W N 454 (455). (Though described as a writer only.)
1915 Mad 1062 (1052) [AIR V 2] (DB).
('13) 19 Ind Cas 589 (590) (DB) (Mad).
[*See also* ('98) 20 All 532 (533).]
[But see 1933 Sind 257 (258) [AIR V 20] (DB). (A writer of a deed who has not signed it as a witness but has as a matter of fact been a witness of execution is a competent attesting witness — Question of his intention not considered—1929 Sind 217 [AIR V 16], Foll.)
1929 Sind 217 (218) [A I R V 16] : 24 Sind L R 223 (DB). (Signature of scribe along with the fact that he witnessed the execution—Scribe held to be attesting witness — Question whether he signed it intending to witness the execution was not considered—Submitted not correct.)]

4. 1930 Cal 750 (752) [AIR V 17] (DB).
1928 Bom 267 (268) [AIR V 15] (DB).
1916 Bom 123 (125) [AIR V 3] : 41 Bom 384 (DB).

name will not, in itself, show that he has not put his signature on the document by way of saying that he has seen the instrument executed. Such a signature often occurs under the heading "witness" or at least among a host of signatures put down without any explanation but obviously as the signatures of the witnesses. Such signatures would be those of attesting witnesses. (5)

19. Sub-Registrar and persons identifying before Sub-Registrar, as witnesses. — There is a conflict of opinion as to whether the signature of a Sub-Registrar or of the identifying witness at the time of registering the document is that of an attesting witness. According to the High Court of Madras, the signatures of the registering officer and of the identifying witnesses before him would be valid attestation within the meaning of this Act, if the other essentials necessary under this definition (namely, that the executant should have acknowledged his signature to them and that they should have signed in the presence of the executant) are satisfied. (1) A similar view has been taken by the Calcutta,(2) Nagpur,(3) Patna(4) and Sind(5) Courts. But a contrary view has been taken by the Allahabad,(6) Bombay,(7) Oudh(8) and Rangoon(9) Courts. According to this view, if it were held that registration and what might happen at the time of registration might take the place of execution and attestation, which according to the language of the Act must precede registration, the

5. 1950 Cal 401 (406) : [AIR V 37 C 149] : ILR (1951) 1 Cal 34 (DB).
† 1929 Cal 123 (125) [A I R V 16] : 56 Cal 598 (DB).

Section 3 — Note 19

1. 1929 Mad 1 (2) [AIR V 16]: 52 Mad 123 (FB). (Signatures though made *alio intuitu*.)
† 1938 Mad 959 (962) [AIR V 25] (DB).
*1935 Mad 178 (181) [AIR V 22] : 58 Mad 220.
1932 Mad 272 (274) [AIR V 19]. (Sub-Registrar must sign in the presence of executant to be an attestor.)
1931 Mad 335 (338, 339) [AIR V 18] (DB).

2. † 1934 Cal 772 (774) [AIR V 21] : 61 Cal 525. (Endorsement by Sub-Registrar, unless made in presence of executant, is not proper attestation under T. P. Act.)
† ('34) 150 Ind Cas 762 (763) (Cal).
† 1930 Cal 750 (752) [A I R V 17] (DB). (There must be affirmative proof that Sub-Registrar signed in the presence of executant.)
1929 Cal 123 (126) [AIR V 16] : 56 Cal 598 (DB).
1928 Cal 154 (156) [AIR V 15] (DB). (Court will take judicial notice of the endorsement of Sub-Registrar.)
(1900) 27 Cal 169 (171) (DB). (Case under Succession Act.)
('85) 11 Cal 429 (433) (DB). (Do.)
('81) 6 Cal 17 (19) (DB). (Do.)
('75) 1 Cal 150 (151). (Do.)

3. 1949 Nag 149 (152) [AIR V 36 C 61] : I L R (1948) Nag 621 (DB). (Endorsement of Sub-Registar under Ss. 58 & 59 — No evidence that he signed in presence of executant — Registrar could not be treated as attesting witness.)
1936 Nag 171 (172) [AIR V 23]. (Sub-Registrar's endorsement of the acknowledgment by the executant of the document is attestation.)
1934 Nag 1 (12) [AIR V 21] : 30 Nag L R 62 (DB).

4. 1922 Pat 402 (404) [AIR V 9] : 1 Pat 300 (DB). (Case under Succession Act, S. 50.)

5 1929 Sind 217 (218) [AIR V 16] : 24 Sind L R 223 (DB).
1928 Sind 93 (94) [AIR V 15].

6. 1932 All 527 (531, 532, 533) [A I R V 19] : 54 All 1051 (FB). (1931 All 101 [AIR V 18], Overruled. Witness must sign as an attesting witness.)
1936 All 712 (716) [AIR V 23] (DB). (Proof of due registration is no proof of attestation.)

7. 1948 Bom 322 (324) [AIR V 35 C 82] (DB). (Person attesting must do so as attesting witness — Endorsement of Sub-Registrar and signature of identifying witnesses cannot be treated as those of attesting witnesses.)
1947 Bom 396 (399) [AIR V 34 C 113] : I L R (1947) Bom 457. (Signature of Sub-Registrar or of identifying witness at time of registering document is not due attestation which must precede registration—1936 Bom 94 [A I R V 23] and S. N. No. 495 of 1941 D/- 28-7-1943, Rel. on.)
1936 Bom 94 (98) [AIR V 23]. (Endorsement by Sub-Registrar on document is about admission of execution and not of attestation.)
[But see 1928 Bom 267 (268) [AIR V 15] : 52 Bom 219 (DB).]

8. 1933 Oudh 365 (367) [AIR V 20] : 9 Luck 12 (DB). (Reversed on another point in 1936 P C 207 [A I R V 23].)
† 1931 Oudh 146 (150) [AIR V 18] : 6 Luck 619 (DB).
[*See also* 1939 Oudh 213 (222) [AIR V 26] (DB). (Case under Succession Act — No presumption of due attestation can be made from registration endorsement.)]

9. † 1939 Rang 211 (212, 213) [AIR V 26] : 1939 Rang L R 388.
[*See also* 1928 Rang 101 (102) [AIR V 15] : 5 Rang 772. (Doubted.)]

entire spirit of the enactment would be broken. Further, neither the Sub-Registrar nor the identifying witnesses at the time of the registration purport to sign as attesting witnesses of the execution of the document. In *Surendra* v. *Behari Singh*, (10) the question came up before the Privy Council on appeal from the Full Bench decision of the Allahabad High Court in *Luchaman* v. *Surendra*. (11) Their Lordships referred to the conflict of opinion in India on this point but refrained from giving any decision thereon. They, however, pointed out that even assuming that the Sub-Registrar or the identifying witness before him may be an attesting witness it was necessary that the other essentials for attestation referred to above should have been complied with and that such facts must be proved and not assumed. See also the undermentioned cases(12) to a similar effect decided after the abovesaid Privy Council decision. In the undermentioned recent case the Kerala High Court, (13) making a distinction between documents which become complete and valid only on registration and others which do not require registration, has observed that while the Sub-Registrar and the identifying witnesses may or may not become attesting witnesses in the former case they may become so in the latter case provided the requirements of law as to attestation are complied with.

20. Registered.—If a document has been registered *under the law for the time being in force*, i. e., the law that was in force on the date of the document, it will be deemed to be "registered" for the purpose of this Act. Thus, a document executed while the law of 1877 (Act III of 1877) was in force and registered according to that law, will be a document "registered" for the purpose of this Act, though such registration may not operate as notice under the proviso to Explanation I added to the clause beginning with the words "a person is said to have notice".

A document which is required to be registered under the law for the time being in force, but is not so registered, is not effective for the purpose for which it is created. Thus, a mortgage which is required to be registered but is not registered *in accordance with law* is not valid as a mortgage. (1) So also a lease required to be

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10. 1939 P C 117 (120, 121) [AIR V 26] : I L R (1939) Kar (P C) 222.

11. 1932 All 527 (531, 533) [AIR V 19] : 54 All 1011 (FB).

12. 1962 Mad 111 (117) [AIR V 49 C 19] : ILR (1962) Mad 1 (FB). (1929 Mad 1 [AIR V 16] (FB), Overruled.)

1961 Orissa 178 (179, 180) [AIR V 48 C 73] (DB). (Sub-registrar and identifying witnesses affixing their signatures to registration and endorsement admitting execution of deed—No evidence that their signatures were affixed in the presence of the executant—Due attestation held not proved.)

1959 Cal 243 (247) [AIR V 46 C 61] : ILR (1959) 1 Cal 431 (DB). (1929 Mad 1 [AIR V 16] (FB), Dissented from to the extent that it lays down that the identifier who signs registration endorsement becomes an attesting witness.)

1958 Cal 440 (443) [AIR V 45 C 111] (DB). (1953 Cal 462 [AIR V 40] Rel. on.)

('58) 24 Cut L T 461 (463).

1957 Raj 180 (181) [AIR V 44 C 71] : ILR (1955) 5 Raj 971 (DB). (Case under Succession Act.)

1953 Cal 462 (465) [AIR V 40 C 170] : ILR (1955) 1 Cal 94 (DB).

1953 Nag 339 (340) [AIR V 40 C 146] : ILR (1953) Nag 507 (DB). (Absence of evidence that Sub-Registrar signed endorsement in presence of executant — Endorsement does not by itself prove execution and attestation of deed. 1940 Nag 382 [AIR V 27] Dissented from.)

1952 Nag 88 (90) [AIR V 39] : ILR (1952) Nag 189. (Executrix admitting her thumb impression before Sub-Registrar—Identifying witnesses also affixing thumb impression in his presence —Absence of evidence however of Sub-registrar having signed in their presence—He cannot be examined as attesting witness.)

1951 Punj 305 (308) [AIR V 38 C 72] (DB). (1939 P C 11 [AIR V 26] Rel. on.)

(1938) 67 Cal L J 31 (34).

13. 1965 Ker 32 (34) [AIR V 52 C 13].

Section 3 — Note 20

1. ('91) 18 Cal 556 (569) (FB). (Mortgage bond — Description of property mortgaged insufficient to identify it.)

1924 Cal 348 (348) [AIR V 11] (DB). (Fictitious property included to secure registration in particular office — Registration is invalid.)

('02) 29 Cal 654 (660). (Mortgage deed registered by officer having no jurisdiction.)

('85) 7 All 590 (593, 594) (DB).

registered but not registered (2). See also the undermentioned cases (3).

21. Actionable claim. — The expression "actionable claim" was originally, before the year 1900, defined in S. 130 of the Act, and that definition ran as follows :

> "A claim which the Civil Courts recognise as affording grounds for relief is actionable whether a suit for its enforcement is or is not actually pending or likely to become necessary."

This definition was practically the same as what in English law is known as a *chose in action*. The expression "a chose in action" in England is used to describe all personal rights of property which can only be claimed or enforced by action and not by taking physical possession,(1) claims enforceable by taking physical possession being known as *choses in possession*.(1a)

The definition given above was very wide and *prima facie* included even mere rights to sue, and mortgage-debts. Thus, it was held that a right of a minor to set aside a transfer of his properties which had been executed by his guardian during his minority on the ground that the guardian exceeded his powers, was an actionable claim which could be transferred.(2) As regards mortgage-debts there was a conflict of opinion as to whether they could be regarded as actionable claims. According to one view such debts were legal vested estates in land and not actionable claims.(3) The reason on which this view seems to have been based was that otherwise the old S. 135 of the Act under which the assignee of an actionable claim could not recover from the debtor more than what he had paid for the assignment, was inconsistent with a mortgage being an interest in land.(4) According to a contrary view mortgage-debts

('83) 5 All 599 (601) (DB). (Execution of bond by father on minor son's behalf — Registration of bond without the minor being represented — *Held*, bond did not affect minor's interest in immovable property.)

('81) 7 Cal 196 (198) (DB). (Bond intended to give a lien upon specific immovable property — Registered in Book No. IV, instead of in Book No. 1.)

Also see S. 59, Note 6.

2. † ('07) 5 Cal L Jour 188 (191). (Kobala deed registered after lapse of 30 days from date of order passed by District Registrar under Section 75.)

('87) 14 Cal 449 (451) (DB). (Lease deed registered by officer having no jurisdiction.)

('73) 5 N W P H C R 91 (93) (DB). (Registered document differs from duly registered document.)

3. 1954 S C 316 (319) [AIR V 41 C 76] : 1954 S C R 919 : 33 Pat 313. (Document presented by agent not authorised in manner prescribed under S. 33, Registration Act — Registration is void.)

1931 P C 52 (56) [AIR V 18] : 58 Ind App 58: 10 Pat 481. (Presentation by person having no valid power of attorney.)

1921 P C 8 (10) [AIR V 8] : 48 Cal 509 : 48 Ind App 127. (Inclusion of property not belonging to mortgagor and not intended to form security —Registration is invalid.)

1954 Orissa 195 (197) [AIR V 41 C 59] : ILR (1954) Cut 298 (DB). (Document (deed of gift) governed by S. 46, C. P. Tenancy Act — Deed is not compulsorily registrable under general law of registration—Contravention of sub-s. (3) of S. 46 of Tenancy Act—Deed is invalid on that account — It cannot become so on account of its non-registration under the general law.)

1948 Oudh 223 (224, 225) [AIR V 35 C 81] : 23 Luck 268. (Registration of gift deed—Necessary formalities gone through and provisions of Ss. 34, 35, 58 and 59, Registration Act, complied with by Sub-registrar — Deed becomes "duly registered" — Validity of registration is not affected by omission to go through subsequent formalities such as the endorsement of a certificate under S. 60 of the Registration Act.)

1941 Oudh 41 (42) [AIR V 28] : 16 Luck 99 (DB). (Registration in wrong registration office is invalid.)

1926 Rang 17 (18) [AIR V 13] : 3 Rang 398 (DB). (Presentation by wrong person.)

(1900) 23 All 233 (240, 242) : 28 Ind App 15 (PC). (Deed presented by attorney after the death of the executant —Registration is invalid.)

Section 3 — Note 21

1. 1965 Andh Pra 410 (412) [AIR V 52 C 99].

1959 Cal 328 (334) [AIR V 46 C 90] : ILR (1959) 2 Cal 325 (DB). (Benefit under commercial letter of credit.)

(1902) 2 K B 427 (430) : 71 L J K B 712, Torkington v. Magee.

1a. 1965 Andh Pra 410 (412) [AIR V 52 C 99].

2. ('86) 12 Cal 470 (472) (DB).

3. ('01) 4 Oudh Cas 210 (213) (DB).

('94) 16 All 313 (315) (DB).

4. See the cases cited in foot-note 3.

[*See also* ('94) 21 Cal 568 (579, 580) (FB). (Per Prinsep, J.)]

were actionable claims.(5)

On the other hand the old definition of actionable claim excluded claims in respect of which the *cause of action had not arisen.*(6)

The present amended definition has now removed the difficulties experienced before, by excluding from it debts secured by mortgages of immovable property or by hypothecation or pledge of movable property, and by including claims in respect of which the cause of action may not have arisen but may accrue in the future.(7) An actionable claim now means a claim to —

(1) any debt, other than a secured debt,(8) or

(2) any beneficial interest in movable property not in the possession of the claimant, which the Civil Courts recognise as affording grounds for relief.

A transfer of a *right in immovable property*(9) or a transfer of a right to movable property(10) is not a transfer of an actionable claim even though the owner is not in possession.

A mere right to sue cannot be subject of transfer by virtue of S. 6, cl. (e) and cannot be considered as either a "debt" or a beneficial interest in movable property.(11) Thus, a claim for damages after breach of a contract is not an actionable claim.(12) But the benefit of a contract in respect of movable property, before breach

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5. ('94) 21 Cal 792 (798) (DB).
('94) 21 Cal 568 (574) (FB).
('94) 16 All 315 (317) (FB).
('95) 18 Mad 454 (454) (DB).
('86) 12 Cal 546 (550) (DB). (Case under Civil P. C.)
('86) 12 Cal 505 (508) (DB). (Assumed.)

6. ('96) 16 All 265 (267, 269) (FB).
('06) 30 Mad 235 (237) (DB).

7. 1965 Andh Pra 410 (412) [AIR V 52 C 99].
1932 All 345 (347) [AIR V 19] : 54 All 499 (DB). (Claim to unpaid dower is actionable.)
1930 Sind 77 (79) [A I R V 17] : 24 Sind L R 160.
1928 Mad 1133 (1134) [AIR V 15].
1917 Mad 928 (929) [AIR V 4] : 40 Mad 683 (DB). (Transfer of mortgage debt held not an actionable claim within the meaning of S. 132. Hence the assignee was held not to take the assignment subject to the liabilities and equities to which the transferor was subject.)

8. 1965 Andh Pra 410 (412) [AIR V 52 C 99].
1963 Assam 11 (15) [AIR V 50 C 4] : ILR (1962) 14 Assam 484. (Debt secured by hypothecation of standing crop — Not an actionable claim— Transfer of right to :recover debt—S. 130 (2) does not apply.)
1941 Lah 337 (340) [AIR V 28] (DB). (Part assignment of debt is actionable claim.)
[*See also* 1938 Cal 377 (381) [AIR V 25] : 62 Cal 51 (DB). (The obligation on the agent's part to account to his principal cannot be assigned being merely a right to sue — Where however an account having been stated, certain sum is found due to the agent from the principal, such an account stated becomes a debt and so an actionable claim.)
1938 Sind 24 (26) [AIR V 25] : 32 Sind L R 640 (If a "debt" be implied from the mere acknowledgment of receipt of money (pahunch in Sind), the claim to that debt is an actionable claim.)]

9. 1939 Oudh 122 (125) [AIR V 26].
(1900) 3 Oudh Cas 215 (228) (DB). (Transfer by heir of his acquired right to share in inheritance although heir was not in possession, held not transfer of actionable claim. 13 Cal 297 relied on.)
† ('86) 13 Cal 297 (298, 299) (DB).
[*See* ('98) 20 All 468 (469) (DB). (Transfer by a usufructuary mortgagor of his interest in the property is not transfer of actionable claim— It is transfer of land itself subject to a mortgage.)]

10. ('88) 11 Mad 445 (447) (DB). (Transfer of ownership of an elephant. 13 Cal 297, followed.)

11. 1966 Guj 6 (12) [A I R V 53 C 2] : I L R (1964) Guj 928 (DB). (Right which consignor has in the contract of bailment or the goods bailed to railway administration is not an actionable claim.)
1951 Pat 415 (417) [AIR V 38 C 107] (DB).
1927 Rang 39 (40) [AIR V 14]. (Claim for mesne profits becomes very nearly a mere right to sue for accounts if it involves accounts as to value of produce)
1939 Oudh 122 (125) [AIR V 26]. (Transfer by quondam minor of immovable property alienated by his guardian, after lapse of prescribed period for its recovery.)
[*See also* 1923 Mad 177 (178) [AIR V 10]. (Transfer of arrears of rent along with the immovable property — Suit by transferee for the rent not barred by S. 6 (e).)]

12. See Note 22.

of the contract, would be a beneficial interest in movable property, not in possession of the claimant and would therefore be an actionable claim.(13) A claim for damages for a wrong is not an actionable claim within the meaning of the definition.(14)

22. Debts. — A "debt" is a sum of money which is now payable or will become payable in future by reason of a *present obligation*.(1) Where there is no existing obligation, there is no "debt".(2)

For the purposes of the Code of Civil Procedure it has been held that a debt does not include any sum of money which may or may not become due or the payment of which depends upon *contingencies* which may or may not happen.(3) Thus, a sum of money payable on contingency is not a debt within the meaning of the Code of Civil Procedure and cannot be attached in execution.(4) The definition in this section is wider and includes conditional or contingent debts. It has, however, been held in the undermentioned cases(5) arising under this Act that a debt would not include a sum of money the payment of which depends upon a contingency which may or may not happen. All these cases follow *Haridas Acharja* v. *Baroda Kishore*(6) which is a leading case on the interpretation of the word "debt" for the purposes of the Code of Civil Procedure. It is submitted that these cases, in so far as they exclude contingent debts from the category of debts for the purposes of this Act, are not correct. A debt must be a liquidated sum of money or a certain sum of money.(7) Thus, a claim for *damages* for breach of contract(8) or a claim for mesne profits(9) or a claim to share in the profits of a village(10) is not a claim for any liquidated sum and is not a debt. But if any *ascertained amount* is found to be recoverable as a result of a breach of contract it will be a debt as, for example, where the contract itself fixes the

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13. See Note 24.

14. 1965 Andh Pra 410 (412) [AIR V 52 C 99].

Section 3 — Note 22

1. ('09) 36 Cal 936 (938) (FB).
1937 Bom 382 (383) [A I R V 24]. (Amount due under policy is debt though payable in future.)
*1935 Cal 756 (757) [AIR V 22] : 63 Cal 578 (DB). (Benefit of an obligation to pay money.)
† 1935 Nag 2 (4) [A I R V 22] : 31 Nag L R 142. (Right to damages is not a debt.)

2. See Note 26.

3. See Section 60, Note 7 of the Authors' Commentaries on the Civil Procedure Code 7th (1963) Edn.
[*See also* 1917 Mad 79 (80) [AIR V 4] : 40 Mad 302 (DB). (The maintenance allowance to be received in monthly instalments is not a debt.)
('11) 11 Ind Cas 422 (424) (DB) (Cal) (Do.)]

4. See Section 60, Note 7 of the Authors' Commentaries on the Civil Procedure Code, 7th (1963) Edn.

5. 1935 Nag 2 (4) [AIR V 22] : 31 Nag L R 142.
1927 Sind 78 (82) [AIR V 14] : 22 Sind L R 1 (DB).

6. † (1900) 27 Cal 38 (42) (DB). (Maintenance allowance not due is not a debt)

7. *1932 P C 32 (33, 34) [AIR V 19] : 59 Ind App 41 : 11 Pat 266. (Payment of revenue on lessee's default—Debt.)
('42) 1942 Nag L Jour 30 (32).
1937 All 470 (471) [AIR V 24] : I L R (1937) All 666 (DB). (Right to recover balance of consideration from mortgagee is an actionable claim.)
1933 All 642 (645, 646) [A I R V 20] : 55 All 814 (DB). (Claim for unliquidated damages for breach of contract.)
('99) 22 Mad 139 (143) (DB). (Case under Succession Certificate Act, 18-9.)
('08) 7 Cal L Jour 658 (660) (DB) (Do).

8. 1939 Cal 715 (716) [AIR V 26] : I L R (1939) 2 Cal 341 (DB).
1934 Oudh 240 (241) [A I R V 21] : 10 Luck 26 (DB). (Surplus left with the vendee is a debt.)
1933 All 642 (646) [AIR V 20] : 55 All 814 (DB).
1930 Oudh 88 (89) [A I R V 17] : 5 Luck 547 (DB). (Claim for interest by way of damages.)
1923 Bom 403 (403) [A I R V 10] : 47 Bom 719 (DB). (Because it is mere right to sue.)
1923 Nag 67 68) [AIR V 10]. (Damages based on chitty, containing the value of articles borrowed not a debt).
1917 Mad 358 (361) [AIR V 4] (DB). (A mere right to sue in the case of a contract is applicable only to cases where there has been a complete breach sounding in damages and where the specific enforcement of the contract cannot be obtained.)
1914 Lah 510 (511) [A I R V 1] : 1914 Pun Re No. 106 (DB).
† ('09) 36 Cal 345 (351) (DB).
[*See also* 1921 Cal 795 (798) [A I R V 8] (DB). (Claim for unliquidated damages for breach of contract is not assignable.)]

9. 1927 Rang 39 (40) [AIR V 14]. (Claim for mesne profits where taking of accounts is necessary.)
1924 Pat 551 (553) [AIR V 11] : 3 Pat 575 (DB).

10. ('42) 1942 Nag L Jour 30 (33).

damages.(11) A sum is not the less liquidated because of the mere fact that a *calculation* will have to be made before determining the exact amount.(12)

The following are all debts within the meaning of this Act :

(1) Book-debt.(13)

(2) A debt separated from the security given therefor.(14)

(3) Arrears of rent or other monies which have become due.(15)

(4) Consideration in money left in the hands of vendee to be paid to a third person,(16) so also the balance of consideration remaining with the vendee after discharge of the debts quoted,(17) so also the unpaid consideration on a usufructuary mortgage bond;(18) but not the consideration due on a mere money bond.(19)

(5) Provident fund money in the hands of an employer.(20)

(6) Money to be recovered under an unpaid bill.(21)

(7) Servant's wages when they become due.(22)

(8) Arrears of annuity though charged upon immovable property,(23) so also arrears of rent which are a charge on the tenure or holding of the tenant.(24)

(9) A claim to money deposited for the due performance of a duty.(25)

(10) A claim to earnest money upon failure of the other party to perform his part of the contract.(26)

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11. 1935 Nag 2 (4) [AIR V 22]: 31 Nag LR 142. (1849) 2 H L C 579 (598) : 9 E R 1213 (1220), Blackham v. Drake.

[But see 1952 Raj 187 (188) [AIR V 39] : ILR (1952) 2 Raj 5.]

12. 1934 Mad 461 (463) [AIR V 21] : 57 Mad 1074 (DB). (Principal's amount in the hands of the agent even before accounts are struck is a debt.)

[*See also* 1930 Bom 409 (411) [AIR V 17] (DB). (Cross-transactions between plaintiff and defendant—On adjustments of rates certain amount found due to plaintiff — Plaintiff assigning this amount to another — *Held*, subject of assignment was actionable claim.)

1924 Nag 145 (146) [AIR V 11]. (Claim for money which might be found due on taking accounts.)]

13. 1939 Sind 288 (289) [AIR V 26] : ILR (1939) Kar 344 (DB). (Debt of Rs. 15000/- due to firm — Suit by two partners in their own name for its recovery — Plaintiffs pleading agreement by all partners that plaintiffs alone would be entitled to the suit debt—*Held* the debt was undoubtedly an actionable claim and that the agreement amounted to transfer of an actionable claim.)

1921 Mad 137 (138, 139) [AIR V 8] : 44 Mad 196 (DB).

14. † 1931 P C 245 (247, 248) [AIR V 18] : 58 Ind App 323 : 59 Cal 377.

1935 All 837 (838) [AIR V 22].

15 ('13) 40 Cal 650 (651) (FB). (Rent due.)

1960 Cal 378 (379) [AIR V 47 C 95] : ILR (1960) 1 Cal 745 (DB).

1944 Pat 129 (134) [AIR V 31] (DB). (Arrears of rent and royalty.)

1925 Pat 310 (312) [AIR V 12] : 4 Pat 43 (DB). (Rent due.)

1923 Pat 165 (166) [AIR V 10] (DB) (Do.).

16. 1938 All 544 (545) [AIR V 25].

17. 1934 Oudh 240 (241) [AIR V 21] : 10 Luck 26 (DB).

18. 1936 Lah 196 (198) [AIR V 23] (DB). (It is unperformed part of the contract.)

19. 1930 Lah 100 (101) [AIR V 17]. (Money bond—Even suit cannot be filed to recover the balance, hence no actionable claim.)

20. 1944 Cal 335 (337) [AIR V 31]: ILR (1943) 2 Cal 325. (There is a "debt" accruing between the making of each deposit and the date on which it becomes payable to the member and the payment is at least conditional or contingent.)

† 1935 Cal 756 (758) [AIR V 22] : 63 Cal 578 (DB).

21. 1939 Cal 715 (716) [AIR V 26] : ILR (1939) 2 Cal 341 (DB).

22. ('66) 5 Suth W R S C C Ref 3 (4) (DB).

23. 1935 P C 165 (166) [AIR V 22]: 62 Ind App 265 : 63 Cal 1.

[*See also* 1936 Pat 527 (530) [AIR V 23]. (Annuity payable under deed of wakf.)]

24. 1925 Pat 310 (312) [AIR V 12] : 4 Pat 43 (DB). (See section 65 of Bengal Tenancy Act.)

25. ('34) 1934 Mad W N 577 (579). (Such claim is analogous to a claim due under an insurance policy.)

26. 1952 Raj 187 (188) [AIR V 39] : ILR (1952) 2 Raj 5.

23. Debt ripened into a decree. — The word "debt" would clearly include a decree debt also but such a debt would not be an *actionable claim*.(1) The reason is that the original debt has already been put in action and relief granted thereon. The contrary view taken in the undermentioned cases(2) that a decree constitutes an actionable claim is no longer good law in view of the Supreme Court decision noted below.(2a) It has also been held by Bhagawati J. in the above Supreme Court decision that a decree to be passed in future on the debt also does not come within the definition of an actionable claim.(2b) Hence the following decisions(3) holding that a claim which has been put in action will, nevertheless, be an actionable claim until the decree is actually passed must also be held to be no longer good law.

24. Beneficial interest in movable property. — The *benefit* of a contract in respect of moveable property is a beneficial interest in movable property.(1) A *liability* under such a contract cannot be said to be a *beneficial* interest in movable property. It was held in the undermentioned case(2) where B contracted with A for the purchase of goods at a fixed price and agreed to pay damages if A suffered any loss on account of B's refusing to take delivery at that price, that B's right under the contract was coupled with a liability and hence could not be considered an actionable claim within the meaning of this Act. The interest of a partner in the partnership is a beneficial interest in movable property though, being in the constructive possession of the partner, it is not an actionable claim.(2a) But a partner's right to call upon another partner to furnish an account in respect of the dissolved partnership is a beneficial interest in movable property not in the possession of the claimant.(3) The right to purchase shares in a company at an agreed price or even an option to do so is a beneficial interest in movable property.(3a) A copyright is a beneficial interest in movable property but the owner cannot be said to be not in possession of such right. It is therefore not an actionable claim.(4) A claim to mesne profits is one for damages and is not a claim to any beneficial interest in movable property.(5) The interest which a member of a provident fund has in the monies standing to his

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Section 3 — Note 23

1. 1955 S C 376 (398, 399) [AIR V 42 C 66] : 1955 S C R 1369. (Per Bhagwati J.)
1928 Mad 478 (478) [A I R V 15] : 51 Mad 681 (DB).
1921 Mad 113 (114) [AIR V 8] (DB). (Decree partakes the nature of property and not actionable claim.)
(1900) 24 Bom 502 (503) (DB). (12 Cal 610 followed.)
('86) 12 Cal 610 (612) (DB).

2. 1951 Pat 415 (417) [AIR V 38 C 107] (DB).
1939 Mad 543 (545) [AIR V 26] (DB).
(1900) 23 Mad 449 (455) (DB). (Right under a judgment is actionable claim, even though of a foreign Court.)

2a. 1955 S C 376 (398, 399) [AIR V 42 C 66] : 1955 S C R 1369. (Per Bhagawati J.)

2b. 1955 S C 376 (399) [AIR V 42 C 66] : 1955 S C R 1369.

3. 1939 Cal 715 (716) [AIR V 26] : ILR (1939) 2 Cal 341 (DB).
1914 Mad 512 (525) [AIR V 1] : 37 Mad 238 (FB). (Even though the matter is ripe for judgment.)

Section 3 — Note 24

1. 1957 Nag 31 (44) [AIR V 44 C 13].
1934 All 960 (962) [AIR V 21]. (Contract to purchase 'Gur'.)
('07) 9 Bom L R 838 (843) (DB).
('07) 9 Bom L R 119 (121).
('07) 9 Bom L R 114 (118). (Benefit of contract is in view of the definition of "actionable claim" in T. P. Act as amended by Act 2 of 1890 assignable by notice.)
*('06) 33 Cal 702 (708). (Affirmed in 34 Cal 289.) [But see 1966 Guj 6 (12) [AIR V 53 C 2]. (Goods bailed to railway administration — No beneficial interest in the goods consigned to transferees by the consignor.)]
2. 1936 Nag 37 (39, 40) [AIR V 23] : 31 Nag LR Sup 154.
2a. 1950 Nag 89 (91) [AIR V 37 C 29] : I L R (1950) Nag 355.
3. 1925 Sind 72 (75) [AIR V 12].
3a. 1966 Cal 134 [AIR V 33 C 26] (DB).
4. † 1939 All 305 (308) [AIR V 26] : I L R (1939) All 275 (DB). (It is movable but intangible property.)
5. 1924 Pat 551 (553) : 3 Pat 575 (DB). (It is mere right to sue.)
[*See also* ('83) 9 Cal 695 (697) (DB).]

credit in the fund, is a beneficial interest in the fund, and a claim to such interest is actionable claim.(6)

A contract for the purchase of *immovable* property does not create any interest in the property. Nor is the benefit of such a contract an actionable claim inasmuch as it is not a beneficial interest in *movable* property. But it has been held that such a right is assignable, though not *as property* or as *an actionable claim*.(7)

As observed by Mr. Justice Coutts-Trotter, the Transfer of Property Act does not give an exhaustive and exclusive enumeration of what is assignable by the law of India and that by virtue of S. 23 (b) of the Specific Relief Act, 1877, all contracts capable of specific performance may be assigned, except those of the class prohibited by S. 23 of the Specific Relief Act.(8) (Now see S. 15 of the Specific Relief Act, 1963).

It has been held in the undermentioned case(9) that a claim to recover back earnest money and part purchase-money which had been given to the proposed vendor under a contract of sale of immovable property, is a beneficial interest in movable property within the meaning of this section. It is submitted that the claim would be a debt rather than a beneficial interest in movable property.(10) (See also Note 22.)

25. Civil Courts. — It has been held in the undermentioned case(1), that the words "Civil Courts" in this section do not include all Courts exercising jurisdiction of a civil nature and do not include Revenue Courts having exclusive jurisdiction over certain matters, and that a claim for profits which is exclusively cognizable by a Revenue Court is not an actionable claim within the meaning of this section. It is submitted that this view is not correct. A Civil Court means a Court which can try suits and proceedings of a civil nature. A suit for profits is clearly a suit of a civil nature, even though it is triable by a particular Court. It has been held by their Lordships of the Privy Council in *Nilmoni Singh* v. *Taranath Mukherjee*,(2) that a Rent Court which had exclusive jurisdiction over certain classes of cases arising out of the Bengal Rent Act was a Civil Court. Their Lordships observed as follows :

> "It must be allowed that in those sections there is a certain distinction between the Civil Courts there spoken of and the Rent Courts established by the Act, and that the Civil Courts referred to in S. 77 (of the Bengal Rent Act) and the kindred sections, mean Civil Courts exercising all the powers of Civil Courts, as distinguished from the Rent Courts, which only exercise powers over suits of a limited class. In that sense there is a distinction between the terms; but it is entirely another question whether the Rent Court does not remain a Civil Court in the sense that it is deciding on purely civil questions between persons seeking their civil rights."(3)

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6. 1944 Cal 335 (337) [AIR V 31] : ILR (1943) 2 Cal 325.

7. 1928 P C 174 (176) [AIR V 15] : 55 Ind App 243 : 51 Mad 533.
1962 Mad 378 (379) [AIR V 49 C 102]. (Right to reconveyance of land — Assignable — 1928 P C 174 [AIR V 15], Rel. on.)
1954 Assam 95 (96) [AIR V 41 C 35].
1917 Mad 358 (361) [AIR V 4] (DB).
[*See also* 1953 Mad 409 (412) [AIR V 40 C 151]. (An agreement to sell immovable property does not create any interest in the said property unless a sale deed is executed conveying the property.)]

8. † 1917 Mad 358 (361) [AIR V 4] (DB). (Contract for the conveyance of land — Executory.) Also see S. 6, Note 17.

9. 1927 Sind 78 (82) [AIR V 14] : 22 Sind L R 1. (Though a claim for damages included therein.)

10. 1952 Raj 187 (188) [AIR V 39] : ILR (1952) 2 Raj 5. See Note 2 on Article 70 of the Authors' Commentaries on the Limitation Act, 4th (1965) Edn.

Section 3 — Note 25

1. 1934 All 155 (159) [AIR V 21] : 56 All 624 (FB).

2. † ('83) 9 Cal 295 (300, 301) : 9 Ind App 174 (PC).

3. See Note 2 on S. 5 in the Authors' Commentaries on the Code of Civil Procedure, 7th (1963) Edn.

26. "Accruing".—In *Webb* v. *Stenton*,(1) Brett, M. R. observed :

"The law has always recognized two kinds of debt. First, a debt payable at the time, and secondly, a debt due at the time but *solvendum in futuro* . . . . . It seems to me that the meaning of "accruing debt" is a debt *debitum in praesenti solvendum in futuro*, and it goes no further. It does not comprise a probable debt—i. e., anything which may probably soon become a debt."

And Lindley, L. J., in the same case observed :

"Apart from authority, I understand any legal or equitable debt—but there must be a debt, and an accruing debt—to be a sum of money which is payable in the future by reason of an existing obligation. An accruing debt is therefore a debt which is not yet actually payable, but is represented by an existing obligation."

It follows from the above observations that rent in respect of a period still in existence is not a debt at all as there is no existing obligation and consequently a claim to such rent is not an actionable claim. As stated by the Allahabad High Court in *Lachman* v. *Jarbandhan*, (2) "an actionable claim is a claim to a 'debt' existent, accruing, conditional or contingent. The last four words do not alter the situation if there is no debt." A contrary view namely that rent in respect of a period still in existence is an "accruing debt" within the meaning of this section was held by Madhavan Nair, J., in the undermentioned case. (3) It is submitted that this view is not correct. In the case of provident fund monies standing to the credit of a member of the fund, which are payable to him under the Provident Fund Rules, not immediately or each year, but upon the happening of a prescribed event (e. g. retirement), there is a debt *accruing* between the making of each deposit and the happening of the prescribed event. (4)

27. **Conditional and contingent debt.** — A contingent debt is first of all a "debt," the payment of which is dependent upon a contingency.(1) A debt, the relationship giving rise to which does not yet exist, is not a contingent debt inasmuch as a debt involves, as has been seen in Note 22, an existing obligation or an existing relation upon which it rests. In *In re Aviet Stephens*(2) it was held by the High Court of Rangoon that a debt due from potential customers in the future, who are not yet ascertained or ascertainable, and with whom no present relation exists giving rise to any possibility of any future liability, is not a debt. In coming to this conclusion Braund, J., observed as follows:

"There are four classes of debts described: existing debts, accruing debts, conditional debts and contingent debts. A debt, the relationship giving rise to which does not yet exist, is clearly not a contingent debt. It appears to me that I must treat these four classes as the only classes of debt that the definition intends to embrace. *Prima facie* a liability to arise in the future on the part of an unknown person out of a relationship, contractual or otherwise, which does not yet exist, cannot, on any ordinary use of language, be described as a "debt": still less can it be described as an 'existing' debt. Neither can it be 'accruing' or 'conditional' and, in my view, it cannot be 'contingent'. A contingency is something that may happen in future which affects a present relationship. For instance, a contingent interest, such as a contingent life-interest, presupposes an existing interest which may or may not develop into an interest in possession. The interest is there all the time. It is even saleable as such. It seems to me that when S. 3, Transfer of Property Act, refers to an 'existing' debt, it intends thereby to exclude a debt which does not yet exist at all."

Section 3 — Note 26

1. (1883) 52 L J Q B 584 (587, 588) : 11 Q B D 518.
2. † 1928 All 193 (193) [AIR V 15] : 50 All 507 (DB).
3. 1926 Mad 1173 (1176) [AIR V 13] (DB). (1916 Mad 974 [AIR V 3] followed.)
4. ('43) 47 Cal W N 441 (446, 447.)

Section 3 — Note 27

1. (1826) 108 E R 134 (135) : 4 L J (OS) K B 176, *Clayton* v. *Gosling*.
2. * 1938 Rang 1 (4) [AIR V 25].

In *Viswanath* v. *Mulraj*,(3) it was held by the High Court of Bombay that a claim to the policy monies under a life policy was a debt not payable *in praesenti* but a conditional and contingent debt, the contingency being the death of the assured and the condition, the proof of the death of the person entitled to the policy. This case went up on appeal to the Privy Council. Their Lordships held that the right to monies accruing becoming due under a life insurance policy was an actionable claim but did not say whether it was so as being a contingent or conditional debt.(4) In *Virjivandas* v. *Magan Lal*(5) also, it was held that the amount due under the policy was a debt but it was not decided whether it was a conditional or contingent debt. In the undermentioned Sind case(6) the right to recover the insurance money payable under life policy was held to be an actionable claim as being a *beneficial interest* in movable property. In the case noted below,(7) the amount accruing due to a member of a provident fund scheme under which the payment could only be demanded upon the happening of a prescribed event, was held to be a debt, the payment of which was conditional or contingent. Following the Privy Council decision in *Mulraj* v. *Viswanath*(7a) it has been held in the undermentioned case(8) that a right to receive proceeds of a business is an actionable claim.

28. Notice. — The old provision as to notice was as follows :

"A person is said to have 'notice' of a fact when he actually knows that fact, or when, but for wilful abstention from an inquiry or search which he ought to have made, or gross negligence, he would have known it, or when information of the fact is given to, or obtained by, his agent under the circumstances mentioned in the Indian Contract Act, 1872, section 229."

The present paragraph with the explanations and provisos was substituted for the original provision mentioned above, by the Transfer of Property (Amendment) Act, 1929.

The definition of notice contained in this paragraph is of general application and not merely confined to this Act.(1a)

This paragraph deals with two classes of notice, namely, actual notice and constructive notice.(1b)

To give notice of a fact to a person is to bring that fact to his knowledge. When the information conveyed is express and it brings home knowledge directly to a party the notice is said to be actual notice.(1c) *Actual notice* must, in order to constitute a binding notice, be *definite* information given by a person interested in the thing in respect of which the notice is issued.(1) Actual notice embraces all degrees and grades of evidence, from the most direct and positive proof to the slightest evidence, from which a Court would be warranted in inferring notice. It is a question of fact and it may be proved by evidence like any other fact.(2a) It is not established by proof of casual conversation(2) much less by proof of what would be constructive

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3. ('11) 11 Ind Cas 964 (966) (DB) (Bom.)

4. ('13) 37 Bom 198 (209) : 40 Ind App 24 (PC).

5. 1937 Bom 382 (383) [AIR V 24]. (11 Ind Cas 964, followed.)

6. 1937 Sind 181 (183) [AIR V 24] : 31 Sind L R 98 (DB). (Actionable claim includes ordinary and endowment policies.)

7. 1944 Cal 335 (337) [AIR V 31] : I L R (1943) 2 Cal 325.

7a. ('13) 37 Bom 198 (209): 40 Ind App 24 (PC).

8. 1951 Assam 56 (57) : [AIR V 38 C 29] : ILR (1951) 3 Assam 1 (DB).

Section 3 — Note 28

1a. 1964 Mad 202 (204) [AIR V 51 C 57].

1b. ('63) ILR (1963) Guj 575 (582).

1c. ('63) ILR (1963) Guj 575 (583).

1. 1928 All 159 (161) [AIR V 15] : 50 All 328 (DB). (Person is not bound to attend to vague rumours or statements by mere strangers.)

2a. ('63) ILR (1963) Guj 575 (583).

2. (1868) 37 L J Ch 881 (882) : L R 3 Ch A 488, *Lloyd* v. *Banks*.
(1861) 9 W R (Eng.) 880 (882) : 7 Jur (NS) 1263, *North British Insurance Co.* v. *Hallett*.

notice. It must be shown that the mind of the person has, in some way, been brought to an intelligent apprehension of the fact in such a way that reasonable man would act upon the information so acquired and would regulate his conduct by the information which has thus come to his knowledge.(3) A statement to a would-be purchaser of property that a third person "has a claim" over the property, is not sufficient notice of a deed if it is not disclosed at the sale.(4) A notification in a newspaper would not be actual notice to the subscriber of the paper unless his attention is drawn to the said notification.(5) Actual notice before purchase of property is notice at the time of the purchase.(6)

Constructive notice is knowledge which the Courts impute to a party upon a presumption so strong that it cannot be allowed to be rebutted, that the knowledge must have been communicated.(7) "The doctrine of constructive notice," said Lord Brougham in *Kennedy* v. *Green*,(8)

> "depends upon two considerations; first, that certain things existing in the relation or the conduct of parties, or in the case between them, beget a presumption so strong of actual knowledge that the law holds the knowledge to exist, because it is highly improbable it should not; and next, that policy and the safety of the public forbids a person to deny knowledge while he is so dealing as to keep himself ignorant, or so as that he may keep himself ignorant, and yet all the while let his agent know, and himself, perhaps, profit by that knowledge."

The doctrine of constructive notice had its origin in equity.(8a)

The section refers to five classes of constructive notice—

(1) Notice imputed to person by reason of wilful abstention from enquiry; see Note 29.

(2) Notice imputed to person by reason of gross negligence; see Note 30.

(3) Notice by registration of instrument; see Note 34.

(4) Notice by possession of immovable property.

(5) Notice to agent.

The broad principle underlying the doctrine of constructive notice is that a person who *is bound to make an inquiry* and fails to do it should be held to have notice of all facts which would have come to his knowledge had he made the inquiry.(9)

(1865) 55 E R 918 (919) : 35 Beav 317, *Re Tichener.*

(1880) 14 Ch D 406 (419) : 49 L J Ch 465 (469), *Saffron Walden Second Benefit Building Society* v. *Rayner.*

(1856) 35 L J Ch 186 (188) : L R 1 Eq 121, *Edwards* v. *Martin.*

3. (1868) L R 3 Ch A 488 (490, 491) : 37 L J Ch 881 (882), *Lloyd* v. *Banks.*
[*See also* (1880) 14 Ch D 406 (409) : 49 L J Ch 465 (468), *Saffron Walden Second Benefit Building Society* v. *Rayner.*]

4. (1797) 30 E R 1114 (1118) : 3 Ves 478, *Jolland* v. *Stainbridge.*

5. 1929 Cal 736 (737) [AIR V 16].

6. (1733) 24 E R 1046 (1047) : 3 P W 243, Jones v. Thomas.

7. ('63) I L R (1963) Guj 575 (583).
1928 All 159 (161) [A I R V 15] : 50 All 328 (DB).
(1859) 44 E R 1380 (1383) : 28 L J Ch 311, Espin v. Pemberton.
(1851) 68 E R 586 (589) : 9 Hare 449, Hewitt v. Loose More. (Per Turner, V. C.)
(1791) 145 E R 926 (928) : 2 Anst 432, Plumb v. Fluitt.

8. (1834) 4 E R 266 (274) : 3 My & K 699.

8a. ('63) I L R (1963) Guj 575 (583).

9. 1964 Pat 144 (147) [AIR V 51 C 38] : 44 Pat 271 (DB).
1954 Cal 367 (368) [A I R V 41 C 124] : 1954 Cri L Jour 132 : I L R (1956) 1 Cal 217.
1952 Mad 265 (266) [AIR V 39]. (Possession of mortgagee is notice to purchaser of property, of all the equities in favour of mortgagee.)
1937 Oudh 301 (308) [AIR V 24] (DB). (Property subject to maintenance charge sold—Purchaser knowing existence of several other maintenance allowances but failing to make inquiries - Purchaser held had constructive notice of charge.)
1932 Mad 305 (306, 309) [AIR V 19] : 55 Mad 519 (DB). (In the case of holdings under a ganom, Kuzhikanom and other similar demises, the tenants do as a matter of fact expect renewals—A melkanomdar therefore who does not make

Where, on the other hand, a person is *not bound* to make an inquiry, he cannot be charged with constructive notice of the facts that might have been ascertained on such enquiry.(10) Again, where a fact, of which a person has notice, would not put him on inquiry as to the matters in question, it cannot be constructive notice of such matters.(11)

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enquiries whether the tenant has a renewal in his favour should be deemed to have constructive notice of the renewal and the melcharth cannot be enforced as against the kanomdar.)

1932 Mad 115 (118) [A I R V 19] : 55 Mad 320 (DB). (Mortgagor as plaintiff in mortgage suit is under a duty to Court to implead all parties interested in the property. His omission to search the register amounts to gross negligence, sufficient to fix him with constructive notice of a sub-mortgage.)

('28) 108 Ind Cas 291 (293) (Mad).

1923 Mad 563 (564) [A I R V 10] (DB). (Possession of land by third party is constructive notice of his rights therein.)

1923 Sind 50 (53) [AIR V 10] : 16 Sind L R 278 (DB).

1915 Cal 478 (481) [A I R V 2] : 42 Cal 625 (DB). (Public sale to person — Constructive notice cannot be imputed to the same extent as to one at a private sale.)

('12) 16 Ind Cas 811 (814) (DB) (Cal). (Where the party could not have learnt the facts by inquiry, he is not prejudiced because he did not inquire.)

('11) 35 Bom 269 (271). (Purchaser of property is bound to make inquiry regarding title of person in possession.)

(1910) 12 Bom L R 940 (946).

('05) 7 Bom L R 407 (410) (DB).

('83) 7 Bom 139 (145) (DB).

('69) 6 Bom H C R O C 59 (61). (Purchaser of land is bound to inquire into title of tenant in possession.)

('63) 3 Mad H C R 294 (296) (DB). (A purchaser from a member of a Hindu family.)

(1862) 1 Mad H C R 298 (300) (DB). (Persons dealing with managers of pagoda bound to inquire about their extent of authority.)

(1901) 2 Ch 750 (761) : 71 L J Ch 76 (83). In re Alms Corn Charity v. Bode.

(1888) 13 App Cas 333 (348) : 57 L J Ch 986. Earl of Sheffield v. London Joint Stock Bank. (Knowledge that the interest of the person dealt with is limited one — Duty to enquire — Constructive notice to the party dealing with him.)

(1885) 54 L J Ch 991 (995) : 53 L T 116, Earl of Gainsborough v. Watcombe Co. (Subsequent mortgagee or purchaser is bound to make enquiry of mortgagor's or vendor's title.)

(1869) 7 Eq 427 (433) : 38 L J Ch 545 (547). Davies v. Sear. (Where part of an estate, agreed to be let upon building leases, was sold and the purchaser had notice of the existence of an archway, which on the completion of the building was to be the only access to the adjoining land, it was held that the state of the property being such as to put the purchaser upon inquiry, he was fixed with constructive notice of the right of way.)

(1868) 16 W R (Eng) 777 (779) : L R 6 Eq 252, Morland v. Cook.

(1865) 34 L J Ch 646 (649) : 12 L T 815, Leigh v. Lloyd.

(1863) 32 L J Ch 520 (521) : 8 L T (N S) 446, Parker v. Whyte.

(1858) 44 E R 1053 (1064) : 27 L J Ch 521, Knight v. Bowyer. (Gibson v. Ingo, 6 Hare 112, *Foll.*)

(1857) 53 E R 274 (279) : 24 Beav 47, Jones v. Williams. (Mortgagee informed that there was "charge" affecting property—Mortgagee treated to have notice of all charges.)

(1857) 53 E R 269 (273) : 26 L J Ch 690, Moreland v. Richardson. (Mortgagee of a burial ground has notice of the purposes to which it is devoted and is bound by rights of burial, temporary or in perpetuity, granted by his mortgagor, while left in possession.)

(1857) 44 E R 194 (200) : 7 De G M & G 497, Mayor v. Murray.

(1856) 52 E R 1123 (1124) : 22 Beav 299, Harvey v. Smith.

(1847) 67 E R 1103 (1108) : 6 Hare 112, Gibson v. Ingo.

(1840) 49 E R 243 (245) : 4 Beav 18, Farrow v. Rees.

(1836) 40 E R 266 (274) : 3 My & K 699, Kennedy v. Green.

(1813) 12 R R 94 (98) : 2 B & B 290, Eyre v. Dolphin.

10. 1964 Pat 144 (147) [A I R V 51 C 38] : 44 Pat 271 (DB). (Usufructuary mortgagor retaining possession on payment of rent agreeing to sell to mortgagee—Subsequent transferee cannot be fixed with notice of the agreement.)

(1910) 12 Bom L L 940 (946). (Person acquiring title to or interest in property—No duty to search for subsequent titles or interests.)

('09) 33 Bom 53 (62) (DB).

(1854) 52 E R 5 (8) : 18 Beav 11 : 3 W R 189, Harryman v. Collins. (Notice of a covenant is not a notice whether it has been performed or not.)

11. (1879) 11 Ch D 790 (794, 796) : 48 L J Ch 611 (613). Allen v. Seckham. (The mere fact of there being windows in an adjoining house which overlooks a purchased property, is not constructive notice of an agreement giving a right to the access of light to them, because windows are frequently made in situation where they are liable to be obstructed.)

✠('72) Ind App Suppl Vol 40 (45) : 11 Beng L R 46 (PC).

The question of constructive notice is a question of fact which falls to be determined on the evidence and circumstances of each case.(11a)

In dealing with questions of constructive notice in India, English decisions in regard thereto should be carefully applied. They should be applied only where the circumstances are really similar.(12)

29. Wilful abstention from enquiry. — A wilful abstention is a *designed or intentional* abstention for the purpose of avoiding the probable consequences of the act abstained from. Thus, where a man is aware of the fact that if he made an enquiry he might learn something which affects his interests, and purposely or designedly abstains from making such enquiry with a view to avoid knowledge, it is wilful abstention.(1) It has been held that the words "wilful abstention from inquiry or search" mean such abstention from inquiry or search as would show want of *bona fides* on the part of the party.(2) It is necessary, however, in order to impute notice to a person of a fact by reason of his wilful abstention from an enquiry or search that it must have been inquiry or search which *he ought to have made.* The "duty" denoted by the words "which he ought to have made" does not refer to any duty which a man owes to a third person but means a duty which, as a reasonable and prudent man, he owes to himself. In *Agra Bank v. Barry,*(3) Lord Selborne observed as follows :

> "It has been said in argument that investigation of title and enquiry after deeds is 'the duty of a purchaser or a mortgagee'; and no doubt, there are authorities which do use that language. But this, if it can properly be called a duty, is not a duty owing to the possible holder of a latent title or security. It is merely the course which a man dealing bona fide in

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11a. 1960 Punj 296 (298) [A I R V 47 C 102] (DB). (Property in possession of tenant sold by A in favour of B — Sale deed reciting that out of the consideration Rs. 9000 had been left with B to be paid within two months—Property put up for sale after 4 years in execution of decree against B—Sale proclamation not showing that property was subject to any charge—Property purchased by C in auction — Held in the circumstances C had no notice of charge.)

1951 Cal 398 (400) [AIR V 38 C 102] (DB).

1916 Oudh 154 (2) (155) [AIR V 3]. (Circumstances held not sufficient to impute knowledge of contract of sale to party.)

1923 Bom 155 (160, 161) [A I R V 10] (DB). (Deposit by executor of various amounts in separate accounts with Bank—Accounts kept for long time as such—No constructive notice to the Bank of the deposits being trust properties under will can be inferred.)

('13) 17 Cal W N 224 (226) (DB). (Purchaser causing search to be made of books in Registry office extending up to the year Bhadra 1300—He must be presumed to have notice of registered instrument entered in register of that year—Presumption cannot be rebutted by his mere statement that the search was unsuccessful.)

12. 1932 Mad 305 (309) [AIR V 19] : 55 Mad 519 (DB).

('13) 17 Cal W N 224 (226) (DB). (Search in Registry office — Document found entered in register admitted to have been searched—Presumption of notice recognised by English decisions which is based on reason and commonsense should be applied.)

Section 3 — Note 29

1. 1944 P C 22 (24) [A I R V 31] : ILR (1944) Kar (PC) 73. (Mortgage by deposit of title deeds in favour of A by B—Subsequent mortgage by B to C—Title deed stated to be with A —No enquiry by C from A—C held must be deemed to have had notice of A's mortgage.)

1964 Pat 144 (146) [A I R V 51 C 38] : 44 Pat 271 (DB).

1952 Mad 265 (266) [AIR V 39]. (Mortgagee in possession—Mortgagor selling property to third person—Failure of purchaser to make enquiries of mortgagee whether he has any rights other than as usufructuary mortgagee amounts to wilful abstention or gross negligence—Purchaser is bound by existing equities in favour of mortgagee.)

1952 Nag 106 (109) [AIR V 39] : ILR (1953) Nag 644. (Not making sufficient enquiry.)

✠(1900) 13 C P L R 43 (46).

(1855) 52 E R 612 (615) : 24 L J Ch 490. Greenslade v. Dare.

1941 Mad 707 (708) [AIR V 28] (DB).

2. 1964 Pat 144 (146) [AIR V 51 C 38] : 44 Pat 271 (DB).

('95) 22 Cal 185 (203) (SB). (Per Sale J., in judgment appealed.)

† 1937 Oudh 301 (308) [AIR V 24] (DB). (Purchaser of family property knowing it to be subject to several maintenance charges.)

(1900) 13 C P L R 43 (46).

3. (1874) L R 7 E & I Ap 135 (157). (Cited in 22 Cal 185 (203).)

the proper and usual manner for his own interest, ought, by himself or his solicitor, to follow with a view to his own title and his own security. If he does not follow that course the omission of it may be a thing requiring to be accounted for or explained. It may be evidence, if it is not explained, of a design inconsistent with *bona fide* dealing, to avoid knowledge of the true state of the title".(4)

A person refusing a registered letter addressed to him must be taken clearly to abstain wilfully from making enquiry which he ought to make and, consequently, will under this section be imputed with the notice of its contents.(5) In the undermentioned cases(6) it was held that a person purchasing property situated within a municipality and assessed to taxes was bound to inquire if any taxes were due, and that his omission to do so would be a wilful abstention from an inquiry which he ought to have made.

30. Gross negligence.—Negligence is the omission to take such care as, under the circumstances it is the *duty* of a person to take.(1a) Baron Alderson defined it in *Blyth* v. *Bermingham Waterworks Co.*,(1) as the omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would do or doing something which a prudent and reasonable man would not do. The duty in this case also, as in the case of a wilful abstention, is a duty which the party owes, not to a third person, but a duty which, *as a reasonable and prudent man, he owes to himself*.(2)

The distinction between wilful abstention and negligence is the existence of a mental advertence to the consequence of an act in the one case, and the absence of such advertence in the other.(3) A person who is aware that by making an enquiry he would obtain knowledge of certain facts and intentionally refrains from making such enquiry with a view to avoid the knowledge, *wilfully abstains* from such enquiry. But a man who is not aware that an enquiry will lead him to the knowledge of a fact, and does not make such an enquiry, is guilty of *negligence*, if as a reasonable and prudent man he should have made such enquiry.

Since negligence is the omission to do something which a person is under duty to do (namely the duty to himself as a reasonable and prudent man) it has been found difficult to give a meaning to the expression "*gross negligence*." It has been held in a number of cases that it is a negative and not an affirmative word and that on this ground the expression "gross negligence" amounts to nothing more than ordinary negligence with the addition of a vituperative epithet.(4) On the other hand it has also been held in other cases that there are degrees of negligence which though not definable are with some approach to certainty distinguishable,(5) and therefore the

4. *See also* (1876) 46 L J Ch 48 (48) : 35 L T 84. Lee v. Clutton. (Following Agra Bank v. Barry, 7 E & I Ap 135.)

5. ('71) 16 Suth W R 223 (224) (DB).
[*See* 1968 Raj 24 (28) [AIR V 55 C 7] (DB).]

6. 1951 Cal 398 (400) [AIR V 38 C 102] (DB). (Acquiring property, be it by private sale or court sale.)
1943 All 115 (123) [AIR V 30] : I L R (1943) All 453 (FB). (1940 All 456 [AIR V 27], *Overruled*.)
1941 Oudh 305 (308) [AIR V 28] : 16 Luck 607. (DB).

Section 3 — Note 30

1a. 1964 Pat 144 (146) [A I R V 51 C 38] : 44 Pat 271 (DB). (Grill v. General Iron Screw Collier Co., (1866) 35 L J C P 321, *Rel. on*.)

1. (1856) 25 L J Ex 212 (213) : 11 Ex 781. [*See also* 1964 Pat 144 (146) [A I R V 51 C 38] : 44 Pat 271 (DB). (1856-11 Ex 781 *Rel. on*.)

2. (1894) 1 Ch 25 (35) : 63 L J Ch 73 (75, 76). Bailey v. Barnes. (Gross negligence does not import a breah of a legal duty but a departure from the usual course of business in order to avoid knowledge.)

3. Salmond on 'Torts' 6th Edition, Page 22.

4. (1900) 13 C P L R 43 (47).
(1866) 35 L J C P 321 (330) : L R 1 C P 600. Grill v. General Iron Screw Collier Co.
(1843) 152 E R 737 (739) : 12 L J Ex 264, Wilson v. Brett. (Per Lord Cranworth Baron Folfe.)

5. (1469) L R 2 P C 317 (336) : 38 L J P C 25 (29), Gibblin v. McMullen.

question whether there is gross negligence or not must depend on the facts involved in each case and a reasonable interpretation to be drawn from such facts.(5a) In *Beal* v. *The South Devon Railway Company*,(6) Mr. Justice Crompton observed as follows :

> "It is said that there may be difficulty in defining what gross negligence is; but I agree in the remark of the Lord Chief Baron in the Court below, where he says, 'there is a certain degree of negligence to which every one attaches great blame. It is a mistake to suppose that things are not different because a strict line of demarcation cannot be drawn between them.'..... For all practical purposes the rule may be stated to be, that the failure to exercise reasonable care, skill and diligence is gross negligence."

In *Hadston* v. *Viney*(7), Eve, J., said :

> "I apprehend that by the words 'gross negligence' something more is meant than mere carelessness; it must at least be carelessness of so aggravated a nature as to amount to the neglect of precautions which the ordinarily reasonable man would have observed, and to indicate an attitude of mental indifference to obvious risks. If there are no circumstances suggestive of risk, I doubt whether the neglect to make enquiries by which the existence of such risk might have been disclosed would, as a general rule, amount to 'gross negligence'."

The following observations of Lord Cranworth in *Ware* v. *Lord Egmont*(8) may also be usefully referred to :

> "When a person has actual notice, there can be no danger of doing injustice, and he is held to be bound by all the consequences of that which he knows to exist; but when he has not actual notice, he ought not to be treated as if he had notice, unless the circumstances are such as enable the Court to say that not only he might have acquired, but also that he ought to have acquired the notice with which it is sought to affect him, and which he would have acquired but for his own gross negligence in the conduct of the business in question. The question, when it is sought to affect a purchaser with constructive notice, is not whether he had the means of obtaining, and might by prudent caution have obtained, knowledge, but whether the not obtaining it was an act of gross or culpable negligence. Now, it is obvious that no definite rule as to what will amount to gross and culpable negligence, to meet every case, can possibly be laid down."

A person taking a transfer of immovable property is under a duty to make a search in the index maintained in the Registry Office and if he omits to make such a search he is to be deemed to be guilty of gross negligence in making an inquiry into the transferor's power of transfer.(9) Similarly it would be gross negligence on the part of a purchaser of property in a municipal area not to make enquiry before acquiring the property as to the amount of tax which is due or which may be due.(10) So also the failure of the purchaser of a property to make enquiries of the mortgagee in possession as to whether he has any other right in the property than as usufructuary mortgagee amounts to a gross negligence on his part.(11) See also the undermentioned case.(12)

5a. 1964 Pat 144 (146) [A I R V 51 C 38] : 44 Pat 271 (DB).

6. (1864) 140 R R 478 (482) : 11 L T 184.

7. † (1921) 1 Ch 98 (104) : 90 L J Ch 149 (151).

8. (1854) 24 L J Ch 361 (366) : 3 Eq 1.

9. 1962 Pat 236 (240) [A I R V 49 C 63] (DB). (Decree-holder executing money decree and purchasing property—Failure to enquire about prior encumbrances for compliance with requirements of O. 21 R. 66, Civil P. C.—Gross negligence on his part may be inferred — Hence he must be fixed with constructive notice of prior encumbrances.)
1960 Ker 139 (140) [AIR V 47 C 64] : ILR (1959) Ker 1242 (DB).
1958 Mad 515 (515) [AIR V 45 C 177].
1955 All 24 (27) [AIR V 42 C 8] (DB).
1952 Nag 106(109) [AIR V 39]:ILR(1953)Nag 684.
1947 Bom 49 (54) [AIR V 34 C 14] : I L R (1946) Bom 984.
(1910) 12 Bom L R 940 (946).
[*See also* ('13) 17 Cal W N 224 (226) (DB). (Purchaser causing search to be made of books in Registry office upto the year Bhadra, 1300 —Document in question entered in register of that year—Presumption that he has notice of the contents of the book will apply and he cannot rebut that presumption by his bare assertion that on search he did not find the entry.)]

10. 1951 Cal 398 (400) [AIR V 38 C 102] (DB). (It is so whether acquisition is by private sale or at court sale.)

11. 1952 Mad 265 (266) [AIR V 39].

12. 1964 Mad 202 (204) [AIR V 51 C 57]. (Bank giving double credit inadvertently to its

31. Attestation of deed, if notice of contents. — The mere attestation of a document by a person is not notice to him of the contents thereof.(1) The reason is that a person who merely attests the execution of a document is under no duty, as a prudent and reasonable man, to inquire into the contents of the document, and cannot be said to be guilty of either wilful abstention from inquiry or gross negligence. But there may be circumstances in which a document is attested which will raise a presumption of notice of its contents.(2) The presumption is a

customer—Customer grossly negligent in scrutinising the weekly statements, accounts, and correspondence — Customer held to have constructive notice of the mistake and could not estop bank from claiming refund of the extra credit.)

Section 3 — Note 31

1. 1945 P C 12 (83) [A I R V 32] : I L R (1945) Kar (PC) 200. (This is equally true of the witnesses who identify the executant before the Registrar.)
1922 P C 20 (22) [AIR V 9] : 49 Cal 334 : 49 Ind App 16 : 18 Nag L R 1. (Even by implication.)
1916 P C 110 (113) [AIR V 3] : 43 Ind App 249 : 44 Cal 186 : 36 Ind Cas 420.
1916 Cal 843 (851, 858) [AIR V 3] (FB).
1963 J & K 14 (15) [AIR V 50 C 9] (DB).
1957 Ker 103 (105) [AIR V 44 C 60] : I L R (1957) Ker 367. (Attesting witness cannot be expected to know the correct age of party to the document —One of parties described as minor —No inference that he was in fact a minor at the time and not a major can be drawn from fact of attestation.)
('55) 1955 Andh W R 459 (461).
1953 Pepsu 86 (87) [A I R V 40 C 38] : 3 Pepsu L R 413 (DB).
1952 Nag 96 (97) [AIR V 39].
1951 Madh B 92 (95) [AIR V 38 C 37].
('51) ILR (1951) 1 Raj 597 (600, 601).
1948 Nag 110 (117) [AIR V 35 C 40] : ILR (1947) Nag 510 (DB).
('45) 23 Mys L Jour 131 (144) (DB).
1944 All 42 (55) [AIR V 31] (DB). (Attestation does not estop person from denying anything except that he witnessed execution of deed.)
('41) 196 Ind Cas 380 (381, 382) (Pat).
1938 Lah 97 (98) [AIR V 25].
1937 Pat 353 (356) [A I R V 24]. (Even by implication.)
1937 Pesh 69 (70) [AIR V 24].
1936 Lah 978 (981) [AIR V 23]. (Party alleging otherwise must prove.)
1935 Oudh 257 (260) [AIR V 22] : 10 Luck 652 (DB).
1933 Bom 217 (220) [AIR V 20] : 57 Bom 709 (DB).
1933 Lah 703 (705) [AIR V 20] (DB). (Positive proof of knowledge of contents is necessory.)
1933 Lah 551 (353) [AIR V 20] : 14 Lah 369 (DB).
('29) 118 Ind Cas 93 (94) (DB) (Oudh). (Attestation of a deed proves no more than that the signature of the executing party has been attached to a document in the presence of a witness.)
1928 Lah 432 (437) [AIR V 15] : 9 Lah 224 (DB).
1928 Oudh 342 (344) [AIR V 15] : 3 Luck 645 (DB). (Attestation proves no more than that the signature of an executing party has been attached to a document in the presence of a witness.)
1927 Cal 933 (934) [AIR V 14] (DB).
1926 Mad 609 (612) [AIR V 13] (DB).
1926 Oudh 131 (132) [AIR V 13]. (Mere attestation does not create estoppel against the attestor of denying the knowledge of the contents of the document.)
1925 Mad 95 (98) [AIR V 12] (DB). (Close relationship of the attestor is no exception.)
1924 Bom 58 (59) [AIR V 11] (DB).
1924 Nag 65 (65, 66) [AIR V 11].
1919 Oudh 384 (385) [AIR V 6]. (Whether he has such notice is a question of fact.)
1914 Oudh 366 (374) [AIR V 1] : 17 Oudh Cas 157.
('13) 18 Ind Cas 289 (291) (DB) (Oudh). (Alienation by Hindu widow—Attestation by reversioner—No presumption of knowledge or his consent.)
('12) 15 Oudh Cas 67 (DB).
† ('10) 5 Ind Cas 252 (252) (All).
('99) 1899 All W N 218 (219).
('06) 33 Cal 613 (622) (DB). (Impliedly overruled on another point in 1942 P C 50 [AIR V 29].
('03) 25 All 296 (303) (DB).
[*See* ('97) 20 Mad 269 (273) (DB).]
[*See also* 1942 All 331 (332) [AIR V 29] : I L R (1942) All 745 (DB).]
Also see S. 41, Note 13 and S. 59, Note 9.
1948 Nag 110 (117) [AIR V 35 C 40] : ILR (1947) Nag 510 (DB). (Sale of house by son — Father and brother attesting witnesses — *Held* that in the circumstances of case they had full knowledge of its contents.)

2. † 1922 P C 20 (22) [AIR V 9] : 49 Cal 334 : 49 Ind App 16 : 18 Nag L R 1.
('55) 1955 Andhra W R 459 (461).
1951 Madh B 92 (95, 96) [AIR V 38 C 37].
1948 Nag 110 (117) [AIR V 35 C 40] : ILR (1947) Nag 510 (DB).
1937 Pat 353 (356) [AIR V 24].
1935 Oudh 257 (260) [AIR V 22] : 10 Luck 652 (DB).
1932 Lah 566 (568) [AIR V 19] (DB). (Lease deed reserving benefit to and accepted by an attesting witness—*Held*, witness had notice.)
1925 All 209 (209) [AIR V 12] (DB). (Widow executed a mortgage for the debt due from reversioners — Reversioners attested the mortgage—Presumption of notice raised.)
('13) 19 Ind Cas 255 (256) (All). (Transferee taking by oral sale from widow—Transferee

rebuttable one.(3) The fact that the attestor is a relative of the parties is not such a circumstance.(4) But where the attestor has an *existing interest* in the property dealt with in the document his attestation would raise a *prima facie* presumption that he knew the contents of the document and acquiesced in the disposition of the property.(5) There may also be other circumstances which would show that the attestation was intended to convey something more than a mere witnessing of the execution and was meant as involving a consent to the transaction.(6) Thus, where it is shown that the attestor had fully understood the transaction when he attested the deed,(7) or that he attested the deed after hearing its contents read out to him, he will be presumed to have consented to the transaction.(8)

32. Notice of deed. — Notice, to a person dealing with property, of a deed relating to that property is constructive notice to him of its contents; provided that such deed *relates to the title or forms part of the chain of title to such property*(1) and

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making substantial improvements to the knowledge of the reversioner — Reversioner attesting sale deed executed by widow subsequent to the improvements.)

3. ('45) 23 Mys L Jour 131 (144) (DB).
('13) 19 Ind Cas 255 (256) (All).

4. 1951 Pepsu 71 (72) [AIR V 38 C 71]: 2 Pepsu L R 237. (Remote reversioner attesting alienation.)

1914 P C 90 (91) [AIR V 1] : 42 Cal 876 : 42 Ind App 84. (Reversioners attesting widows' alienation.)

('6?) 13 Moo Ind App 209 (229).

1924 Pat 736 (750) [AIR V 1?] (DB). (Relative scribe of some deeds - Presumption raised.)

('09) 3 Ind Cas 415 (416) (Cal). (Reversioner.)

('99) 3 Cal W N 207 (208) (DB).

('83) 9 Cal 463 (468) (DB).

[*See also* ('13) 21 Ind Cas 367 (368) (DB) (Cal). (Attestor, officer of executor.)]

5. ('45) 23 Mys L J 131 (144) (DB).

1924 Mad 819 (823) [AIR V 11]. (Reversioner.)

1919 Nag 124 (125) [AIR V 6]. (One member of the body of the landlords.)

1915 Mad 800 (804) [AIR V 2] (DB). (Reversioner.)

('12) 36 Bom 513 (519) (DB).

('68) 10 Suth W R Civil Rule 293 (293) (DB). (Joint brother.)

[*See also* 1963 Mad 21 (24) [AIR V 50 C 9]. (Mortgage in favour of P and S — P assigning his mortgage rights in favour of X—S attesting the assignment in favour of X—Such attestation will not have effect of transferring rights of S to X.)

1952 Nag 96 (97) [AIR V 39]. (Attestation of sale deed by pre-emptor — No statutory notice given to exercise option—No interest arises in his favour to prevent execution of sale deed and his attestation cannot be treated as an act which can estop him from claiming right of pre-emption.)]

[But see 1937 Pesh 69 (70) [AIR V 24]. (Person interested in property assenting to execution of mortgage—It is no proof of his renunciation of proprietary interest.)]

6. 1956 Madh B 16 (17) [AIR V 43 C 3]. (Joint property—Sale of, by younger brother — Elder brother (karta) having knowledge of the sale attesting the document and also identifying younger brother as executant before Registrar—Elder brother not informing that the executant has no saleable interest—Held, former should be taken as having consented to the transaction.)
1926 Oudh 131 (132) [AIR V 13]. (Attestation of deed and oral assurance by the real owner.)
('41) 196 Ind Cas 380 (381, 382) (Pat).

7. ('99) 3 Cal W N 207 (208) (DB).
('68) 10 Suth W R 293 (293) (DB).

8. ('51) I L R (1951) 1 Raj 597 (600, 601).
1934 Pat 93 (95) [AIR V 21].
(1864) 1 Suth W R 66 (67) (DB).
[*See also* 1953 Pepsu 86 (87) [AIR V 40 C 38] : 3 Pepsu L R 418 (DB). (Sale by father — Attestation by son — No evidence that latter knew contents of document and had signed in token of his acceptance of the transaction—No consent by son.)]

Section 3 — Note 32

1. 1963 All 194 (199) [AIR V 50 C 58].
1952 Nag 106 (109) [AIR V 39] : I L R (1953) Nag 684.
1933 Mad 715 (720) [AIR V 20] (DB).
1914 Cal 382 (384) [AIR V 1] (DB). (Notice of a lease is notice as to its terms.)
1927 Cal 806 (808) [AIR V 14]. (Document referred to in plaint—Opposite party held to have notice of the contents.)
('12) 16 Ind Cas 618 (619, 620) (DB). (Notice of a book is notice of its contents and when it is admitted that the registry was searched, the presumption is that there was notice of its contents.)
('93) 16 Mad 301 (303) (DB). (Vendee having constructive notice of partition deed in respect of property purchased — Omission to ascertain contents of deed is wilful abstention.)
✠(1881) 17 Ch D 353 (356) : 50 L J Ch 642, Patman v. Harland.
(1849) 68 E R 75 (79) : 19 L J Ch 322, Smith v. Capron.

provided he had an *opportunity of inspecting* the deed.(2) This would be so even if he is told that it does not affect the title.(3) The reason is that the failure in such cases to look into the deed would amount to a wilful abstention from an inquiry or search which he ought to have made or to a gross negligence. But the position would be different where a person has notice of a deed which *may or may not affect the title* and he is told that it does not affect the title. In *Jones* v. *Smith*,(4) *C* advanced money on a mortgage to *A*. *C* was assured by *A* and his wife *B* that there was a settlement which had been executed by *A* on his marriage with *B*, but that it did not relate to the mortgaged property. As a matter of fact it turned out that it did affect the property. The question was whether *C* should be held to have had constructive notice of the contents of the settlement. In coming to the conclusion that *C* should not be held to have such notice, the Lord Chancellor, Lord Lyndhurst, observed as follows :

> "Undoubtedly, where a party has notice of a deed, which from the nature of the deed itself must affect the property, or is told at the time that it does affect the property, he of course is fixed with notice of the contents of that deed, and of the other instruments to which that deed refers; but I think no case has gone so far as to say or to decide, that where a party has notice of an instrument which does not necessarily affect the property — which may or may not affect it, and is at the same time told that the instrument does not affect the property, but relates to some other property, and the party acts fairly in the transaction, and believes the representation to be true; there is no decision which goes the length of saying that if he is misled, he is affected with notice of the contents of the instrument."(5)

A transferee of property is bound to call for and examine the title deeds relating to the property. His failure to do so would amount either to a wilful abstention from making an enquiry or search which he ought to have made or gross negligence, with the consequence that he would be deemed to have constructive notice of the transferor's title(6) and of all other facts which he could have discovered had he chosen

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(1853) 52 E R 34 (34) : 18 Beav 85, Lewis v. Bond. (Notice that transferor was lessee is notice of restrictions contained in the lease.)
(1854) 52 E R 81 (83) : 18 Beav 206, Wilbraham v. Livesay. (Notice of lease is notice of ordinary covenants in it.)
(1847) 67 E R 1136 (1137) : 16 L J Ch 348, Steedman v. Poole. (Notice of underlease to which X is party is notice of X's interest in the lease.)
(1821) 22 R R 238 (239) : 6 Mad 59, Prosser v. Watts. (Abstract deed reciting loss of old deed, throwing no reasonable doubt upon vendor's title—No constructive notice.)
('10) 7 Ind Cas 218 (224) (DB) (Cal).
(1794) 30 E R 713 (714) : 2 Ves 437, Taylor v. Stibbered. (Notice of lease is notice of covenants.)
(1676) 22 E R 804 (806) : 1 Chan 287, Bisco v. Earl Banbury.

2. (1903) 2 K B 487 (493) : 72 L J K B 373, Malyneur v. Hawtrey.
† (1902) 1 Ch 816 (833, 834) : 71 L J Ch 363, Jacobs v. Morris. (Person having opportunity to inspect but not inspecting the document would be imputed with notice of its contents.)
(1888) 20 Q B D 523 (527) : 57 L J Q B 265, Reeve v. Berridge.
(1384) 33 W R (Eng) Dig 232 (232) : L R 15 Ir 37, Bank of Ireland v. Brookfield Linen.
(1862) 54 E R 1185 (1189) : 31 Beav 378, Cox v. Conventon.

3. † (1881) 50 L J Ch 642 (646) : 44 L T 728 (729), Patman v. Harland.

4. (1843) 12 L J Ch 381 (382) : 1 Ph 245.

5. *See also* (1843) 67 E R 104 (108) 2 Hare 249, West v. Reid.

† (1892) 2 Q B 700 (710, 712, 718) : 62 L J Q B 136, English & Scottish Mercantile Investment Co. v. Burnton.

6. 1963 All 194 (199) [AIR V 50 C 58]. (Decree (pre-emption) referring to agreement to resell executed by vendee — Pre-emptor must be deemed to have notice of terms of agreement which he would have known from inquiry — Transferee from pre-emptor was bound to examine title of the pre-emptor — He must also be fixed with notice of agreement to resell.)

† 1937 Oudh 301 (308) [A I R V 24] (DB). (It is merely a course, a transferee ouget to follow for his own title and security.)

1933 Cal 321 (322) [AIR V 20] (DB). (Private purchaser is deemed to have knowledge of terms of lease by vendor.)

(1849) 60 ER 987 (988) : 18 L J Ch 233, Worthington v. Morgan.

(1905) 1 Ch 632 (639) : 74 L J Ch 249, Berwick & Co. : v. Price. (Principal imputed with notice though agent employed concealed dishonestly.)

(1860) 66 E R 122 (126) : 2 Gift 292, Hipkins v. Amery.

to make a proper investigation of title.(7) Where a mortgagee living in a place like Akyab, where he knew that mortgages by deposit of title deeds were legal and usual, failed to ascertain whether or not the title deeds were already pledged, it was held by their Lordships of the Privy Council that his failure to ascertain it, was such abstention from inquiry which he ought to have made, or such negligence as to infer notice within the meaning of this section.(8)

It has been held that notice of a deed is notice of all *other* deeds referred to in that deed.(9) It is of course necessary that such deeds should form a link in the chain of title. In *Moore* v. *Bennet*,(10) it was held that in all cases where a purchaser cannot make out a title but by a deed which leads him to another fact, the purchaser shall not be a purchaser without notice of that fact but shall be presumed cognisant thereof, for it is *crassa negligentia* that he did not seek after it. But a transferee of property cannot be said to be guilty of negligence where he has *bona fide* inquired for the deeds and a reasonable excuse has been given for not delivering them to him.(11) Nor can he be said to be guilty of negligence in not making enquiry for the title deeds of an *adjoining property* which *prima facie* he has no right to ask his vendor to produce.(12) *A* purchased property *x* from *B*. The deed recited that there was a charge on property *y*. Subsequently, *A* purchased property *y* and the sale deed did not recite the prior charge. It was held that the recitals in the first sale deed would not operate as constructive notice of the prior charge. The principle in essence was stated to be that notice to a purchaser by his title papers in one transaction will not be notice to him in an independent subsequent transaction in which the instruments containing the recitals are not necessary to his title.(13) A mortgagee advancing money on the security of a considerable estate and omitting to investigate the title to a particular portion of it will not be affected with notice of equities affecting the residue of the estate which upon such

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(1881) 50 L J Ch 642 (646) : 44 L T 728, Patman v. Harland.

(1856) 10 E R 1159 (1167, 1168) : 26 L J Ch 65, Colyper v. Finch.

(1899) 2 Ch 264 (274, 275) : 81 L T 212, Oliver v. Hinton.

(1826) 4 L J Ch 118 (121) : 2 Sim & St 472 Jackson v. Rowe.

(1833) 160 E R 123 (133, 134) : 1 Y & C 303, Whitbread v. Jardan. (Purchaser having knowledge of deposit of title deeds failing to ask for them—Sufficient to fix him with notice.)

(1857) 44 E R 895 (902) : 2 De G & J 21, Perry-Herrick v. Attwood. (First mortgagee intentionally leaving title-deeds with mortgagor tc secure another debt—First mortgage must be postponed to subsequent incumbrancer.)

(1866) 1 Ch 463 (467) : 35 L J Ch 569, Wilson v. Hart. (Case before the Law of Property Act, 1925.)

[*See* ('12) 16 Ind Cas 825 (827) (DB) (Cal).]

[*See also* (1870) 9 Eq 678 (681, 682) : 39 L J Ch 560, Carter v. Williams. (Tenant of assignee of grantee not bound by agreement by grantee in restriction of trade.)]

7. 1937 Oudh 301 (308) [AIR V 24] (DB). (Maintenance charges.)

[*See also* 1920 Pat 383 (402) [A I R V 7] (DB). (Every person who acquires a leasehold interest is bound to investigate the title of his lessor and is affected with constructive notice of any covenant contained in any document forming part of the chain of title of his lessor.)]

8. (1923 P C 211 (216) [AIR V 10] : 50 Ind App 283 : 1 Rang 637 : 51 Cal 86.

[*See also* 1927 Cal 538 (543) [A I R V 14] (DB). (Abstention from inquiry as to title deed. 1923 P C 211 [AIR V 10], *Followed*.]

Also see S. 78 Note 9 and S. 76 Note 8.

9. (1836) 160 E R 383 (388) : 2 Y & C 234, Davies v. Thomas.

[*See also* 1963 All 194 (199) [A I R V 50 C 58]. (Decree for pre-emption referring to agreement to re-sell executed by vendor—Under S. 3 pre-emptor must be deemed to have notice of terms of agreement which he would have known from inquiry.)

10. (1678) 22 E R 928 (928): 2 Ch Cas 246.

11. (1851) 68 E R 586 (589) : 21 L J Ch 69, Hewitt v. Loose More.

12. 1925 Bom 183 (184, 185) [AIR V 12]. (DB). (Restrictive covenant respecting adjoining land.)

13. 1921 Cal 730 (738) [AIR V 8] (DB). (It is impossible for any one to recollect recitals in deeds.)

investigation he might possibly have discovered.(14) In the undermentioned case,(15) a mortgagee from an *executor* was held to have constructive notice of a prior charge, "for had he taken the slightest pains to investigate the title of the mortgagors under the will he must have discovered the charge created by the will." But, from a mere failure of the mortgagee to scrutinise the will it cannot be inferred that he has notice that the amount raised as loan is not *necessary* for the administration and that the executor was acting in breach of trust.(16)

A person purchasing agricultural land, and not examining the Record of Rights has been held guilty of wilful abstention from an inquiry which he ought to have made.(17)

33. Question of wilful abstention or gross negligence, if one of law or fact.—The question whether a person is guilty of wilful abstention from an inquiry or search which he ought to have made, or is guilty of gross negligence is not a matter of pure law but is one of fact, or a mixed question of law and fact, which has to be determined according to the means of knowledge and the means of information available to him. What would amount to wilful abstention or gross negligence in one man would not necessarily be so in another. As remarked by Sir James Wigram, in *Jones* v. *Smith*,(1) "it is indeed scarcely possible to declare *a priori* what shall be deemed constructive notice, because, unquestionably, that which would not affect one man may be abundantly sufficient to affect another".(2) Where a person has all the means of knowledge of a fact he cannot escape responsibility, if, by using all ordinary diligence he could have acquired the knowledge.(3) But the means of the knowledge by which any one is to be affected must be understood to be means of knowledge which are practically *within reach* and of which a prudent man might have been expected to avail himself or otherwise, as was stated by Lord Campbell in *Broadbent* v. *Barrow*,(4) "it may be said that all mankind had the means of knowledge of the planet Neptune before it was discovered by Adams or Leverrier."

34. Notice by registration of instrument. — Before the decision of the Privy Council in *Tilakdhari Lal* v. *Khedan Lal*,(1) there was a conflict of opinion among the High Courts as to whether the registration of a document under the Indian Registration Act was of itself constructive notice of the transaction effected by the document. One set of cases held that it would be a notice.(2) Another set of cases

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14. † (1871) 41 L J Ch 175 (183) : 7 Ch App 75 (83), Hunter v. Walters.

15. ('09) 33 Bom 1 (21) : 35 Ind App 139 (PC).

16. 1933 Cal 429 (430) [AIR V 20] : 60 Cal 394.

17. 1928 Bom 427 (429, 430) [A I R V 15] : 52 Bom 883 (DB).

Section 3 — Note 33

1. (1841) 66 E R 943 (948, 949) : 11 L J Ch 83.

2. 1939 Nag 132 (135) [A I R V 26]. (It all depends upon the man's knowledge and the means of information which lay to his hand.) 1929 Cal 83 (86) [AIR V 16] (DB). (1841) 1 Hare 43, Referred to.)

[*See also* 1951 Cal 398 (400) [AIR V 38 C 102.) (DB). (Constructive notice is a question of fact.) 1931 Bom 430 (431) [A I R V 18]. (It is a question of law and fact.)]

3. 1953 Nag 106 (109) [AIR V 39] : I L R (1953) Nag 684.

(1902) 71 L J Ch 363 (367) : 1 Ch 816 (830, 831), Jacobs v. Morris.

4. (1861) 30 L J Ch 569 (574) : 4 L T (N S) 193 (194).

Section 3 — Note 34

1. 1921 P C 112 (117) [AIR V 8] : 48 Cal 1 : 47 Ind App 239.

2. ('81) 6 Bom 168 (187) (FB).
1921 Mad 657 (658) [AIR V 8] (DB). (Registration is prima facie sufficient notice to subsequent transferees.)
1914 Lah 204 (206) [A I R V 1] : 1915 Pun Re No. 4 (DB).
('12) 9 All L Jour 759 (763) (DB).
('10) 8 Ind Cas 633 (635) (Bom).
('04) 6 Bom L R 1044 (1050).
('03) 27 Bom 452 (467) (DB).
('02) 26 Bom 538 (542) (DB).
('97) 22 Bom 213 (216) (DB).

held that it would not be a notice.(3) A third view was that though mere registration was not notice by itself, the omission to search the register together with other facts amounting to gross negligence or wilful abstention, would attract the consequence following from the notice.(4) In *Tilakdhari Lal* v. *Khedan Lal*,(5) their Lordships of the Privy Council held that notice could not in all cases be imputed from the mere fact that a document was to be found upon the Indian Register of Deeds, and, they approved of the observations of Sir Lawrence Jenkins in *Mohindra Chandra Nanty* v. *Troyluckhyo Nath*(6) to the following effect :

> "The proposition involved is not one of law but of fact, and as each case arises it should be determined whether in that individual case the omission to search the register, taken together with the other facts, amounts to such gross negligence as to attract the consequence which results from notice."

This view was followed by later decisions of the High Courts(7) though the

('96) 20 Bom 290 (292) (DB).
('94) 18 Bom 444 (446, 448) (DB).
('93) 17 Bom 741 (744) (DB).
('90) 14 Bom 506 (510) (DB).
('89) 12 Mad 424 (428).
('86) 9 All 125 (128) (DB).
('85) 9 Bom 427 (428) (DB).
('81) 6 Bom 495 (497) (DB).
('77) 1877 Bom P J 26 (DB).
('74) 11 Bom H C R 41 (42) (DB).
[*See also* ('03) 30 Cal 599 (607, 608) (FB). (Per Prinsep, J : —It is desirable to hold that registration is notice.)
('05) 29 Bom 199 (202) (DB). (But registration cannot be treated as notice for the purpose of vitiating payments made by a mortgagor to his mortgagee without actual notice of the sub-mortgage.)
(1912) 8 Nag L R 18 (19). (Registered mortgage deed binds subsequent transferee from mortgagor even if mortgagee is not in possession.)
(1900) 2 Bom L R 223 (224) (DB). (Purchaser in possession under registered sale deed has priority over person claiming under unregistered prior mortgage unaccompanied with possession, of which purchaser has no notice.)
('67) 4 Bom H C R A C 68 (69) (DB). (Registered mortgagee is entitled to priority over subsequent purchaser.)]

3. 1916 Cal 33 (36, 41) [AIR V 3] : 43 Cal 1052 (DB). (The making of a search at the registry for a document does not raise an inferential presumption of notice in any case under S. 3 of the Transfer of Property Act and it is open to a party making the search to show that in fact he had no notice.)
1914 Lah 326 (328) [AIR V 1] (DB). (Residence in place where deed is registered does not fix person with notice.)
('13) 20 Ind Cas 385 (390) (DB) (Mad).
('12) 16 Ind Cas 618 (619) (DB) (Mad).
('10) 8 Ind Cas 1199 (1199) (LB).
('8) 31 Mad 7 (10) (DB).
(1904) 6 Bom L R 836 (841) (DB). (Registered sub-mortgage by sub-mortgagee—Mortgagor having no actual knowledge continuing to make payments to mortgagee—Payments are not invalid—Registration is notice for certain purposes only.)
(1900) 27 Cal 358 (362) (DB).
(1900) 13 C P L R 43 (46).
(1896) 23 Cal 790 (794).
(1892) 15 Mad 268 (278) (DB).
(1890) 13 Mad 383 (386) (DB).
8 Mad 246 (249) (DB).
[*See* ('10) 7 Ind Cas 252 (253) (DB) (Mad).]
[*See also* ('04) 1904 Pun L R No. 134, p. 474 (475). (Mere registration would not be sufficient notice in every case though in many cases, following the principles epitomized in S. 3 (3), T. P. Act, it might be rightly held to be so.)
('89) 12 Mad 429 (433) (DB). (Subsequent mortgagee held entitled to priority over first mortgagee although the latter's deed was registered.)]

4. ('94) 16 All 478 (482) (FB). (Note—Overruled on a different point in 1924 All 339 [AIR V 8] (FB)).
1921 Bom 161 (162) [A I R V 8] : 45 Bom 170 (DB).
1917 Lah 397 (399) [AIR V 4]. (Two vendors of two adjoining shops sold one shop to A—one of the conditions of sale-deed was that neither vendors nor vendee should erect a balcony to their respective shops—One of the vendors subsequently sold the other shop to B—Sale-deed to B referred to the deed in favour of A and the condition therein—*Held*, registration of first sale deed was constructive notice of the condition therein.)
('08) 30 All 82 (83, 84) (DB).
('03) 7 Cal W N 11 (17, 18) (DB).
('99) 3 Cal W N 30 (32).
('96) 23 Cal 790 (794) (DB).
('95) 22 Cal 185 (203, 204). (Per Sale J.)
('81) 7 Cal 199 (201) (DB).
[*See* ('04) 31 Cal 95 (102) (DB).]
[*See also* ('98) 2 Cal W N 750 (755). (Question whether registration is notice or not is a question of fact.)]

5. ‡1921 P C 112 (116, 117) [AIR V 8] : 47 Ind App 239 : 48 Cal 1.

6. † ('98) 2 Cal W N 750 (755).

7. 1931 All 277 (294) [A I R V 18] : 53 All 334 (FB). (The mere registration of a mortgage is not per se constructive notice of the mortgage —No legal obligation is cast upon an auction-

older views were still followed in some cases without reference to the decisions of the Privy Council.(8)

The present Explanation I has now set the conflict at rest by providing that where a document which is required by law to be registered, has been registered, a person would, *as a matter of law*, be deemed to have notice in the circumstances and to the extent mentioned in the Explanation.(9) The reason for the introduction of this provision has been stated by the Special Committee in their report as follows ;

"In our opinion, in a country like India, where the system of registration has been generally applied, if registration is to be held as not implying notice, one of the objects for which instruments are required to be registered would be defeated. Moreover, as will be seen

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purchaser to search the registry before he bids at the auction.)

1929 Rang 34 (35) [A I R V 16]. (Registration held notice under the circumstances of the case.)

1927 All 357 (357, 358) [AIR V 14] (DB).

1926 All 159 (162) [AIR V 13] : 50 All 328 (DB). (A transferee is not under a legal duty to search register.)

1926 Lah 415 (416) [AIR V 13].

1926 Rang 195 (197) [AIR V 13] : 4 Rang 238. (Subsequent mortgage by deposit of title deeds —Mere registration of previous mortgage no notice.)

1925 Nag 398 (402) [AIR V 12].

1925 Lah 25 (26) [A I R V 12] : 5 Lah 368 (DB). (No duty to search registers.)

1925 Lah 542 (543) [A I R V 12] : 6 Lah 344 (DB). (Gross neglect of the transferee attracts the effect of notice.)

1923 All 169 (170) [AIR V 10].

1923 All 447 (447) [AIR V 10]. (Registration is not notice especially where there is nothing to put the plaintiffs on enquiry or to cause them to search the register.)

1923 Bom 410 (410) [AIR V 10] (DB). (Proof of other circumstances necessary.)

1923 Sind 50 (53) [AIR V 10] : 16 Sind L R 278 (DB). (Registration necessarily no notice even where registration is compulsory.)

[*See* 1929 All 85 (86) [A I R V 16]. (Property not specified in registered deed—Registration is not notice.)

1929 All 545 (547) [AIR V 16] (DB). (No circumstances to necessitate enquiry in Registration office—Registered deed not notice.)

1931 All 193 (195) [AIR V 18] (DB). (Registration per se is not notice. No duty on the transferee to search registration records.)]

1947 Lah 147 (150) [AIR V 34 C 26] : ILR (1947) Lah 749 (FB). (Presumption of notice under S. 3 only applies in respect of transactions required by law to be effected by registered instruments and in respect of those not so required but have been registered.)

1947 Bom 49 (54) [AIR V 34 C 14] : I L R (1946) Bom 984. (This imposes on everyone taking a transfer of immovable property the duty of making a search in the index maintained in the Registry Office, and if he omits to make such a search, he is to be deemed to be guilty of gross negligence in making an inquiry into the transferor's power to make the transfer, which would deprive him of the benefit of S. 41, T. P. Act.)

8. 1924 Pat 359 (361) [A I R V 11] (DB). (Is notice.)

1923 Rang 41 (42) [AIR V 10]. (Is notice.)

1923 Nag 15 (16) [AIR V 10]. (Is not notice.)

1922 Lah 64 (65) [AIR V 9] (DB). (Is notice.)

9. 1967 All 531 (532) [AIR V 54 C 158].

1965 Mad 185 (186) [AIR V 52 C 64] : ILR (1965) 1 Mad 624 (DB).

1964 All 381 (383) [AIR V 51 C 124] : ILR (1964) 1 All 553 (DB).

('61) 65 Cal W N 882 (895). (Mortgagees deemed to have notice of prior registered deed of assignment.)

('55) 1955 Andhra W R 699 (701).

1954 Cal 367 (368) [AIR V 41 C 124] : ILR (1956) 1 Cal 217 : 1954 Cri L Jour 132. (Mortgaged property — Purchaser at rent sale — He must be deemed to have notice of mortgage it being registered.)

1953 Mys 22 (24) [AIR V 40 C 10] : I L R (1953) Mys 152.

1952 Nag 106 (109) [A I R V 39] : I L R (1953) Nag 684.

1942 Bom 339 (340) [AIR V 29] (DB). (An agreement for a mortgage does not under the Indian Law give rise either to an equitable mortgage or to a charge over the property, and such an agreement is not compulsorily registrable—The fact that it is registered does not amount to constructive notice of the agreement within the meaning of S. 3, T. P. Act, to a subsequent transferee of the property.)

1940 Nag 7 (8) [AIR V 27]. (Prior private sale—Subsequent Court sale — Registration of the private one is notice.)

†1937 Oudh 301 (309) [AIR V 24] (DB).

1931 All 62 (64) [A I R V 18] : 52 All 985 (DB). (Charge contained in registered instrument—Notice.)

[*See* 1934 All 447 (448) [AIR V 21].]

[*See also* 1935 Lah 313 (314) [AIR V 22] (DB). (Though a will is registered no one else except the executant or his agent is competent to take inspection or copies and it will be scarcely justifiable to take registration as sufficient notice for the purpose of limitation.)]

[But see 1931 All 333 (340) [A I R V 18]. (The question of notice is a question of fact — The amendment of the section was not noted.)]

below, one of the important changes suggested by us is 'compulsory registration.' It is, therefore, necessary that express provision should be made in the Act making it clear that registration of an instrument relating to immovable property amounts to notice of the instrument from the date of the registration. For this purpose we propose to add Explanation 1 to the definition of 'notice' in Section 3."

The Explanation is not retrospective.(10) But that does not mean that in order to impute a person, who acquires an interest in immovable property subsequent to Amending Act of 1929, by which this Explanation was added, with knowledge of an earlier registered transaction affecting that property, the registration of that transaction should also have taken place after the amendment. The transaction might have been registered prior to the amendment but still he should be deemed to have knowledge of it under this section.(10a) Further, where the Transfer of Property Act is not in force, the view expressed by the Privy Council in *Tilakdhari's case* would still apply.(11)

The object of the Explanation is merely to safeguard the interests of a third party who has acquired a good title under a previous registered instrument. Constructive notice of the previous registered mortgage which is imputed to the subsequent purchaser under this Explanation would not be a defence to a charge against the seller for cheating by selling the property by misrepresentation that it was unencumbered.(12)

35. "Any person acquiring such property", etc. — The words "any person acquiring such property," etc., show that the provision as to constructive notice by registration of a document is applicable only to a person who *acquires* property *subsequent* to such registration. A person is not fixed with constructive notice of a document coming into existence *subsequent* to his title. This was the view which had been held in cases before the amendment where registration was held to operate as notice,(1) and would still be good law.(2)

Where A, B and C are co-sharers in certain property and C executes a registered document affecting the common property, A and B cannot be charged with the notice

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10. See Section 63, Transfer of Property (Amendment) Act, XX of 1929.
1937 Oudh 1 (2) [AIR V 24] : 12 Luck 563 (DB).
1933 Rang 153 (154) [AIR V 20].
1931 Nag 60 (63) [AIR V 18] : 27 Nag L R 24.

10a. ('55) 1955 Andh W R 699 (701). (Sale deed creating a charge—Person acquiring an interest in that property by registered instrument after 1-4-1930 — He should be fixed with notice of the charge contained in the earlier deed although it had been registered before the Amending Act.)

11. 1940 Lah 269 (272) [AIR V 27]. (Reversed on another point in 1943 Lah 113 [A I R V 30] (DB).)
1937 Pesh 74 (75) [AIR V 24] (DB). (Subsequent mortgagee was held bound by prior registered mortgage though he was not expressly told of its existence because if the subsequent mortgagee had taken due care and made inquiry he would have known it.)
1935 Lah 410 (411) [AIR V 22]. (Case of sale by ostensible owner.)
[*See also* 1952 Pepsu 31 (33) [AIR V 39] : 2 Pepsu L R 571. (Deed of adoption—Mere registration does not amount to a notice to all the world unless there are circumstances from which a presumption could be raised.)
1935 Lah 887 (888) [AIR V 22] (DB).]

12. 1954 Punj 31 (33) [AIR V 41 C 18] : I L R (1954) Punj 691 : 1954 Cri L Jour 299 (DB). (1915 Sind 21 [A I R V 2] : 16 Cri L Jour 706, doubted but distinguished; 1937 Sind 56 [A I R V 24] : 38 Cri L Jour 510, *Rel. on.*)

Section 3 — Note 35

1. 1968 Mad 83 (84) [AIR V 55 C 17].
1931 All 275 (276) [A I R V 18] (DB). (Registration of prior mortgage on subsequent date.)
1925 All 557 (557) [A I R V 12]. (Registration of sub-mortgage is not notice to the mortgagor.)
1921 Mad 374 (376) [AIR V 8] (DB). (The registration of sub-mortgage is not legal notice to the original mortgagor of the existence of the sub-mortgage.)
('12) 16 Ind Cas 102 (103) (DB) (All).
('10) 8 Ind Cas 633 (635) (Bom). (Registration of prior partition deed, subsequent to mortgage is no notice of partition to the mortgagee.)
('04) 31 Cal 737 (742, 743) (DB). (Subsequent mortgage is not notice to prior mortgagee.)
('03) 7 Cal W N 11 (18) (DB). (Mere registration of puisne mortgages is no constructive notice to a prior mortgagee.)

2. 1932 Mad 115 (118) [AIR V 19] : 55 Mad 320 (DB).

of the deed, under this Explanation. The reason is that A and B do not *acquire* and have not *acquired* the property subsequent to such registered deed, and therefore the Explanation does not apply. Even apart from the Explanation, A and B cannot be charged with notice on the principle of *Tilakdhari's case*(3) inasmuch as a co-sharer is not put upon any duty to search the register periodically to see whether other co-sharers have executed documents in denial of their title.(4)

36. Date of registration.—The notice is only as from the *date of registration* which, it is conceived, is the *actual* date on which the document is registered and not the date of the *execution* of the document, though after registration, the document becomes operative from the date of its execution, by reason of the doctrine of relation back. (See Section 47 of the Registration Act.) Thus, if X executes a document on 1.1-40 in favour of A and a second document in favour of B on 2.1-40 and the first document is registered on 1.3-40, B cannot be imputed with notice of the prior document from 1-1.40, the date of the execution of the prior document, but only from 1-3-40.

37. Date of filing memorandum. — Where immovable property is situated in more sub-districts than one and a document relating thereto is registered in one of such sub-districts, the registering officer is, under S. 64 of the Registration Act, bound to make a memorandum thereof and send the same to the Sub-Registrars of the other sub-districts and they are bound to file the memorandum in their books. Where immovable property is situated in more districts than one and a document relating thereto is registered in one district, the registering officer is bound under S. 65 to send a copy thereof to the Registrars of the other districts and the latter are bound to forward a memorandum thereof to each of the Sub-Registrars subordinate to him within whose sub-district any part of the property is situate and such Sub-Registrars are bound to file such memorandum in their books.

This Explanation provides that where a document relating to property situated at X and Y is registered at Y (under the provisions of S. 30, sub-s. (2) of the Registration Act, 1908), a person acquiring any part of the property situated at X shall be deemed to have notice of such instrument only from the date on which such memorandum is filed by the Sub-Registrar at X.(1) The reason is that a person who acquires property in one sub-district cannot be expected to search the registers of all other districts and sub-districts in which documents relating to that property might be registered under the provisions of the Registration Act.(2)

38. Proviso to Explanation I. — In order that registration may be deemed to be notice it is necessary that clauses, (1), (2) and (3) of the proviso should have been satisfied.(1a) The first clause shows that registration will be notice only when

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3. 1921 P C 112 (116, 117)]AIR V 8] : 47 Ind App 239 : 48 Cal 1.
1968 Mad 83 (84) [AIR V 55 C 17].

4. 1968 Mad 83 (84) [AIR V 55 C 17] : 80 Mad L W 248.
1935 All 774 (776) [AIR V 22].
1923 Lah 522 (522) [AIR V 10] (DB). (Case from the Punjab where Transfer of Property Act does not apply.)
1917 Lah 372 (373) [AIR V 4] (Do.)

Section 3 — Note 37

1. 1936 Lah 482 (483) [A I R V 23] (DB). (See S. 51, Registration Act.)

2. See Statement of Objects and Reasons, Gazettee of India, 1930 Part V (July).
1947 Mad 175 (176) [AIR V 34 C 91]. (Mortgage recorded in Book IV instead of Book I — Subsequent encumbrancer abstaining from making search in registration department—He must be deemed to have constructive notice of prior mortgage and cannot be said to have been injured by the mistake in registration.)

Section 3 — Note 38

1a. 1964 Bom 1 (3) [AIR V 51 C 1] : ILR (1963) Bom 509 (DB). (Charge, the particulars of which have not been entered in indexes main-

it is valid. A registration may be invalid for various reasons such as by reason of the document having been presented by a wrong person,(1) or by reason of its having been registered at a place where the property is not situated.(2) Registration will not also be notice when the document has not been registered *under the Registration Act*, 1908, and the rules made thereunder. A registration under the Act of 1877 will not be regarded as notice for the purpose of this Explanation. The reason on which clauses (2) and (3) of the proviso are based is that if it is not so it is not possible for a person even by a search of proper register to obtain information of the document.(3)

But the fact that clauses (2) and (3) have not been observed does not make the registration itself invalid.(4) It may not operate as valid notice, but as a registered document it will be operative between the parties.

39. Possession as notice.—Before the insertion of Explanation II, in this section, there was a difference of opinion how far possession was to be regarded as notice.

It was generally held that it should be regarded as constructive notice of the rights of the person in possession.(1) In *National Bank of Australasia* v. *Paul*

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tained under S. 5, Registration Act.)
1963 Raj 141 (143) [AIR V 50 C 45] : ILR (1963) 13 Raj 552.
1962 Andh Pra 94 (102) [AIR V 49 C 25] : I L R (1961) 1 Andh Pra 579. (Registration in wrong book — No notice can be imputed to third parties.)
1962 Pat 236 (239) [AIR V 49 C 63] (DB). (Registration of mortgage document in one district — Memorandum to be filed in other district — Unless it is proved to have been so filed notice to purchaser of mortgage will not be imputed — No presumption can arise under Section 114, Evidence Act.)

1. 1954 S C 316 (319) [AIR V 41 C 76] : 33 Pat 313 : 1954 S C R 919. (Document presented by agent not authorised by party in manner prescribed by S. 33, Registration Act.)
1914 P C 16 (18) [A I R V 1] : 37 All 49 : 42 Ind App 22. (Presentation by agent not duly authorised.)

2. 1914 P C 67 (71) [AIR V 1] : 41 Cal 972 : 41 Ind App 110. (Inclusion of fictitious property for purposes of registration is a fraud on registration.)
Also see S. 59, Note 6.

3. 1964 Bom 1 (8) [AIR V 51 C 1] : I L R (1963) Bom 509 (DB). (Charge registered but particulars not entered in indexes kept under S. 55 of Registration Act — There can be no constructive notice in such case imputed to subsequent mortgagee.)
1963 Raj 141 (143) [AIR V 50 C 45] : ILR (1963) 13 Raj 552.
1921 Bom 161 (162) [AIR V 8] : 45 Bom 170 (DB). (Registration is not notice unless the prudent purchaser would have found the agreement in register when he went to inspect it.)
[*See also* 1927 Mad 586 (590) [A I R V 14] (DB). (Document entered in Book IV instead of Book I—Registration is not invalid.)]

4. † 1935 P C 165 (167) [A I R V 22] : 63 Cal 1 : 62 Ind App 265. (Registration in wrong book—Valid.)
*('74) 2 Ind App 210 (216) : 15 Beng L R 228 (PC). (Mere defect of procedure will not invalidate registration)
1934 Oudh 283 (284) [AIR V 21] (DB). (Omission of some particulars from Index — Sections 60, 61, Registration Act.)
1927 Mad 586 [AIR V 14] (DB).
('09) 34 Bom 202 (207) (DB).
[*See also* 1919 Cal 235 (239) [A I R V 6] (DB). (Improper registration cannot affect validity of document.)]
[But see 1920 Lah 302 (303) [AIR V 7]. (Submitted wrong in view of Privy Council decision in 1935 P C 165 [AIR V 22].)
('08) 35 Cal 845 (849) (SB). (Do.)]

Section 3 — Note 39

1. ('11) 12 Ind Cas 905 (906) (Low Bur).
1926 Oudh 330 (331) [AIR V 13].
1918 Cal 20 (21) [AIR V 5] (DB).
1914 Cal 333 (334) [AIR V 1] : 40 Cal 565 (DB).
1914 Cal 331 (333) [AIR V 1] (DB).
('13) 18 Ind Cas 46, 47 (DB) (Cal).
('12) 16 Ind Cas 811 (814) (DB) (Cal). (This principle however does not apply to purchasers at a Court sale.)
('86) 9 All 125 (129) (DB).
('89) 12 Mad 334 (337) (DB). (The separate possession of family property by a widow in a joint family is notice to the purchaser that she has some interest in the land such as that of her right to maintenance.)
1923 Bom 13 (14) [AIR V 10] (DB).
('11) 35 Bom 269 (271) (DB).
('03) 27 Bom 408 (412) (DB).
('13) 22 Ind Cas 250 (250) (DB) (Mad).
('81) 6 Bom 515 (518) (DB).
('83) 9 Bom 427 (428) : 1883 Bom P J 83 (DB).
('81) 6 Bom 193 (201) (FB).
('81) 6 Bom 168 (187, 188) (FB).
('74) 11 Bom H C R 41 (42) (DB).

Hamilton,(2) their Lordships of the Privy Council observed :

> "It has always been held that such possession is in itself notice of the title under which such possession is retained which any one dealing with the property cannot, without risk, ignore."

In the undermentioned cases(3) it was held that possession, though not conclusive, was very cogent evidence of the title of the person in possession. The basis of this view was that whoever purchases an estate from an owner knowing it to be in the possession of another was bound to make enquiry into the title of the person in possession and if he did not do so must be taken to have constructive notice of such title either on the ground of wilful abstention from an enquiry which he ought to have made or of gross negligence.(4) This principle is found enacted also in S. 27 of the Specific Relief Act (1877), one of the illustrations to which runs as follows :

> "A contracts to sell land to B for Rs. 5000. B takes possession of the land. Afterwards A sells it to C for Rs. 6000. C makes no inquiry of B relating to his interest in the land. B's

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('84) 8 Bom 182 (185) DB).
('74) 22 Suth W R 189 (189).
1916 Low Bur 38 (38) [AIR V 3].
1917 Low Bur 16 (16) [AIR V 4].
1918 Lah 281 (282) : 1918 Pun Re No. 46. (Real owner remaining in possession—That circumstance is constructive notice of benami nature of transaction)
('92) 14 All 362 (364, 365) (DB). (Lessee taking lease of the cultivatory holding from zamindar.)
('95) 19 Bom 391 (397, 398) (DB).
(1900) 1900 Pun Re No. 56 (FB). (Original transferee was in possession.)
('03) 25 All 365 (370) (DB).
('89) 16 Cal 414 (417) (DB). (Person in possession as lessee - Possession is notice of tenancy but not notice of lessor's title.)
1927 Mad 699 (700) [AIR V 14].
[*See also* ('72) 9 Bom H C R 121 (146) (DB). (Prior unregistered deed of transfer accompanied by possession preferred to subsequent registered deed unaccompanied by possession.)
('72) 9 Bom H C R 147 (150) (DB). (Do.)
('72) 9 Bom H C R 151 (152). (Do.)
('72) 1872 Bom P J 104 Reprint 160 (DB). (Possession under a verbal contract of sale not affected by a subsequent registered conveyance.)
('74) 1874 Bom P J 44 (DB). (Oral sale accompanied by possession transfers ownership so that it cannot be dealt with by a subsequent registered conveyance.)
(1900) 2 Bom L R 110 (111) (DB). (Unregistered agreement of sale accompanied with possession is entitled to priority over subsequent registered deed.)]

2. 1920 P C 274 (276) [AIR V 7]. (Mortgage by deposit of the title deeds — Person other than the mortgagor in possession—Mortgagee imputed with notice of the title of the person in possession.)

3. ('93) 16 Mad 148 (170) (FB).
('84) 10 Cal 1073 (1075) (DB).
(1920) 2 Lah L J 720 (723, 724).
(1902) 4 Bom L R 253 (255, 256) (DB).

4. † ('82) 8 Cal 597 (610) (FB). (A purchaser under a registered conveyance subsequently executed cannot eject one who holds possession under prior unregistered conveyance, where registration is optional.)
† ('03) 27 Bom 452 (471) (DB). (Possession presupposes title.)
('94) 21 Cal 116 (120) (DB).
('89) 16 Cal 414 (417) (DB). (Purchaser neglecting to inquire is affected only by the equities the person in possession insists on.)
('84) 10 Cal 1073 (1075) (DB).
('80) 5 Cal 336 (350).
(1794) 30 E R 713 (714, 715) : 2 Ves 437, Taylor v. Stibbert. ("Whoever purchases an estate from the owner knowing it to be in possession of tenants, is presumed to know the estate those tenants have.")
(1806) 33 E R 237 (240) : 13 Ves Jun 114, Hiern v. Mill.
1921 Bom 459 (460) [AIR V 8] : 45 Bom 910.
(1806) 2 Sch & Lef 583 (600) : 9 R R 107, Crofton v. Ormsby.
(1816) 35 E R 679 (680) : 1 Mer 282 : 15 R R 113, Allen v. Anthony.
(1852) 68 E R 711 (712) : 9 Hare 734, Bailey v. Richardson.
(1856) 44 E R 510 (514) : 8 De G M & G 572, Holmes v. Powell.
(1858) 44 E R 1053 (1064) : 2 De G & J 21, Knight v. Bowyer.
(1898) 67 L J Q B 296 (299) : 78 L T 165, Lewis v. Stephenson.
(1873) L R 9 Ch 79 (83, 85) : 43 L J Ch 370, Cavander v. Bulteel.
(1902) 1 Ch 425 (433) : 71 L J Ch 239, Hunt v. Luck.
(1853) 14 E R 204 (209) : 9 Moo P C 18, Barnhart v. Greenshields.
(1869) 9 Eq 51 (55) : 39 L J Ch 248, James v. Lichfield.
(1809) 33 E R 978 (980) : 16 Ves 249, Daniels v. Davison. (Where there is tenant in possession under a lease or an agreement, a person purchasing part of the estate is bound to inquire on what terms that person is in possession.)
1917 Mad 955 (956) [AIR V 4] (DB).

possession is sufficient to affect C with notice of his interest, and he may enforce specific performance of the contract against C."

(See now S. 19 of the Act of 1963. The illustrations appearing in the old section have, however, been omitted in the new section.)

Where notwithstanding enquiry, the fact of occupation of property by a person did not come to the knowledge of the person charged, the latter was held not to have constructive notice.(5) The present amendment makes possession, as a *matter of law*, notice to persons dealing with the property, of the title of the person in possession.(5a)

But the notice is only of the title *of the person in possession* and not of any *other person*. Thus, where a tenant is in possession, the constructive notice should have reference only to the title of the *tenant* and not to that of his lessors.(6) Further, the notice would have reference only to the *title* of the person in possession. It has been held in England that notice by possession is not only notice of the title of the person in possession, but extends also to the interests of such person under *collateral* agreements. Thus, where a tenant in possession has obtained from the landlord an agreement to sell the land to him, a subsequent transferee from the landlord would be charged with the notice of the agreement to sell.(7) This view was followed in this country also.(8) Under the present Explanation II, it is clear that the notice is limited to the *title* of the person in possession.(8a) But the Patna High Court,(8b) taking a contrary view, has held that the Explanation is merely a legislative adoption of the English view that had been followed by the Courts in this country before the amendment and hence a subsequent purchaser who does not make enquiry of the person in actual possession of the circumstances under which he is in such possession should even now be deemed to have constructive notice of all the equities in favour of

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5. ('10) 35 Bom 342 (348, 349) (DB).
(1829) 39 E R 15 (17) : 1 Russ & My 39, Miles v. Langley. (Subsequent transferee must have knowledge of possession.)
('89) 1889 Pun Re No. 143, p. 483 (485) (Do.)
('83) 1883 Pun Re No. 159, p. 485 (487) (Do.)

5a. 1967 All 531 (532) [AIR V 54 C 158].
1960 Pat 354 (358) [AIR V 47 C 123].
('58) 1958 B L J R 466 (468) (DB).

6. 1932 Mad 71 (72) [AIR V 19] (DB).
† 1924 Mad 67 (69) [AIR V 11] (DB). (Unknown occupation of the part of the premises would not put the purchaser on enquiry as to the possible rights of the occupier over the remainder of the premises.)
('83) 1883 Pun Re No. 102, p. 315 (323).
('89) 16 Cal 414 (417) (DB).
(1853) 14 E R 204 (210) : 9 Moo P C 18, Barnhart v. Greenshields.
(1833) 39 E R 1084 (1086) : 2 M & K 629, Hanbury v. Litchfield.
(1902) 1 Ch 428 (433) : 71 L J Ch 239, Hunt v. Luck.
('88) 12 Bom 569 (572) (DB).

7. (1809) 33 E R 978 (980) : 16 Ves 249, Daniels v. Davison.
(1853) 14 E R 204 (209) : 9 Moo P C 18, Barnhart v. Greenshields.
[See however (1848) 64 E R 224 (233) : 2 De G & S 501, Penny v. Watts. (Daniels v. Davison, (1809) 33 E R 978, held not to apply where the possession was not by virtue of the agreement.)]

8. 1929 Pat 300 (301) [AIR V 16] (DB). (Mortgagee in possession having also an agreement to sale in his favour.)
1929 Pat 284 (286) [A I R V 16] : 8 Pat 316 (DB).
1926 Cal 204 (211) [AIR V 13] (DB).
1921 Lah 146 (146) [AIR V 8] (DB).
1917 Pat 478 (480) [AIR V 4] : 2 Pat L Jour 513 (FB). ('*A*' in possession of portion of property 'X' but having an agreement in his favour for sale of the whole of 'X'— Subsequent purchaser of 'X' held not to have notice of the agreement to sale the whole of 'X'. *Daniels* v. *Davison*, (1809) 33 E R 978 distinguished.)

8a. 1962 Orissa 83 (89) [AIR V 49 C 32]. (1952 Orissa 163 [AIR V 39] followed—Held also assuming that the mere occupation of property as a tenant would be notice of an agreement not connected with the occupation the doctrine cannot be extended to cases where the tenant of part of a property has also a contract to purchase in his favour as against the purchaser of the whole property: 1917 Pat 478 [AIR V 4] (FB), Rel. on.)
('60) 1960 Raj L W 103 (106). (Notice does not extend to any collateral agreement which the tenant may have in his favour.)

8b. 1965 Pat 467 (469) [A I R V 52 C 132] : 44 Pat 596 (DB).
('58) 1958 B L J R 466 (468) (DB).

the person in possession. See also the undermentioned cases of Andhra High Court(8c) and Madras High Court(8d) to the similar effect. The view that had been held before the insertion of the Explanation was, in the undermentioned case,(9) applied to a case in Lahore to which *the Act did not apply* and it was held that possession would be notice not only of the title of the person in possession but also of any agreement in his favour under which he might subsequently obtain a further title to such possession.

The possession which will operate as notice under this Explanation is *actual* possession, though it is not necessary that it should be continually visible or should have been, without cessation, asserted.(10) The question whether any person is in actual possession is one of fact. Stacking fodder and tying cattle in an open site in a village where it is usual for neighbours to use open sites not belonging to them for such purposes, cannot be said to be such possession as would constitute notice.(11)

See also the undermentioned case.(12)

40. Possession is not notice to person who has contracted to purchase the property — This Explanation, like Explanation I, imputes notice only to a person who *acquires* immovable property. Where *X* is in possession and *A contracts* to sell the property to *B*, *B* cannot, before the completion of the contract, be charged with notice of the title of *X*. In *Caballero* v. *Henty*,(1) Lord Justice James said :

> "I am not prepared to follow the dicta in that case (i.e., *James* v. *Lichfield*(2)) which support the notion that the doctrine of *Daniels* v. *Davison*(3) applies as between vendor and purchaser, while the matter still rests in *contract*. Such a notion does not seem to be deducible from the previous authorities. These decisions apply only to certain equities between the purchaser and the tenant when the *purchase has been completed* and have nothing to do with the rights and liabilities of vendors and purchasers as between themselves."

41. Notice to agent — Explanation III. — Before the amendment of the section by Act XX of 1929, the last paragraph of the section provided that

> "a person is said to have 'notice' of a fact when. . . . . information of the fact is given to or obtained by his agent under the circumstances mentioned in the Indian Contract Act, 1872, S. 229."

That section provided that

> "any notice given to or information obtained by the agent, provided it be given or obtained in the course of the business transacted by him for the principal, shall, as between the principal and the third parties, have the same legal consequence as if it had been given to or obtained by the principal."

8c. 1954 Andh 20 (22) [AIR V 41 C 12].

8d. 1952 Mad 265 (266) [AIR V 39]. (The possession of a usufructuary mortgagee of the mortgaged property is notice to the purchaser of the said property of the previous agreement of sale of the property between the mortgagor and the mortgagee.)

9. 1938 Lah 39 (40) [AIR V 25].

10. (1856) 44 E R 510 (514) : 8 De G M & G 572, *Homes* v. *Powell*.
[*See also* 1954 Punj 14 (16) [AIR V 41 C 9]. (*A* mortgaging part of his lands to *G*—Mortgagee *G* on the death of A's widow taking actual possession of all lands of *A* claiming to be his sole heir to the knowledge of her rival claimant *R*—Mortgage of lands by *G* after some years — Held R's suit brought after 12 years of *G* taking exclusive possession was barred and mortgage by *G* could not alter this result.)]

11. 1939 Lah 29 (31) [AIR V 26] : ILR (1939) Lah 261.

12. 1950 Pepsu 34 (35, 36) [AIR V 37 C 12] (DB). (Possession under unregistered sale deed is merely that of a trespasser and not as an owner — No question of notice to subsequent vendee arises and he will have priority.)

Section 3 — Note 40

1.† (1874) 9 Ch App 447 (449, 450) : 43 L J Ch 635.

2. (1863) 9 Eq 51 (55) : 39 L J Ch 248.

3. (1809) 33 E R 978 (980) : 16 Ves 249. (As to this doctrine, see Note 39.)

This definition was regarded as defective in that it appeared to restrict the rule to the facts of which the agent has *actual* knowledge, or express notice.(1) No such restriction is recognised in England.(2) It was with a view to make it clear that this was not so that this Explanation has been added. In other respects the present provision is substantially a reproduction of the former provision.(3)

The principle on which the doctrine that notice to agent is notice to principal rests, is that the agent is the *alter ego* of the principal and is the principal himself who stands precisely in the same position as his agent in the transaction.(4) The provision is based upon substantial justice because mankind would not be safe if it were held that a man has not notice of that which his agent has notice of.(5) As stated in *Seldon* v. *Cox*,(6) if it were held otherwise it would cause great inconvenience, and notice would be avoided in every case by employing agents.(7) The Explanation only declares a general principle of law, which is, in an especial sense, applicable to legal proceedings which are usually conducted through an agent. It is not a mere question of constructive notice or inference of fact but a rule of law which imputes the knowledge of the agent to the principal.(7a)

Notice to an agent is notice to the principal in the circumstances stated in the Explanation,(8) whether it is communicated or not by the agent to the principal.(9) The presumption in such cases, which cannot be allowed to be rebutted, is that he did communicate it.(10) It would be fraud on the part of the agent to conceal the know-

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Section 3 — Note 41

1. ('79) 4 Cal 897 (910). (Ponfifex J.)

2. (1873) L R 17 Eq 15 (18, 19) : 43 L J Ch 46, *Maxfield* v. *Burton*.

3. ('03) 25 All 1 (17) : 29 Ind App 203 (P C). (Mukhtear's knowledge is landlord's one.)

4. ('98) 26 Cal 381 (392, 393) (SB). (Solicitor.)
✠(1866) L R 2 Eq 134 (142) : 14 W R (Eng.) 565, *Boursot* v. *Savage*.

5 ('04) 6 Bom L R 557 (572) (DB). (Citing *Rolland* v. *Hart*, L R 6 Ch App 678.)

6. (1764) 28 E R 884 (885) : 2 Eden 224.

7. See also to the same effect.
†1939 Nag 132 (136) [AIR V 26].
1929 Mad 426 (429) [AIR V 16].
(1905) 1 Ch 632 (639) : 74 L J Ch 249 (252), *Berwick & Co* v. *Price*.
(1764) 2 Eden 224 (228) : 28 E R 884, *Sheldon* v. *Gox*.

7a. ('02) 6 Cal W N 849 (855) (PC).

8. ✠('02) 25 All 1 (17) : 29 Ind App 203 (P C). (Agent obtaining knowledge while defending legal proceedings.)
('73) Ind App Sup. Vol 175 (179) : 12 Beng L R 406 (PC), (*Quaere.*)
('02) 30 Cal 535 (545) : 30 Ind App 114 (PC).
1933 All 607 (608) [A I R V 20] : 55 All 810. (Notice to managing director is notice to company.)
1929 Lah 500 (502) [AIR V 16]. (Co-vendees as principal and agent, notice to one is notice to the other.)
1927 Sind 24 (25) [AIR V 14]. (Fact of agency should be established.)
('67) 8 Suth W R 399 (408) (DB).
(1892) 2 Q B 534 (539, 542) : 61 L J Q B 892, *Bawden* v. *London etc. Assurance Co.*
(1850) 64 E.R 677 (679) : 29 Beav 387, *Wills* v. *Greenhill*. (Solicitor.)
(1813) 14 R R 392 (395) : 1 M & S 35, *Gladstone* v. *King*.
(1736) 22 E R 576 (576) : 2 Eq Cas Abr 685, *Attorney-General* v. *Gower*.
(1748) 26 E R 1172 (1177) : 3 Atk 646, *Le Neve* v. *Le Neve*.
(1806) 33 E R 237 (239) : 13 Ves 114, *Hiern* v. *Mill*.
(1785) 99 E R 944 (946) : 1 T R 12, *Fitzherbert* v. *Mather*.
(1905) 2 Ch 147 (158, 160) : 74 L J Ch 531, *Rainford* v. *James Keith and Blackman Co. Ltd.* (A notice to a director of the company.)
('98) 26 Cal 381 (392, 393) (DB). (Notice to solicitor—An *alter ego*.)
[*See* 1914 Low Bur 225 (225) [AIR V 1]. (Purchaser of land paying off mortgage over land due from vendor and his father — Purchaser's agent having notice of mortgage by father — Purchaser is not *bona fide* purchaser.)]
[*See also* (1853) 61 E R 618 (620) : 2 Drew 1, *Proctor* v. *Cooper*.
('97) 21 Bom 827 (856) (FB). (As a general rule, a client is affected with notice of what comes to the knowledge of his pleader in the course of his employment.)]

9. (1859) 44 E R 1380 (1383) : 8 De G and J 547, Espin v. Pemberton.
1929 Lah 500 (502) [AIR V 16].

10. (1878) 9 Ch D 189 (196) : 47 L J Ch 811, Bradley v. Riches. (Solicitor is agent—It is his duty to communicate to his client.)

ledge or not to communicate it to the principal, and if so, the principal should not, on principle, be at liberty to derive a benefit from the fraud of the agent.(11)

The definition in this Explanation has nothing to do with the manner or the legality of service of notice either under the Land Acquisition Act or under the Civil P. C. The husband cannot be deemed to be an agent of the wife for purposes of service of notice under the said enactments.(12)

42. "Agent."— An agent is a person employed to do any act for another.(1) Where an agent is not authorised to receive notice, a notice to him would not be a notice to the principal if the agent is not held out to the world as if he had such authority.(2) If he is so held out, it would be the height of injustice to allow the principal to set up his own secret and private instructions to the agent limiting his authority and thus to defeat his act and transaction under the agency when the party dealing with him had, and could have, no notice of such instructions.(3) In the undermentioned cases,(4) where two companies had a common director and he had notice of irregularities committed by one company, it was held that the test to be applied in determining whether notice of such irregularities is to be imputed to the other company, was, firstly, was it within the scope of the duty of one company's officer to give notice to the other company? and secondly, was it within the scope of his duty as the officer of the other company to receive notice? If there was no such duty no notice could be imputed.

It has been held in the undermentioned cases(5) that notice to the *agent of an agent* is notice to the principal. But where one solicitor employed another for the purpose of obtaining the execution of a mortgage-deed, the second solicitor was not to be a solicitor of the transferee and notice to such solicitor was held not to be a notice to the transferee.(6)

A partner is, under S. 18 of the Partnership Act, 1932, an agent of the firm in the circumstances mentioned in that section. A notice to such partner under such circumstances would therefore constitute notice to the firm, i.e., notice to all the partners.(7)

The husband of a purdanashin woman is not necessarily the agent of the woman and the mere fact that he has knowledge of a particular fact cannot operate as notice to the woman.(8) It has been held that a husband cannot be deemed to be an agent of

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[*See also* (1882) 21 Ch D 685 (705) : 51 L J Ch 281, Kettlewell v. Watson. (If it is the agent's duty to communicate to the principal his knowledge the Court will hold that he did communicate it.)]

See also Storey on 'Agency,' Para. 140.

11. (1838) 56 R R 246 (257, 258) : 2 Dr & Wal 364, Nizam v. Hamilton.

12. 1862 Ker 266 (267) [AIR V 49 C 80] : ILR (1962) 1 Ker 83.

Section 3—Note 42

1. See Section 182 of the Indian Contract Act.

2 ✠(1880) 49 L J Ch 465 (467) : 14 Ch D 406, Sabron Walden Second Benefit building Society v. Rahner. (Solicitors employed to do something accepting notices concerning other business of the client—Notice invalid.)

[*See also* 1962 Ker 266 (267) [A I R V 49 C 80] : ILR (1962) 1 Ker 83. (Notice to husband is not notice to wife to be served under Land Acquisition Act or Civil P. C.)]

3. † 1928 Cal 371 (374, 375) [AIR V 15]. (Citing Storey on Agency, Para. 127.)

4. (1896) 2 Ch 743 (749) 65 L J Ch 860, In re Hampshire Land Co.

[*See also* 1936 Bom 62 (81) [A I R V 23] : 60 Bom 326. ((1896) 2 Ch 743, followed.)]

5. (1744) 26 E R 818 (824) : 3 Atk 26, Norris v. Le Neve. (Notice to the town agent of a country solicitor is notice to the person employing the solicitor.)

(1848) 17 L J Q B 282 (285) : 12 Q B 465, Pike v. Stephens. (Notice to the clerk of attorney.)

6. (1863) 142 R R 180 (180) : 3 De G J & Sm 596, Wyllie v. Pollen.

7. 1931 Lah 227 (229) [A I R V 18] : 12 Lah 328 (DB).

8. 1925 Oudh 613 (615) [AIR V 12].

the wife for purposes of service of notice under the Land Acquisition Act or Civil P. C.(9)

43. "Whilst acting on his behalf in the course of business to which that fact is material." — These words show two things —

(1) the agent must have acquired the knowledge *during the period when he was actually* acting as the agent.(1) A knowledge acquired *before* he was appointed agent cannot be regarded as notice to the principal.(2)

(2) the agent must have acquired the knowledge *in the transaction* in which he was employed as agent and the fact about which knowledge is acquired must be *material* to that transaction.(3) If the knowledge is acquired, not in the matter for which he is appointed agent but in some other matter there is no constructive notice to the principal of such fact.(4)

Thus, notice to the solicitor or counsel of a party would be notice to the client(5) if such knowledge is acquired by the solicitor or counsel, *after* he was employed and in the transaction in which he was employed. As observed by Lord Hardwicke in *Worsley* v. *Lord Scarborough*,(6)

> "notice to an agent or counsel, who was employed in the thing by another person, or in another business, and at another time, is no notice to his client, who employs him afterwards; and it would be very mischievous if it was so; for the man of most practice and greatest eminence would then be the most dangerous to employ."(7)

In *Chabildas* v. *Dayal Mowji*(8) their Lordships of the Privy Council observed :

> "The view of the Court of appeal imputes to a principal the knowledge of an agent, not

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9. 1962 Ker 266 (267) [A I R V 49 C 80] : I L R (1962) 1 Ker 83.

Section 3 — Note 43

1. ('88) 11 Mad 419 (440) (DB). (Solicitor coming to know a fact while not acting as an agent — Principal not fixed with notice.)

2.†(1886) 31 Ch D 671 (677) : 55 L J Ch 662, In re Cousins.
(1740) 27 E R 621 (621) : Barn Ch 220, Stead v. Whitaker.

3. (1967) 71 Cal W N 31 (36).
(1848) 9 E R 897 (909) : 1 H L C 605, Wilde v. Gibson.
(1806) 33 ER 237(239):13 Ves 114, Hiern v. Mill.
(1746) 26 E R 970 (972) : 3 Atk 294 : Warwick v. Warwick.
[*See also* 1921 Sind 121 (124) [AIR V 8] : 16 Sind L R 235. (Broker signing bill of lading on behalf of ship-owner—Latter is affected with notice of contents of bill of lading.)]

4. ('07) 31 Bom 566 (581, 582) : 34 Ind App 179 (PC).
(1967) 71 Cal W N 31 (36).
[*See also* 1935 Lah 821 (822) [A I R V 22] (DB). (Knowledge acquired by the Director of bank in his personal capacity—Held, knowledge to bank could not be implied.)]

5 (1878) 9 Ch D 189 (196) : 47 L J Ch 811, Bradley v. Riches. (Solicitor is assumed to have communicated to his client.)
(1871) 6 Ch App 678 (682) : 40 L J Ch 701, Rolland v. Hart.
(1866) L R 2 Eq 134 (142) : 14 W R (Eng) 565, Boursot v. Savage.
(1856) 44 E R 465 (469, 470) : 8 De G M and G 454, Atterbury v. Wallis.
(1848) 17 L J Q B 282 (285) : 12 Q B 465, Pike v. Stephens.
†(1843) 67 E R 162 (165) : 2 Hare 394, Fuller v. Bennet.

6. (1746) 26 E R 1925 (1926) : 3 Atk 392.

7. (1967) 71 Cal W N 31 (36).
1931 Oudh 333 (340) [A I R V 18] : 7 Luck 131 (DB). (Information to plaintiff's pleader in previous suit cannot be information to plaintiff or to his authorized agent.)
[*See also* (1843) 67 E R 162 (166) : 2 Hare 394, *Fuller* v. *Bennet*. (Lord Hardwicke's observations were cited with approval by Sir James Wignam.)]
[But see (1817) 36 E R 81 (85) : 3 Mer 210, *Toulmin* v. *Steere*. (*P* purchased from *W* an annuity secured on *W's* estate *X* — *M N* as attorney and agent negotiated the sale for *W* — Subsequently *X* property was purchased from *W* and conveyed on trust for *D* and infant son *S*—*M N* was also the agent employed in the subsequent transaction — It was held that notice to *M N* was constructive notice to *D* and *S*, on whose behalf the subsequent purchase was made — Fact that *S*, an infant, was interested in the purchase did not affect the question of notice.)
(1864) 34 L J C P 48 (48) : 11 L T (NS) 111, *Dresser* v. *Norwood*. (Knowledge of agent before the transaction held notice to principal.)]

8. ('07) 31 Bom 566 (581, 582) : 34 I A 179 (PC).

> acquired in the matter for which he was agent, and uses it to upset a transaction of a date before the agency commenced. This is an extension of the doctrine of constructive notice in which their Lordships cannot concur."

Where the same person is the agent of both parties to a transaction, a notice to him in the transaction in one capacity will be effectual notice to him in both capacities. Thus, where *A*, an attorney, was the agent of an insurance company, and received notice in his capacity of attorney to *X* to be transmitted to the company, it was held that the company must be held to have constructive notice of such fact.(9) Similarly, where the same person acts as agent or attorney, as well on behalf of the vendor as the purchaser of an estate or is himself the vendor and agent or attorney for the purchaser, whatever notice he may have received will affect the purchaser.(10)

In the undermentioned cases,(11) *A* having notice of an encumbrance agreed to purchase the property in the name of *B*. But he subsequently agreed that *B* himself should be the purchaser. *B* accordingly paid the purchase-money without notice of the encumbrance. It was held that though *B* did not employ *A*, nor knew anything about *A's* agreement to purchase till after the purchase was made, yet *B's* approval of the agreement afterwards, made *A* his agent *ab initio* and affected *B* with the notice.

44. Effect of agency ceasing after notice.— The fact that subsequent to the acquisition of notice by the agent, he ceased to be so does not prevent the application of the rule of constructive notice to the principal.(1)

45. Principal, an infant—Notice to agent. — Where immovable property is purchased on behalf of an infant through an agent employed by trustees acting on behalf of the minor, notice of a charge on the property to the agent will be notice to the infant.(1)

46 Principal, the Government—Notice to agent. — The fact that the principal is the Government does not render the doctrine of constructive notice inapplicable. In the undermentioned case(1) where the officers of the Government acquired knowledge of a particular fact, and the question was whether such knowledge should be imputed to the Government, it was observed by Chandavarkar, J.:

> "That doctrine (i. e., doctrine of constructive notice), being founded on a fiction, must, indeed, be cautiously applied, and the mere fact that a village official has made an entry in the books of the Government in the discharge of his official duty would not be sufficient by itself to bind the Government with knowledge of it. But where, as in the present case, the entries have been repeated from year to year for a number of years without the levy of an increased assessment, the District Judge was, I think, right, in the absence of any evidence to the contrary, in holding that the Government through their agents have acquiesced in the permanence of the grant."

47. Fraud of agent. — In English law where an agent is guilty of *fraud* and has an interest in concealing the knowledge from the principal and does so conceal it, the general rule that notice to agent is notice to principal does not apply and the principal is not to be imputed notice of the fraud. In *In re David Payne & Co.*,

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9. (1846) 16 L J Q B 119 (120) : 9 Q B 730, *Gale* v. *Lewis.*

10. (1837) 8 L J Ch 235 (236) : 3 My & Cr 670, *Dryden* v. *Frost.*
(1872) 20 W R (Eng.) 793 (793), *Jones* v. *Frost.*

11. (1708) 23 E R 998 (998) : 2 Vern 609, *Jennings* v. *Moore.*
(1724) 2 E R 727 (730) : 5 Bro P C 355, *Coote* v. v. *Mammon.*

Section 3 — Note 44

1. (1861) 9 W R (Eng) 880 (882) : 7 Jur (NS) 1263, *North British Insurance Co.* v. *Hallet.*

Section 3 — Note 45

1. (1817) 36 E R 81 (85) : 3 Mer 210, *Tculmin* v. *Steere.*

Section 3 — Note 46

1. ('01) 26 Bom 271 (281) (DB).

Ltd.(1) the Court of Appeal confirmed the judgment of Mr. Justice Buckley (afterwards Lord Wrenbury) who stated this exception in the following words:

> "If a communication is made to an agent of a corporation which it would be his duty to hand on to his principals, and if that person had an interest which would lead him not to disclose to his principals the information which he has thus obtained, and in point of fact he did not communicate it, knowledge is not to be imputed to the principals by reason of the fact that the agent knew something which it was not to his interest to disclose and which he did not disclose."

The exception will apply with greater force where the party seeking the benefit of the doctrine of constructive notice is a party to or is cognisant of the fraud. In *Sharpe* v. *Foy*,(2) S advanced moneys on a mortgage executed in his favour by F, the transaction being negotiated by C, a solicitor's clerk who acted for both parties. It appeared that there was a previous settlement affecting the land comprised in the mortgage and F had communicated this fact to C. C, however, told F that he would not communicate it to S, as it would make him nervous and cause him to hesitate about advancing money. It was held that when C refused to communicate the fact to S, it was the duty of F himself to communicate it to S, that by his failure to do so, F must be considered to be a party to what amounted to a fraud committed by C upon his client S and that "if it were to be held that notice given under these circumstances was binding upon the principal it would amount to robbing the person who advanced the money." A similar view was taken in *Cave* v. *Cave*.(3) It was pointed out by Fry J., in that case that the exception rested on two grounds:

(a) that the circumstances led to the inevitable conclusion (over-riding even the irrebuttable presumption arising in cases of constructive notice that the agent must have communicated the information to the principal as part of his duty) that the notice had not been communicated, and

(b) that the agent could not be said to be acting in the character of agent at all but only as an independent party playing a fraud.

An exception to the above exception has also been recognised in England and that is where, in addition to the fraud of the agent, it appears from the circumstances that if an honest agent had been employed, he would have discovered the fraud. In such cases the exception that notice to the fraudulent agent is not notice to principal does not apply, and the general rule that notice to agent is notice to principal will apply. The leading case on the point is *Kennedy* v. *Green*,(4) decided in the year 1834. In that case, Bostock, a solicitor, fraudulently obtained an assignment of a mortgage from Mrs. Kennedy who was his client. This mortgage Bostock assigned to one Kirby who was also his client. The circumstances were, however, such that if Kirby had employed any honest solicitor Bostock's fraud would have been discovered. It was held that apart from such circumstances Kirby could not be charged with constructive notice of the fraud, but in view of such circumstances he should be charged with notice. The Lord Chancellor, Lord Brougham, observed as follows :

> "It cannot here be said that Mr. Kirby is fixed with all which Bostock knew. For the fraud, practised by Bostock upon Mr. Kirby himself, was of course concealed from him; and so

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Section 3 — Note 47

1. (1904) 73 L J Ch 849 (851) : 2 Ch 608 : 91 L T 777. (65 L J Ch 860, followed.)
[*See also* (1929) 2 K B 356 (374, 375) : 98 L J K B 751, *Newsholme Bros.* v. *Road Transport General Insurance Co.* (Knowledge of the agent acquired in breach of duty and who is guilty of fraud is not the one of the principal.)

1919 P C 20 (24) [AIR V 6] : 44 Bom 139 : 46 Ind App 250.

2. (1868) 4 Ch App 35 (40) : 17 W R (Eng) 65.

3. (1880) 15 Ch D 639 (644) : 49 L J Ch 505. (Citing *Thomson* v. *Cartwright*, 33 L J Ch 234, for the first ground and *Rolland* v. *Hart*, 40 L J Ch App 701, for the second ground.)

4. (1834) 40 E R 266 (274) : 3 My & K 699.

we may say would certainly be that other fraud which he had practised on Mrs. Kennedy ..... I think, we cannot, on *on this account alone* fix his client, Mr. Kirby, any more than his other employer, Mrs. Kennedy, with the knowledge of his criminal proceedings. We must lay out of our view all the knowledge, the actual and full knowledge he had of his own fraud, and are not to hold Mr. Kirby as cognisant—I mean, of course, cognisant in law and constructively—of that merely because his solicitor himself, the contriver, the actor, and the gainer of the transaction, knew it all well.

"But suppose him not the actor, and only regard him as an attorney wholly unconcerned in the plot, and employed by Mr. Kirby, and not only innocent of the whole affair, but wholly ignorant of it ..... I say still with all this deduction and all this supposition that Mr. Kirby is fixed. For Bostock, had he been wholly free from the guilty knowledge, and only employed as a solicitor to act for and advise Mr. Kirby must, on seeing the deed, have had his attention at once called to the suspicious circumstances under which it was executed ..... Thus taking Bostock to be merely an ordinary solicitor, employed by Mr. Kirby in settling this transaction for him, the deed was such as at once gave him notice that all was not right, and put him upon enquiring. That is notice to him and his employer of whatever the inquiry would have disclosed."

The above principles of English law were followed in this country also. In *Hormasji* v. *Mankuvarbai*,(5) a case decided before this Act, the High Court of Bombay followed the principles stated in *Kennedy* v. *Green*(6) and *Sharpe* v. *Foy*(7) and held, *firstly* that the Court will not presume notice to have been given to his client by an attorney where such notice would involve a confession by the attorney of a fraud practised by himself and, *secondly*, that the Court will not apply the doctrine of constructive notice where the party seeking the benefit of it has been guilty of secrecy in the transaction with constructive notice of which he seeks to affect the principal. The same principles were followed in subsequent cases decided after this Act was passed. Thus, in *Sooleman* v. *Rahimtula*,(8) it was held that where the person who acted both for the mortgagor and the mortgagee acted fraudulently towards the latter by not disclosing to him the flaw in the title, the latter was entitled to say that the agent's knowledge should not be imputed to him and used to his prejudice. In *The Texas Co.* v. *Bombay Banking Co.*,(9) their Lordships of the Privy Council relied upon the observations of Buckley, J., in the case of *In re David Payne & Co. Ltd.*,(10) and held that notice to an agent guilty of fraud was not notice to the principal. See also the undermentioned cases(11) to a similar effect.

In introducing the proviso to Explanation III, by the amending Act, XX of 1929, the Legislature seems to have departed to some extent from the English law as above stated. Under the proviso, notice even to an agent who fraudulently conceals his knowledge from the principal, will be notice to the principal except *as against a person who is a party to or otherwise cognisant of the fraud.*

48. **Lis pendens and decree as notice.** — The pendency of a suit is very often spoken of as operating by way of notice to all would be transferees of the property involved in the suit.(1) That this view was incorrect was pointed out in

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5. †(1875) 12 Bom H C R 262 (266, 267) (DB).
6. (1834) 40 E R 266 (274) : 3 My & K 699.
7. (1868) 4 Ch App 35 (40) : 17 W R (Eng) 65.
8. ('04) 6 Bom L R 800 (810). (English Case law reviewed.)
9. 1919 P C 20 (24) [AIR V 6] : 44 Bom 139 : 46 Ind App 250.
10. (1904) 73 L J Ch 849 (851) : 2 Ch 608.
11. 1929 Cal 497 (499) [AIR V 16] : 56 Cal 367. (Member of pledgor firm also member of pledgee's advisory committee for advancing loan—No notice of pledgor's fraud can be imputed to pledgee.)
('12) 36 Bom 564 (585).
('09) 4 Ind Cas 652 (686) (Bom).

Section 3 — Note 48

1. (1842) 59 R R 726 (729) : 2 Dr. & War 361, *Higgins* v. *Shaw.*
(1831) 39 E R 236 (238) : 1 Russ & M 617, *Kinsman* v. *Kinsman.*

Bellamy v. *Sabine.*(2) In that case, the Lord Chancellor said :

> "It is scarcely accurate to speak of *lis pendens* as affecting a purchaser upon the doctrine of notice although undoubtedly the language of the Court often so describes its operation. It affects him, not because it amounts to notice, but because the law does not allow to litigant parties, and give to them pending the litigation, rights in the property in dispute, so as to prejudice the opposite party."(3)

A decree is not notice to a purchaser who purchases after the decree where it is merely declaratory and inexecutable.(4)

49. Fraudulent party cannot plead constructive notice.— A person who is himself guilty of fraud in transactions with another cannot plead that the other had constructive notice of the facts which he was bound to disclose and which he actively concealed from him.(1) Thus, where a person who had a registered mortgage in his favour obtained a decree against the mortgagor on another debt and sold the property in execution but *fraudulently concealed* the fact of his mortgage in execution proceedings, it was held that he was estopped from charging the execution purchaser with constructive notice of the registered document.(2) Similarly, it was held that the doctrine of constructive notice by the omission of a purchaser to call for and examine the title deeds of his vendor, would not cover a case where the vendor practised a fraud on the purchaser.(3)

50. Onus of proof as to notice. — The general rule is that the *onus* is on the party who alleges that another party has notice of a fact to prove it.(1) Where *A* alleges that *B* has constructive notice of certain facts the onus is on *A* to establish facts which give rise to the application of the doctrine of constructive notice, such as gross negligence or wilful abstention from an enquiry on the part of *B*, the registration of a document, the possession of property by a third person or notice having been given to the agent. In cases coming under S. 27, cl. (b) of the Specific Relief Act, 1877, (S. 19 of the Act of 1963), however, it has been held that it is for the *transferee* for value to plead and prove that his purchase was without notice of a prior contract of sale. (See Notes under S. 40. See also S. 53A, Note 15). Where a person has to prove that notice has been given to another person the mere fact that the transaction in question might have been known to a considerable number of persons will not amount to the necessary proof.(2)

(1813) 35 E R 295 (296) : 2 V & B 205, *Metcalfe* v. *Fulvertoft* (*Lis pendens* is presumptive if not actual notice.)

(1858) 53 E R 533 (556) : 25 Beav 47, *Taylor* v. *Thomas.*

[*See also* ((1806) 33 E R 237 (239) : 13 Ves 114, *Hiern* v. *Mill.*]

2.* (1857) 26 L J Ch 797 (801) : 1 De G & J 566.

3. ('74) 11 Bom H C R 24 (27) (DB). (Case law thoroughly reviewed.)

('74) 11 Bom H C R 64 (66, 67) (DB).

('72) 8 Beng L R 474 (477, 478) (DB).

4. 1940 Nag 163 (172) [AIR V 27] : ILR (1941) Nag 513 (DB).

Section 3 — Note 49

1. ('88) 11 Mad 419 (439) (DB). (Contract of sale —Vendor concealing lease.)

2. ('88) 12 Bom 678 (682) (DB).

('96) 20 Bom 290 (292) (DB). (Where there is no fraud but omission to declare the mortgage at time of sale the rule does not apply.)

[See however ('98) 22 Bom 686 (692) (DB). (Correctness of distinction between 12 Bom 678 and 20 Bom 290, i.e., between fraudulent concealment and mere omission doubted.)]

3. (1860) 66 E R 122 (126) : 2 Gif 292, *Hipkins* v. *Amery.*

Section 3 — Note 50

1. 1963 J & K 14 (15) [AIR V 50 C 9] (DB). (Attestation, no notice of contents of document—Party to prove that witness has knowledge of contents.]

('60) 1960) Raj L W 103 (105).

2. 1928 All 307 (309) [AIR V 15] (DB).

Enactments relating to contract to be taken as part of Contract Act.

4. The chapters and sections of this Act which relate to contracts shall be taken as part of the Indian Contract Act, 1872.

[a][And sections 54, paragraphs 2 and 3, 59, 107 and 123 shall be read as supplemental to the Indian Registration Act, [b][1908].]

[a] *Inserted* by the Transfer of Property Act (1882) Amendment Act, 1885 (III of 1885), S. 3.

[b] *Substituted* for "1877" by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), Section 5.

Synopsis

1. Legislative changes. [Omitted.]
2. Scope of the section.
3. Chapters and sections of the Act relating to contracts.
4. "Shall be taken as part of the Indian Contract Act."
5. "Shall be read as supplemental to."
6. Registration of lease deeds.
7. Registration of gifts—Section 123.
8. Registration of charges —Section 100.

1. Legislative changes. — [Omitted.]

2. Scope of the section. — All transfers of property other than gifts necessarily imply a *contract* to transfer such property. They are in fact *executed* contracts and, as a general rule, depend for their validity upon the same principles as those applicable to contracts. The first paragraph of this section gives legislative expression to this view and enacts that the chapters and sections of this Act which *relate to contracts* shall be taken as part of the Indian Contract Act. In their report of the year 1879, the Law Commissioners observed as follows :

> "Read with the Contract Act, this bill covers almost the whole of the ground which could be profitably occupied by law relating to the transfer *inter vivos* of interests in property . . . . . We would declare that all chapters and sections of the bill which relate to contracts should be taken as part of the Contract Act, 1872. When the body of substantive civil law enacted for India is re-arranged in a more compact and convenient form than that of a series of fragmentary portions from time to time passed by the Legislature, the chapters on sale, mortgage lease and exchange contained in the present bill, will probably be placed in close connexion with the rules contained in the Contract Act."

The provisions of the Indian Registration Act relating to the optional registration of documents conflict with certain provisions of this Act which require that transfers of property in writing must, in order to be operative, be registered, even if the property is less than Rs. 100 in value. It was pointed out by Garth, C. J., in *Narayan Chandar* v. *Data Ram Roy*,(1) a decision given in 1882, before the second paragraph was inserted in this section, that S. 54 "virtually abolished optional registration." The insertion of the second paragraph by the Amending Act III of 1885, now makes it clear that the provisions of this Act prevail over those of the Registration Act so far as transfers of property are concerned.(2)

3. Chapters and sections of the Act relating to contracts. — *Sales*, *mortgages*, *leases* and *exchanges* are all transfers of property based initially on *contracts* and, consequently, the chapters of the Act dealing with those transfers must be said to "relate" to contracts and must, therefore, be taken as part of the Contract Act.(1a)

Section 4 — Note 2

1. (82) Cal 597 (612) (FB).

2. *See* (92) 19 Cal 623 (626) (FB), (Overruling 16 Cal 622. The effect of the insertion is to make S. 54, para 3 absolute, in so far as it prescribes that a transfer of ownership by sale of tangible immovable properties of values less than Rs. 100 can be made only by registered instrument or by delivery.)

Section 4 — Note 3

1a. *See* 1960 Bom 126 (126) (Pr 2) [AIR V 47 C 35] : ILR (1959) Bom 1797 (DB). (Though a lease

The chapter on gifts cannot be said to relate to contracts. The reason is that a gift which is made without consideration cannot be based on any contract inasmuch as there can be no contract without consideration (except in some cases specified in S. 25, Contract Act). The chapter on gifts cannot, therefore, be read as part of the Contract Act except where the case may also come under Contract Act, S. 25. There is, however, a special provision in S. 126 to the effect that a gift can be revoked in any of the cases (save want or failure of consideration) in which, if it were a contract, it might be rescinded.

An actionable claim is contractual in its nature, and the chapter dealing with the transfer of such claims must be said to 'relate to contracts" within the meaning of this section.(1)

The sections of the Act which deal with transfers for consideration e.g., Ss. 38 to 43, 45 and 53, also 'relate to contracts" within the meaning of this section and must be taken as part of the Contract Act. One of the effects of so taking them would be to interpret the word "consideration" occurring in those sections in the light of the definition of that word in the Contract Act.

4 "Shall be taken as part of the Indian Contract Act."—It has been seen in Note 3 that one of the effects of taking the provisions of this Act as part of the Contract Act is to give the same meaning to the word "consideration" as it has under the Contract Act.

Another important consequence of taking the provisions of this Act relating to contracts as part of the Contract Act is to render a sale, mortgage, lease or exchange void or voidable, as the case may be, if the agreement or the contract in pursuance of which the transfer has been made, is void or voidable under the provisions of the Contract Act. Thus, a sale, mortgage, lease or exchange without consideration is void inasmuch as an agreement without consideration is void under S. 25 of the Contract Act.(1) Similarly, a sale, etc. would be void where both the parties thereto are under a mistake as to an essential matter of fact,(2) inasmuch as an agreement under such circumstances would be void under S. 20 of the Contract Act. Again, a transfer of property which has been brought about by undue influence, coercion, misrepresentation or fraud is voidable at the option of the person whose consent to the transfer was obtained by such undue influence, etc.,(3) inasmuch as a contract brought about under such circumstances would be voidable under Ss. 19 and 19A of the Contract Act.

In *Thakurain Harnath Kuar* v. *Thakur Indar Bahadur Singh*,(4) a person

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is a transfer it cannot be said to have ceased to be contract altogether. No doubt some of the clauses of the Contract Act will not apply as they would to a contract which is wholly executable. But that is a different matter.)

1952 Orissa 116 (117) [AIR V 39] (DB). (Behind every transfer of immovable property, there is a contract.)

1. 1933 Mad 207 (209) [AIR V 20] : 56 Mad 177 (DB). (Section 137 is made part of the Contract Act.)

1914 Bom 290 (292) [AIR V 1] : 38 Bom 255 (DB). (Section 137 is to be taken as part of the Contract Act.)

Section 4 – Note 4

1. ('11) 11 Ind Cas 4 (4) (All). (DB) (Mortgage). ('96) 22 Bom 176 (181) (DB). (Sale without consideration.)
('76) 1 All 309 (311) (DB). (Mortgage without consideration — Case before Transfer of Property Act was enacted.)
Also see S. 58, Note 18.

2. 1930 All 252 (254) [AIR V 17] (DB).

3. ('01) 25 Bom 126 (128) (DB). (Undue influence.)
†('68) 1 Beng L R A C 95 (98) (DB). (Do.)
1933 Rang 90 (90) [AIR V 22] (Do.)
1940 Lah 505 (508) [AIR V 27].

4.† 1922 P C 403 (404, 405) [AIR V 9] : 50 Ind App 69 : 45 All 179 : 26 Oudh Cas 223.

who had only a mere expectancy in certain villages purported to convey the villages to another and received a certain sum of money towards the consideration for the conveyance. The purchaser, finding subsequently that his vendor had only an expectancy in the property conveyed, sued for the recovery of the money advanced by him. It was held by their Lordships of the Privy Council that he was entitled to do so, on the ground that an *agreement* to sell an expectancy would be void and that, under S. 65 of the Contract Act, the party who had advanced the money would be entitled to receive it back from the other party. In other words their Lordships applied S. 65 of the Contract Act to a case of transfer of property. See also the undermentioned cases(5) to the same effect.

There has, however, been a conflict of opinion on the applicability of Ss. 24 and 39 of the Contract Act to transfers of property. In *Rajan Harji* v. *Ardeshir Hormusji Wadia*,(6) the High Court of Bombay assumed that S. 24 would apply to transfers of property, but came to the conclusion on the facts of the particular case that the consideration for the transfer was not "unlawful" within the meaning of that section and that, therefore, the section did not apply, so as to render the transfer void. The High Court of Allahabad also in a series of decisions(7) held that S. 24 was applicable to transfers of property. But in *Dip Narayan Singh* v. *Nageshwar Prasad*,(8) a Full Bench of the Allahabad High Court has held, dissenting from the view expressed in previous decisions, that S. 24 has "not been made applicable to transfers of immovable property" but that it applies only to contracts. This view has been followed by a subsequent decision of the same Court(9) and by the Chief Court of Oudh.(10)

It is very respectfully submitted that the view expressed by the Full Bench of the Allahabad High Court in *Dip Narayan's* case is not correct. The facts of the case were that a registered mortgage bond had been executed of properties *some* of which were not transferable by virtue of certain provisions of the Agra Tenancy Act, 1901. It was contended that the mortgage was void on the ground that the consideration therefor was in part unlawful within the meaning of S. 24 of the Contract Act. Their Lordships came to the conclusion that the attempt to transfer a non-transferable property neither "defeated any provision of law" nor was "forbidden by law" and was not, therefore, "unlawful." In this view, S. 24 of the Contract Act (which applies only where the consideration is in part "unlawful") was obviously inapplicable to the facts of the case. But their Lordships rested their decision in the case on the broad ground that S. 24 did not apply to *transfers of property*. They would appear to have assumed that S. 24 would render all agreements, the considerations for which are in part unlawful, *totally void*, even though the legal can be separated from the illegal part of the covenant, and that it is thus against the well-recognised general principle that

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5. 1937 Oudh 410 (413) [AIR V 24] : 13 Luck 531 (DB). (Mortgage invalid — Mortgagee can recover his money under S. 65, Contract Act.)
1930 All 252 (254) [AIR V 17] (DB). (Contract void due to mutual mistake — Remedy of vendee is to claim consideration or purchase money.)

6. ('79) 4 Bom 70 (73, 74) (DB).

7. 1929 All 394 (395, 396) [AIR V 16]. (Section 24 applies to transfers of property but the transfer of an untransferable occupancy holding and of other lands is not 'unlawful' within the meaning of that section. Such a transfer is therefore valid so far as the other property is concerned.)
1922 All 134 (135) [AIR V 9] : 44 All 486 (DB). (Usufructuary mortgage of occupancy holding.)
1921 All 392 (392) [AIR V 8] : 43 All 81 (DB). (Following 17 Ind Cas 522 and 18 Ind Cas 9.)
('13) 18 Ind Cas 9 (10) (All). (Loan in consideration of promise to give possession of occupancy holding.)
('12) 16 Ind Cas 42 (42) (All). (Usufructuary mortgage of occupancy holding.)

8. 1930 All 1 (2, 3) [AIR V 17] : 52 All 338 (FB).

9. 1934 All 246 (249) [AIR V 21] (DB).

10. 1935 Oudh 501 (504, 505) [AIR V 22] (DB).

where the legal can be separated from the illegal part of the covenant, the bad part may be rejected and the good retained. And, on this assumption, their Lordships seem to think that the section must be strictly limited to cases of contracts and not extended to transfers of property. There does not seem to be any ground for the said assumption. Section 24 of the Contract Act clearly seems to apply only to cases where the legal *cannot* be separated from the illegal part of the contract as is indicated by the word "*single*" used in the section in relation to the consideration and the object of the contract. The general principle is recognised by S. 57 of the Contract Act that where the legal part can be separated from the illegal part, the whole contract is not void. If Ss. 19, 19A, 20, 25 and 65 of the Contract Act can be applied to transfers of property, as they have been in numerous cases, it is not clear why S. 24 is not so applicable.

There has also been a conflict of opinion as to the applicability of S. 39 of the Contract Act to transfers of property. According to some cases of the High Court of Madras, a transfer of property may be cancelled by a party thereto, in circumstances under which he may put an end to the contract on which the transfer rests, but unless he so cancels it the transfer cannot be said to be invalid. In *Subba Rao* v. *Devu Chetty*,(11) where a mortgagee under a mortgage of Rs. 800 failed to pay Rs. 500 out of the consideration, it was held that the mortgagor could under S. 39 cancel the mortgage. In *Subbaraya Reddi* v. *Manikka Koundan*,(12) where mortgagee had paid only Rs. 235 out of the consideration of Rs. 400, it was held that though the mortgagor was entitled to cancel the mortgage he did not in fact do so and that therefore, the mortgage was valid to the extent of Rs. 235 which had been paid. In *Thirumal Raju* v. *Pandla Muthial Naidu*,(13) it was held that where a part of the consideration for a mortgage is void or fails, or the mortgagee makes default in paying it, the mortgage is good to the extent to the consideration that has validly passed unless the mortgagor has cancelled it, inasmuch as there is nothing to prevent the mortgagor from treating the mortgage as good to the extent of the consideration received and suing the mortgagee for damages for non-payment of the balance. But a contrary view was taken in *Abdul Hashim* v. *Khadir Batcha*,(14) namely, that a mortgage could not be cancelled on the ground of want of consideration inasmuch as the matter had passed beyond the stage of contract. The High Court of Calcutta appears to be of the same view as that taken by the High Court of Madras in the earlier cases. In *Bajrangi Sahai* v. *Udit Narayan*,(15) it was held by Maclean, C. J., after referring to *Subba Rao's case*, that where it was not shown that the mortgagor had cancelled the mortgage, the mortgagee was entitled to relief to the extent of the amount actually advanced.

On the other hand the High Courts of Allahabad, Bombay and Patna have taken the view that S. 39 does not apply to transfers of property. In *Rashik Lal* v. *Ram Narayan*.(16.17) Karamat Husain, J., observed: "Section 39 of the Indian Contract Act has no application for the simple reason that it deals with contracts, and a mortgage when registered is not a contract but a transfer." In that case there was in fact no cancellation of the mortgage by the mortgagee and the actual decision could be supported even if S. 39 applies to transfers of property. In *Basalingappa* v. *Virupakshappa*,(18) Chandavarkar, J., held that a mortgagor cannot rescind a conveyance

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11. ('94) 18 Mad 126 (127) (DB).

12. ('11) 10 Ind Cas 258 (259) (DB) (Mad).

13. ('11) 35 Mad 114 (118) (DB).

14. 1919 Mad 781 (782, 783) [AIR V 6]: 42 Mad 20 (DB).

15. ('06) 10 Cal W N 932 (933) (DB).

16-17. ('12) 34 All 273 (277) (DB).

[*See also* 1934 All 617 (617) [AIR V 21]. ("Under S. 39 of the Contract Act, if that can be held to apply, the vendee might have put an end to the contract....")

18. ('03) 5 Bom L R 392 (393) (DB).

under S. 39 of the Contract Act as that section applies only to contracts and not to executed conveyances. In *Makkan Lal* v. *Hanuman Baksh*.(19) the Patna High Court held that S. 39 cannot be applied to transfers of property. In that case, as in the case of *Rashik Lal*, the mortgagor had not, up to the time of the suit by the mortgagee, as a fact cancelled the mortgage, and the actual decision could be supported even if S. 39 applies to transfers of property.

It is submitted that the view taken by the Madras High Court in the earlier cases is correct on principle. A *contract* does not, on the refusal of a party to perform his part of the contract, *ipso facto* become void under S. 39 of the Contract Act. It *may* be put an end to by the promisee. If he does not do so the contract is good. If he does not do so for a considerable time a Court will hold that he has waived his right to put an end to it and will not allow him to rescind it when the other party sues to enforce the contract to the extent to which it has been partly performed. These principles may equally be applied to transfers of property without causing any injustice. If, for example, a mortgagee has not paid a portion of the consideration, the mortgage cannot *ipso facto* be said to be void. It will be good to the extent of the consideration which has actually passed, unless and until the mortgagor elects to put an end to it, and can be enforced to that extent. A mortgagor cannot keep quiet for a long time and when the mortgagee seeks to enforce the mortgage to the extent of the consideration which has actually passed, turn round and claim to rescind the mortgage. The Court will regard his conduct in such cases as amounting to an election on his part to treat the mortgage as good to the extent to which it is supported by a valid consideration. In cases, however, when the mortgagor does elect to rescind the mortgage, he will have, under the provisions of S. 65 of the Contract Act, to give up the benefit that he has received from the mortgagee, and thus the mortgagee does not really suffer any *injustice*. The actual decisions themselves in all the cases on the subject may generally be supported on the principles stated above. There does not seem to be anything peculiar about S. 39, which distinguishes it from other sections of the Contract Act which have been held to be applicable to transfers of property.

Section 55 of the Contract Act applies to a contract for sale of immovable property.(20)

5. "Shall be read as supplemental to." — The Indian Registration Act applies only where a transaction *is embodied in a document* and it deals with two classes of such documents, namely, those which are *compulsorily* registrable and those which are *optionally* registrable. This Act provides that in certain cases where a transfer of property is made by a document, *no title will pass to the transferee unless the document is registered*. The effect of reading the sections referred to in the second paragraph, as supplemental to the Indian Registration Act, would be that a transfer of property referred to in those sections will be valid only if it conforms to the provisions *both* of this Act and the Registration Act. Thus, a sale *in writing* of immovable property of the value of less than Rs. 100 is not compulsorily registrable under the Indian Registration Act. But such a sale does not convey any title to the vendee under this Act for, a sale of immovable property under this Act can be effected only in two ways—by a registered instrument or by oral contract accompanied by delivery of possession. The effect of reading the provisions of the two Acts as supplemental to

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19. 1917 Pat 514 (515, 516) [AIR V 4] : 2 Pat L Jour 168 (DB).

20. 1964 Orissa 269 (272) (Pr 7) [AIR V 51 C 104].

each other would be to make the registration of an instrument of sale of immovable property absolutely necessary in all cases.

There was, however, before the year 1929, a difference of opinion as to whether an instrument which without registration cannot convey any title to immovable property under the provisions of this Act, but which is not compulsorily registrable under the provisions of the Registration Act, would be inadmissible in evidence for any purpose under S. 49, Registration Act. The High Courts of Allahabad(1) and Madras(2) held that S. 49 of the Registration Act rendered inadmissible in evidence only the instruments referred to in S. 17 of that Act, and not instruments which though not compulsorily registrable under that section, did not convey any title under the Transfer of Property Act without registration. In the undermentioned case(3) of the Bombay High Court, Macleod, J., was of the same opinion as that expressed by the Allahabad and Madras decisions. But Beaman, J., expressed the view that the consequence of reading the provisions of this Act as supplemental to the Registration Act was to render inadmissible under S. 49 of the latter Act, *all unregistered instruments* of transfer of immovable property whatever may be the value of such property. The Legislature has now given effect to Mr. Justice Beaman's view and negatived the other view by amending S. 49 of the Registration Act, by adding the words therein 'or by any provision of the Transfer of Property Act, 1882."(4)

A security bond executed in Form No. 3 of Appendix G of the Civil P. C. creates a mortgage and in view of Ss. 4 and 59 of this Act. and S. 49 of the Registration Act, quite apart from S. 17 of the latter Act, such a bond has got to be registered where the principal money secured is one hundred rupees or upwards in order to affect the immovable property comprised in it.(4a)

The expression "shall be read as supplemental to the Indian Registration Act", cannot be construed as importing the *definitions* given in the Registration Act into this Act.(5) Thus, the word "lease" does not for the purposes of this Act include an *agreement to lease*, though it does for the purposes of the Registration Act. Such an agreement in writing if for less than one year is not within this section and need not be registered.(6)

See also the undermentioned cases.(7)

Section 4 — Note 5

1. 1928 All 726 (730, 731) [AIR V 15] : 50 All 986 (FB).

2. 1921 Mad 337(340) [AIR V 8]:44 Mad 55(FB).

3. 1917 Bom 203 (204, 205, 206) [AIR V 4] : 41 Bom 550 (DB).

4. See Act XXI of 1929.
[*See also* 1936 Pat 372 (377) [AIR V 23]: 15 Pat 460 (DB . (Case of lease. This case was reversed on another point in 1938 P. C. 20 [AIR V 25]).

4a. 1958 Ker 377 (379, 380) (Prs 13, 19) [AIR V 45 C 130] : ILR (1958) Ker 992 (FB).

5 † 1923 Oudh 237 (238) [AIR V 10]. (Definition of lease in Registration Act should not be imported into S. 107, Transfer of Property Act.)
('12) 35 Mad 95 (100) (FB). (Do.)
†1935 Pat 291 (295) [AIR V 22] : 14 Pat 672 (FB). (Definition clause of Transfer of Property Act cannot be read with definition clause of Registration Act.)

6. 1923 Oudh 237 (238) [AIR V 10].
('10) 5 Ind Cas 562 (563) (Cal).
Also see S. 107, Note 16.

7. 1958 Madh Pra 146 (148) (Pr 14) [AIR V 45 C 52]. (Oral lease on monthly rent with delivery of possession —Execution of rent note, on a subsequent day, in respect of portion taken on rent — Rent note, a unilateral document, was not effective as a lease and did not require registration under Registration Act.)
1952 Orissa 116 (117, 118) [AIR V 39] (DB). (Non-registration of lease deed — Deed would be treated as contract to lease — Lessor delivering possession in part performance — He is entitled to decree for sum agreed to be paid.)
1939 Lah 423 (425) [AIR V 26] : ILR (1940) Lah 70 (DB). (Rent deed by lessee not a 'lease' within S. 107 and need not be registered.)
1935 Pat 291 (295) [AIR V 22] : 14 Pat 672 (FB). (Kabuliat is not a lease within S. 107.)

6. **Registration of lease deeds.** — Under S. 17 (1) (d) of the Registration Act leases of immovable property *other* than those from year to year or for any term exceeding one year or reserving a yearly rent are not compulsorily registrable. The effect of reading S. 107 of this Act with the Registration Act is to make all such leases also, if made in writing, compulsorily registrable.(1) It was held in the undermentioned case(2) that this applied even to leases falling within the proviso to S. 17 (1) (d) of the Registration Act. Section 107 of this Act was subsequently in the year 1904 amended by the addition thereto of a proviso in terms similar to the proviso to S. 17 (1) (d) of the Registration Act. The result is that now there may be a valid lease in *writing* though not registered if the case falls within the proviso to S. 107 of this Act.

It has been held by the Oudh Judicial Commissioner's Court that an instrument of lease by the Government need not, by virtue of the exemption in S. 90 of the Registration Act, be registered in order to pass a valid title to the lessee.(3) Wazir Hasan, A. J. C. observed :

> "When the provisions of the two Acts, that is to say, the one appearing in S. 107 of the Transfer of Property Act and the other, in S. 90 of the Indian Registration Act are read together, there is no escape from the conclusion that the exceptions provided for by S. 90 of the Registration Act must also cover cases dealt with by S. 107 of the Transfer of Property Act."

It is submitted that if this view were right, it would follow, that an instrument of sale of immovable property of the value of less than Rs. 100, or an instrument of mortgage of immovable property to secure a loan of less than Rs. 100, or an instrument of lease not covered by first paragraph of S. 107, may convey a valid title to the transferee without registration—a view which has been negatived, as has been seen already, by numerous decisions.

7. **Registration of gifts — Section 123.** — Section 123 requires a gift, even of *movable* property, if made in writing, to be registered. Under S. 17 (1) (a) of the Registration Act, however, only an instrument of gift of immovable property is compulsorily registrable. The effect of reading S. 123 of this Act as supplemental to S. 17 of the Registration Act is that *all* gifts, whether of movable or of immovable property, must be registered if they are effected by an instrument.

8. **Registration of charges—Section 100** – Under the present S. 100 all the provisions of the Act which apply to a simple mortgage shall, so far as may be, apply to a *charge*. The words "so far as may be" do not have the effect of taking S. 59 out of the purview of S. 100; therefore the requirement of registration of a simple mortgage will apply to a charge also, and by virtue of S. 4, S. 59 has now to be read as being supplemental to S. 17, Registration Act, thus rendering the registration of a charge compulsory except in cases where registration is incompatible with the particular charge created, e. g., a charge created by operation of law.(1) The observations of Rangnekar J.,

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Section 4 — Note 6

1. 1935 Pat 291 (294) [AIR V 22] : 14 Pat 672 (FB).
('12) 35 Mad 95 (99) (FB).
1923 Oudh 237 (238) [AIR V 10].
('09) 32 Mad 532 (533) (DB). (Approved on this point but overruled on another point in 8 Ind Cas 668.)
Also see S. 107, Note 1.

2. ('98) 21 Mad 109 (110) (DB).

3. 1923 Oudh 114 (115) [AIR V 10] : 27 Oudh Cas 64.

Also see S. 107, Note 12.

Section 4 — Note 8

1. 1962 All 101 (103) (Pr 4) [AIR V 49 C 28] (DB). (Combined effect of Ss. 4, 59 and 100 of the Transfer of Property Act is to make all

in the undermentioned case(2) that the position in the case of a charge within the meaning of S. 100, Transfer of Property Act, as to the requirement of registration or attestation is different from that in the case of a mortgage under the same Act, and that S. 4 would have nothing to do with the question does not appear to be correct. The charge in that case was created by a *decree* and the words "as the case may be" in S. 100 would prevent the provisions of S. 59 of the Act being applicable to such a charge.

CHAPTER II[a]

OF TRANSFERS OF PROPERTY BY ACT OF PARTIES

(A) Transfer of Property, whether moveable or immoveable.

5. In the following sections "transfer of property" means an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself, [b][or to himself] and one or more other living persons; and "to transfer property" is to perform such act.

"Transfer of property" defined.

[b][In this section "living person" includes a company or association or body of individuals, whether incorporated or not, but nothing herein contained shall affect any law for the time being in force relating to transfer of property to or by companies, associations or bodies of individuals.]

[a] Nothing in this Chapter is to be deemed to affect any rule of Muhammadan Law—*see* Section 2.

[b] *Inserted* by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), S. 6.

Synopsis

1. Scope of the section.
2. Act not exhaustive of all kinds of transfers.
3. "Living persons."
4. "Conveys."
5. "Property."
6. Legal and equitable estates.
7. "In present or in future."
8. "Or to himself."

1. Scope of the section. — The definition of the expression "transfer of property" given in this section does not apply to the expression used in other Acts.(1)

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charges in respect of immovable properties compulsorily registrable under the Registration Act provided that the amount secured exceeds rupees one hundred.)

1959 Raj 143 143, 144) (Pr 5) [AIR V 46 C 55] : ILR 1959) 9 Raj 331. If the principal money secured by the charge is Rs. 100/- or more, the charge can be effected only by a registered instrument signed by the debtor and attested by at least 2 witnesses. AIR 1939 Mad 202 and 1940 Mad 140 [AIR V 27], Rel. on.)

† 1940 Mad 140 (141) [AIR V 27]: ILR (1940) Mad 306 (DB). (1939 Mad 202 AIR V 26], Followed.)

1939 Mad 202 (203) [AIR V 26] : ILR (1939, Mad 199 (DB .

Also see S. 100, Note 16.

2. 1933 Bom 298 299) [AIR V 20] (DB).

Section 5 — Note 1

1. 1965 Andh Pra 95 (98) [AIR V 52 C 28] (DB). (The definition of "transfer of property" given in S. 2 (xxiv) (d) of the Gift-tax Act (1958) is of wider import than that contained in the Transfer of Property Act.)

('65) ILR (1965) Madh Pra 1003 (1006). (When a coparcener gets an item of property in partition there is no acquisition by him of that property by transfer within the meaning of S. 12 (4 of the M. P. Accommodation Control Act (1961).)

1964 Andh Pra 514 (518) [AIR V 51 C 134] (DB). (Hyderabad Tenancy and Agricultural Lands Act (21 of 1950), S. 47 — "Other transfers" — Expression cannot be limited to transfers *inter*

But there is nothing to limit the definition only to the sections in Chapter II of the Act. In the undermentioned case(2) decided before the addition of the last paragraph it was observed that, in view of the fact that the definition does not occur in S. 3 of the Act where it ought to be if it is applicable to the whole of the Act, and in view also of the fact that a sale, mortgage, etc., to non-sentient judicial persons, such as a municipal committee or a corporation, would not be a "transfer of property" governed by this Act, if the definition applied, the definition must be limited only to Chapter II of the Act and is not applicable to other chapters of the Act. The basis of this view has now been removed by the addition of the last paragraph extending the meaning of the words "living persons" by including in it a company, or association or body of individuals, whether incorporated or not. In the following case(2a) also it has been held that the definition of 'transfer of property' in this section is for purpose only of the sections which immediately succeed it in which these particular words occur. It may be noticed that the words, "sale", "mortgage", 'lease", etc., have been defined in the beginning of Chapters III, IV and V respectively. It cannot be said that these definitions cannot be applied to the words occurring in other parts of the Act. If so, there is no reason why the definition of the expression "transfer of property" should be confined to Chapter II of the Act.

The definition does not exclude properties outside India. The provisions of the Act are not inapplicable, because the properties sought to be transferred are situated in a place where this Act does not apply, if the transactions are effected in India and the rights of the parties thereunder are being determined by a Court which is bound to give effect to the provisions of this Act. Otherwise, a transfer of property effected in Bombay when the property is in the Punjab, a province to which the Transfer of Property Act does not apply, will not be governed by the definition for the purpose of enforcing the rights of the parties thereunder by the Court.(3)

There is nothing to suggest that the words "transfer of property" are intended to confine the operation of the Act to transfers by *contract*; the "transfer" may also be

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partes on basis of S. 5, T. P. Act—Court-sales are transfers as contemplated by S. 47.)

1963 Cal 551 (552) [AIR V 50 C 104] (DB). (West Bengal Estates Acquisition Act (1 of 1954), S 5-A (7) (iii)—"Gift"—Word not restricted to transfer to living persons—Dedication to Hindu deity is transfer by gift.)

1962 Mad 21 (25) [AIR V 49 C 4] : ILR (1961) Mad 1029 (FB). (Madras Agriculturists Relief Act (4 of 1938), S. 9-A (10) (ii) (a)—Applies to all sales of equity of redemption, whether by act of parties or by operation of law — 1955 Mad 245 [AIR V 42], Overruled.)

1923 Bom 107 (113) [AIR V 10]. (Not applicable to Presidency (Towns Insolvency Act.)

[*See* 1938 Cal 171 (171) [AIR V 25]. (Does not apply to 'transfer' under the Partition Act, 1893.)]

[*See also* ('59) ILR (1959) Bom 424 (428) DB). (Word "transfer" used in Sub-s. (9) of S. 9 of the Berar Regulation of Agricultural Leases Act (24 of 1951) does not include a partition : 1958 N L J 100 (Revenue Tribunal) (FB), dissent. from.)]

[See however 1965 Andh Pra 196 (198) [AIR V 52 C 52] : ILR (1965 Andh Pra 325 (DB). (Definition of transfer in S. 2 (17) of the Income-tax (1961) denotes that the sale, exchange, etc., should constitute a "transfer" under any law. It is the T. P. Act that is concerned with transfers.)]

[But see 1951 Bom 94 (96) [AIR V 38 C 20] : ILR (1951 Bom 679 (DB). (Definition is to be taken as definition of "transfer of property" for determining what is transfer within the meaning of that term used in Proviso to S. 2 of Bombay Hindu Women's Right to Property (Extension to Agricultural Land) Act (17 of 1942).)

1933 Cal 467 (468) [AIR V 20] : 60 Cal 379. ('Transfer' in Partition Act has same meaning as it has in the Transfer of Property Act.)

1924 All 508 (508 [AIR V 11]. (The word 'transfer' in S. 20, Agra Tenancy Act, bears the same meaning as in S. 5 of the Transfer of Property Act.)]

2. 1926 Nag 469 (470) [AIR V 13].

2a. 1938 Rang 1 (3) [AIR V 25].

3. 1951 All 462 (462, 463) [AIR V 38 C 100] ILR (1951) 2 All 703 (DB). (Mortgage of property, part of which is outside India).

† 1932 Bom 642 (643) [AIR V 19] : 57 Bom 234. (Property in Baroda State.)

of a non-contractual character. Thus, where a person who is not the owner but who is empowered to make an appointment under a deed of appointment makes an appointment, there will be a "transfer of property" in favour of the appointee.(4)

Under various provisions of the Act, transfers of property can be made only in certain specified modes and subject to certain conditions and limitations. A transfer of property in such cases can be effected only in the way required by law and not in any other way.(5) Thus, where the law requires a deed of conveyance, for the purpose of transferring title, it cannot be transferred by the mere agreement of parties.(6)

As to whether the creation of an easement is a transfer of property, see Note 7 on S. 54. See also Preamble Note 5.

2. Act not exhaustive of all kinds of transfers. — In *Ariyaputhira Padayachi* v. *Muthukumaraswamy Padayachi*,(1) it was observed by Mr. Justice Sadasiva Iyer that all transfers *inter vivos* were intended to be included in one or other of the transactions coming under the heads of "sale," "mortgage," "lease," "exchange" and "gift"; in other words, that the Act is exhaustive of all modes of transfer.(2) This view has not, however, been followed, the general trend of opinion being that the Act is *not* exhaustive of all modes of transfer.(2a) It has accordingly been held that a transfer by an award,(3) a pledge of movable property, Government promissory notes and policies of insurance and the like(4) are all "transfers of property" but they would not fall under any of the heads of "sale", "mortgage," "lease," "exchange" or "gift." See also Preamble Note 2.

3. 'Living persons." — A "person" is defined in the General Clauses Act, 1897, as including "any company or association or body of individuals whether incorporated or not."(1) Such company or association or body of individuals will be a

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4. ('95) 22 Cal 185 (202).
[*See also* 1939 Rang 76 (78) [AIR V 26] : 1938 Rang L R 678.]
Also see S. 53, Note 5.

5. ✠ ('01) 24 Mad 377 (384) : 28 Ind App 46 (PC). (Transfers cannot be effected by Arzis and statement made to Collector unless the deed is registered as required by T. P. Act.)
1956 Andhra 209 (211, 212) [AIR V 43 C 59]. (DB).
1923 Mad 241 (244) [AIR V 10] : 45 Mad 537 (DB).
1924 Cal 1047 (1049) [AIR V 11] : 51 Cal 972 (DB). (The mere delivery of a document of title does not constitute a transfer of the rights to immovable property.)
1926 Nag 357 (358) [AIR V 13]. (Do.)
[*See also* 1928 Rang 47 (48) [AIR V 15] : 5 Rang 636 (DB). (Mere registration of a document does not pass title without reference to other circumstance.)
(1913) 9 Nag L R 54 (63). (A person cannot claim to have acquired the right of another unless such acquisition is by a valid transfer from the person to whom such right belonged or by the operation of law.)]

6 1956 Andhra 209 (211, 212) [AIR V 43 C 59] (DB).
1927 Cal 956 (962) [A I R V 14] : 55 Cal 35 (DB).
1924 Pat 185 (186) [AIR V 11]. (Title cannot pass by admission when law requires a deed.)

Section 5 — Note 2

1. 1914 Mad 489 (492) [AIR V 1] : 37 Mad 423 (DB).
Also see S. 9 Note 7.

2. [See also 1915 Mad 103 (105) [AIR V 2] : 43 Mad 849. (Mr. Justice Sadasiva Aiyar reiterated the view expressed by him in 1914 Mad 489 [AIR V 1].)

2a. 1965 Madh Pra 1 (3) [AIR V 52 C 1] : I L R (1964) Madh Pra 122.
1965 Pat 144 (148) [AIR V 52 C 38] (DB). (Contribution of immovable property to partnership —Change of ownership from that of individuals to partnership firm is a transfer.)
1964 Andh Pra 514 (517) [AIR V 51 C 134) (DB).
1963 Pat 221 (223) [AIR V 50 C 66] (DB). (Partner contributing immovable property as his share of partnership — Such transfer is not prohibited by T. P. Act—No written document or registration is necessary.)

3. 1927 Sind 206 (208) [AIR V 14] (DB).
†1919 Mad 1113 (1115) [AIR V 6] (DB). (Oral award.)

4. ('09) 34 Mad 442 (449) (DB). (Pledge of mortgage decree.)

Section 5 — Note 3

1. General Clauses Act, X of 1897, S. 3, cl. (42).

juristic person capable of holding property.(2) A joint Hindu family,(3) a Hindu *math*,(4) a Hindu idol(5) and the Almighty(6) are all *juristic persons* capable of acquiring and holding property, and of vindicating legal rights. But can such juristic persons be said to be *living* persons within the meaning of this section, and are transfers of property to such juristic persons governed by the provisions of this Act? It was assumed in the undermentioned case(7) that a non-sentient juridical person such as a limited liability company, a municipal committee or a registered society is not a "living person" within the meaning of this section, but it was held that the definition of "transfer of property" in this section must be limited to Chapter II of the Act and not to other chapters of the Act dealing with mortgages, sales, exchanges, etc.

The section has been amended by the amending Act XX of 1929 by the insertion of a paragraph to the effect that living person includes a company or association or body of individuals whether incorporated or not. The question, however, still remains, whether a Hindu idol or the Almighty is a *living* person, and whether a transfer or dedication in favour of an idol or the Almighty is a "transfer of property" governed by this Act. It has been held by the Oudh Chief Court that a dedication in favour of an idol would be governed by the provisions of S. 123 of the Transfer of Property Act,(8) though in a later decision(8a) arising under the U. P. Encumbered Estates Act it has been held that a gift in favour of God Almighty would not satisfy the requirements of a gift under S. 7 (3) of that Act. According to the Judicial Commissioner's Court of Nagpur a gift to a deity would be governed by the provisions of the Act other than those in Chapter II of the Act, though the deity may not be a *living* person, but S. 123 does not in terms apply to such gifts, as the notion of the *acceptance* of worldly goods by a deity is contrary to Hindu religion, and acceptance is necessary for a valid gift under the Act.(9) According to the High Court of Allahabad a gift to God Almighty is a transfer governed by the provisions of the Act.(10) In a

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2. 1936 Bom 62 (76) [AIR V 23] : 60 Bom 326 (DB). (Joint Stock Company.)
1935 All 872 (873) [AIR V 22]. (Unregistered Society.)
1927 All 789 (789) [AIR V 14] (DB). (Do.)
[But see 1917 All 94 (94) [AIR V 4] (DB). (Case before amendment in 1929 — No longer good law.)]

3. 1934 All 553 (556) [AIR V 21] (DB).

4. 1959 Bom 287 (289) [AIR V 46 C 89] : I L R (1959) Bom 210.:
('04) 28 Bom 215 (223) (SB).

5. 1925 P C 139 (140, 144) [AIR V 12] : 52 Ind App 245 : 52 Cal 809.
('05) 32 Cal 129 (140, 141) : 31 Ind App 203 (P C). (It is however only in an ideal sense that property is so held.)
('15) 23 Suth W R 253 (255) : 2 Ind App 145. (It is only in an ideal sense that property can be said to belong to an idol.)
('69) 13 Moo Ind App 270 (273) (PC). (The shebait has not the legal property but only the title of the manager of religious endowment.)
('11) 33 All 735 (737) (FB).
('09) 37 Cal 128 (140) (FB). (It is only in an ideal sense that property can be said to belong to an idol.)
1931 Oudh 14 (14) [AIR V 18] (DB).
1914 Oudh 255 (259) [AIR V 1].
('02) 29 Cal 260 (274). (It is not a juristic person unless it has been consecrated by appropriate ceremonies and so has become spiritualised. Overruled on another point in 37 Cal 128 (FB). (Do.))

6. 1957 All 94 (102) [A I R V 44 C 23] : I L R (1954) 2 All 556 (DB).
1929 All 277 (278) [AIR V 16] (DB). (Waqf—Dedication to God.)
[*See also* ('52) I L R (1952) 1 Cal 296 (301). (The creation of the wakf deed amounts to transferring the property to the Almighty for the benefit of his creatures.)]

7. 1926 Nag 469 (470) [AIR V 13].

8. 1946 Oudh 256 (257) [AIR V 33 C 81]. (A transfer of property to an idol is not bad if it is not covered by S. 5 of the T. P. Act. Such a transfer will not be subject to the provisions of that Act.)
1931 Oudh 14 (14) [AIR V 8] (DB).

8a. 1948 Oudh 301 (304) [AIR V 35 C 105] : 23 Luck 271 (DB). (The waqf alal-aulad does not fulfil the requirements of a gift for purposes of S. 7 (3), U. P. Encumbered Estates Act.)

9. 1926 Nag 469 (470) [AIR V 13].

10. 1957 All 94 (97) [AIR V 44 C 23] : I L R (1954) 2 All 556 (DB). (The phrase "living persons" within the meaning of the Act simply means an entity which has a personality of its

recent case(10a) of the same High Court it has, however, been held that a deity is not a "living person" and therefore when property is dedicated to a Hindu deity, no gift, as defined in S. 122, can be said to have been effected. In the undermentioned case(11) the High Court of Calcutta observed that a Hindu idol is treated as a living being, but the question was not one arising under this section. It was however held by the same High Court in the undermentioned case(12) that the idol must be *in existence* at the time of the gift. On the other hand, the High Court of Madras has held that a juristic person is not necessarily a *living* person and that the fact that for some purposes the law, by a fiction, invests non-animate bodies with the rights of persons, would not make juristic persons living persons for all purposes. Accordingly it was held that Hindu idol, though it might be a juristic person, is not a living person, and that in any view the Almighty is not a living person.(13) A similar view has been expressed by the High Court of Patna.(14)

A Court is not a juridical person. It cannot take property and cannot assign property.(15) It is not a *living* person and a court sale is not a "transfer of property" as defined in this section.(16) In the undermentioned case(16a) it has been held that a sale-deed executed by the direction of the Court in pursuance of a decree for specific performance is a transfer by the Court on behalf of the judgment-debtor and the sale-deed so executed has got all the characteristics of a transfer *inter vivos*. It was held in the undermentioned case(17) that the expression "transfer" by itself is not altogether appropriate to indicate a sale *in invitum* by the Court. No doubt the expression "transfer" has been used in such collocations as "transfer by operation of law," but at the same time the expression is undoubtedly more appropriate to indicate what is effected or brought about by the *will* of the person in whom the property is vested. The observations in the undermentioned case(17a) that transfer as defined under this

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own, which exists and which has the capacity of holding property.)

1929 All 277 (278) [AIR V 16) (DB). (Mahomedan wakf.)

[*See* ('11) 33 All 793 (795). (But a gift in favour of an idol not in existence is invalid. 37 Cal 128 (FB), Distinguished.)]

10a. 1966 All 100 (101) [AIR V 53 C 23] (DB). (1927 Mad 636 [A I R V 14], Rel. on — 1929 All 271 [AIR V 16] distinguished on the ground that in that case the question was whether a wakf made under Muhammadan Law was governed by T. P. Act and it was held that transfer was governed by that enactment.)

11.† 1923 Cal 60 (62) [AIR V 10] (DB).

12. ('08) 12 Cal W N 808 (811). (Otherwise the gift is not valid.)

13. 1927 Mad 636 (638, 639) [AIR V 14] : 50 Mad 687 (FB). (Hence S. 123 has no application.)

† 1919 Mad 809 (811) [AIR V 6] : 42 Mad 440 (DB). (A dedication to an idol itself without the intervention of trustees is not a dedication to any sentient being and is not a transfer of property.)

14. 1959 Pat 305 (308) [AIR V 46 C 81] : 38 Pat 49 (DB).

1930 Pat 610 (612) [AIR V 17] (DB). (A gift to God Almighty is not a gift to a living person and consequently does not require a registered instrument.)

15.† 1919 P C 55 (59) [AIR V 6] : 42 All 158 : 46 Ind App 228 : 22 Oudh Cas 212. (Do.)

('36) 40 Cal W N 1281 (1284) (DB).

1929 All 834 (835) [AIR V 16] (DB). (Surety bond executed in Court cannot be treated as mortgage bond to the Court.)

16.† 1938 Oudh 84 (86) [AIR V 25] : 13 Luck 746 (DB).

1929 All 800 (801) [AIR V 16] (DB).

[*See also* 1939 All 415 (422) [AIR V 26] : I L R (1939) All 607 (FB). (A court sale is not a transfer by act of parties.)

1942 Mad 632 (633) : I L R (1943) Mad 47 (DB). (Sections 2 (d) and 5 prevent S. 53 operating in the case of a transfer under an order or decree of Court.)

('04) 1 All L Jour 621 (624) (DB). (A decree cannot effect a transfer of property.)]

16a. 1966 Mys 299 (303) [AIR V 53 C 72].

17. 1928 Mad 571 (574) [AIR V 15] (DB).

[*See also* 1964 An. Pra 514(517) [AIR V 51 C 134] (DB). (Word "transfer" is normally used to indicate what is effected by will of a person.)]

17a. ('63) I L R (1963) Bom 246 (256) (DB).

section includes a transfer by operation of law must be held to be wrong in view of the Supreme Court decision in *Laxmi Devi* v. *Mukand Kankar.*(17b) But although the definition of "transfer of property" in this section contemplates transfers by act of parties, the definition cannot override the clear and positive direction contained in S. 2 (d) and, therefore, the provisions of S. 57 and those contained in Chapter IV apply to a transfer by operation of law or by or in execution of a decree or order.(18)

A *will* is not a "transfer of property" as defined in this section.(19)

4. "Conveys." — The performance of an act by a person will not operate as a "transfer of property" unless by such act he *conveys* property to another. It implies that the person conveying is entitled to the property sought to be conveyed, and is conveying it to a person who has *no title* to such property otherwise.(1). The test, therefore, to see whether a transaction is a conveyance of property, so as to constitute it a "transfer of property" is whether it is in favour of a person who has *no title* already to the property which is the subject-matter of the transaction. This aspect may be considered with respect to some classes of transactions such as family arrangement, partition, release, etc. It may be noted that it is not necessary to constitute a transfer of property that the word "convey" should be used. It is sufficient if the document shows a transfer of ownership.(2)

Family arrangement.

A family arrangement is a transaction between members of the same family which is for the benefit of the family generally, as, for example, one which tends to the preservation of the family property, to the peace or security of the family and the avoidance of family disputes and litigation or to the saving of the honour of the family.(3) Such an arrangement in respect of property "is based on the assumption

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17b. 1965 S C 834 (838) [AIR V 52 C 130].

18. 1965 S C 834 (838) [AIR V 52 C 130]. (1943 All 115 [AIR V 30] (FB), Approved; 1940 Mad 701 [A I R V 27] and AIR 1937 Cal 129 [A I R V 24], Overruled.)

1943 All 115 (121, 122) [AIR V 30] : ILR (1943) All 453 (FB). (1939 All 687 [A I R V 26], Overruled.)

1960 Punj 296 (297) [AIR V 47 C 102] (DB).

19. 1959 J & K 62 (63) [AIR V 46 C 22] (FB).

1922 Bom 295 (295) [AIR V 9] (DB). (A mere statement in a certain will that a transfer has been effected in favour of A will not result in a transfer of property.)

1922 Mad 457 (468) [A I R V 9] : 46 Mad 190 (FB).

1944 Oudh 65 (70) [A I R V 31] : 19 Luck 320 (DB).

1924 All 508 (508) [AIR V 11].

Section 5 — Note 4

1. 1967 Pat 191 (197) [AIR V 54 C 54] (DB).

1957 Pat 570 (574) [AIR V 44 C 175] (DB).

1929 Oudh 334 (336) [A I R V 16] : 4 Luck 243. (Partition between co-tenants is not a conveyance.)

[*See also* 1956 Bom 580 (581) [AIR V 43 C 227] 1956 Cri L J 987. (Use of word "transfer" in R. 13 (d) of the rules framed under Bombay Village Panchayat Act means that though the house has an owner another person has got an interest in it which has been obtained by him for example by way of a mortgage.)

('96) 4 Cal L Jour 323 (331) (DB). (Family arrangement in settlement of either a doubtful claim or dispute is valid.)

('02) 15 C P L R 1 (5). (Transfer implies the making over of possession or control, an alienation of property or of some interest in property made as between living persons.)]

2. 1936 Mad 918 (919) [A I R V 23]. (Sale—Intention to transfer ownership for price should be clear.)

[*See also* 1920 Bom 369 (370) [AIR V 7] (DB). (Whether rajinamah and Kabuliat form sale deed depends upon circumstances—Intention to transfer ownership is necessary.]

3. 1955 S C 481 (490, 491) [AIR V 42 C 80] : (1955) 2 S C R 22 : ILR (1955) 2 All 177.

1959 All 473 (481) [AIR V 46 C 120] (DB).

that there was an *antecedent title of some kind* in the parties, and the agreement *acknowledges and defines* what that title is."(4) On this assumption, it is clear that a family arrangement by which each party takes a share of the family property is not a *conveyance* of property from a person who has title to it to a person who has *no title* to it(5) and is therefore not a "transfer of property."(6) From the definition of family arrangement given above, it is clear that the existence of a dispute *in praesenti*

1959 Assam 109 (110) [A I R V 46 C 24] : ILR (1959) 11 Assam 59 (DB).
1959 Mad 131 (134) [A I R V 46 C 42] (DB). (A release of her rights by a Muhammadan presumptive heir (daughter) before the inheritance to the property of her father opens cannot amount to a family arrangement.)
1958 Andh Pra 147 (155) [AIR V 45 C 46] (DB).
('57) 1957-2 Mad L J 610 (616).
1954 All 769 (769) [A I R V 41 C 304] (DB). (*Bona fide* dispute as to existence of certain custom of succession—Division of property according to arrangement arrived at.)
1947 Oudh 174 (178) [A I R V 34 C 64] : 22 Luck 164 (DB). (The essential requisite of a family settlement is that it should be a *bona fide* settlement of dispute, either existing or future, between members of a family.)
Halsbury, Laws of England, Vol 14, pp. 540, 547.

4. 1966 S C 292 (295) [AIR V 53 C 61]. (Arrangement when brought about by document, for purpose of proof registration is necessary — Mere memoranda of arrangement — Registration not necessary.)
1955 S C 481 (490, 491) [AIR V 42 C 80) : (1955) 2 S C R 22 : ILR (1955) 2 All 177.
('11) 33 All 356 (367) : 38 Ind App 87 (PC).
✠('74) 1 Ind App 157 (166) : 13 Beng L R 312 (PC).
1968 J & K 35 (37) [AIR V 55 C 10].
†1937 All 578 (580) [AIR V 24] : ILR (1937) All 817 (FB).
1928 All 641 (643) [AIR V 15] : 51 All 79 (FB).
1959 Assam 109 (110) [AIR V 46 C 24] : ILR (1959) 11 Assam 59 (DB).
('59) ILR (1959) 9 Raj 1264 (1273).
1958 Andh Pra 147 (155) [AIR V 45 C 46] (DB). (Settlement need not be reduced to writing and even if it is embodied in document it need not be registered.)
1958 Orissa 242 (246) [AIR V 45 C 59] (DB). (Deed in question held could not be treated as a family settlement since there was no dispute or any question of antecedent title involved.)
1953 All 213 (215) [AIR V 40 C 97]. (Arrangement between reversioners and the widow).
1951 All 823 (824) [AIR V 38 C 202].
('47) 52 Mys H C R 187 (196) (DB).
1938 Oudh 97 (98) [AIR V 25] : 14 Luck 9.
1937 Oudh 347 (349) [AIR V 24] : 13 Luck 365.
1929 Oudh 193 (201) [AIR V 16] : 4 Luck 452 (DB).
1924 Oudh 273 (290, 291) [AIR V 11] (DB).
[*See also* 1950 All 320 (321) [AIR V 37 C 124]. (Members of family who have no proprietary interest in property in their possession can enter into family arrangement with respect to such right as they may possess in property.)]
[See however 1944 Oudh 65 (72) [AIR V 31] : 19 Luck 320 (DB). (Observations of Dhar, J. in AIR 1943 All 101 [AIR V 30] (FB), Rel. on. Note — It may be noted that in the Allahabad Full Bench decision there was antecedent title in the members as was pointed out by Dhar, J., himself.)
1943 All 101 (107) [AIR V 30] : ILR (1943) All 411 (FB). (There are observations of Dhar, J., to the effect that an antecedent title in members is not essential for family arrangement— It may be noted that all the members joining the arrangement had such title as was found by Dhar, J., himself.)]

5. 1966 S C 292 (295) [AIR V 53 C 61].
1955 S C 481 (490, 491) [AIR V 42 C 80] : (1955) 2 S C R 22 : ILR (1955) 2 All 177.
1964 Pat 214 (219) [AIR V 51 C 58] (DB).
1959 Assam 109 (110) [AIR V 46 C 24] : ILR (1959) 11 Assam 59 (DB).
1951 All 823 (824) [AIR V 38 C 202].
1930 All 498 (502) [AIR V 17] (DB).
1927 Oudh 572 (573) [AIR V 14] : 2 Luck 662 (DB).

6. 1966 S C 292 (295) [AIR V 53 C 61].
1955 S C 481 (490, 491) [AIR V 42 C 80] : (1955) 2 S C R 22 : ILR (1955) 2 All 177.
1914 P C 44 (45) [AIR V 1].
1968 J & K 35 (37) [AIR V 55 C 10].
1964 Pat 214 (219) [AIR V 51 C 58] (DB). (Party getting property under family arrangement subject to absolute restraint in matter of alienation —Section 10 does not apply.)
('61) ILR (1961) Mys 932 (941, 942). (Arrangement held did not involve transfer of property and did not attract S. 10.)
('59) ILR (1959) 9 Raj 1264 (1273).
1953 All 213 (215) [AIR V 40 C 97]. (Arrangement between widow and reversioner - Not a transfer of *spes successionis*—Not hit by S. 6(a).)
1951 All 823 (824) [AIR V 38 C 202].
1937 All 578 (580) [AIR V 24] : ILR (1937) All 817 (FB).
1928 All 641 (643) [AIR V 15] : 51 All 79 (FB).
1930 All 498 (502) [AIR V 17] (DB).
1929 Oudh 193 (201) [AIR V 16] : 4 Luck 452 (DB).
1927 All 484 (486) [AIR V 14] : 49 All 873 (DB). (Compromise before Revenue Court.)
1926 All 173 (174) [AIR V 13] : 48 All 213 (DB).
1925 All 176 (177) [AIR V 12].
1924 Oudh 273 (290, 291) [AIR V 11] (DB).
1923 Bom 276 (278, 280) [AIR V 10] : 47 Bom 597 (DB).
1923 Nag 55 (56) [AIR V 10].
1914 All 464 (465) [AIR V 1].
('13) 35 All 502 (505) (DB).

between members of the family(7) or the existence of a doubtful claim(8) is not essential for the validitv of a family arrangement. An arrangement merely for the maintenance of peace and harmony and the avoidance of future discord or for the preservation of the family property, is a valid family arrangement.(9) But the essential thing is that the arrangement should be for a consideration other than love and affection.(10) But when the object of the arrangement is to preserve family property, family peace and family honour, the quantum of consideration which moved the parties to the arrangement is not to be scanned with much nicety.(11) A contrary view,

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7. 1943 All 101 (104, 105) [A I R V 30] : I L R (1943) All 411 (FB). (1926 All 194 [AIR V 13], Overruled.)
1957 Pat 570 (572) [AIR V 44 C 175] (DB).
1957 Pat 456 (460) [A I R V 44 C 137] (DB). (There must however be apprehension of future dispute.)
1956 Trav-Co 217 (219) [A I R V 43 C 83] : ILR (1956) Trav-Co 277 (DB).
1946 Nag 377 (390) [A I R V 33 C 108] : I L R (1946) Nag 433 (DB).
1944 Oudh 65 (72) [A I R V 31] : 19 Luck 320 (DB). (1941 Oudh 185 [AIR V 28] and 1937 Oudh 347 [AIR V 24] not referred to.)
1930 All 687 (690) [AIR V 17] : 52 All 716 (DB).
1930 All 498 (502) (DB). (Overruled on another point in 1943 All 101 [AIR V 30] (FB).)
('09) 3 Ind Cas 247 (251) (DB) (Cal).
('06) 4 Cal L Jour 323 (331).
[*See also* 1952 All 1011 (1018, 1019) [AIR V 39] (DB). (Per Desai J. (Mushtaq Ahmad J. contra):—It is not necessary that there should be an existing dispute. If the rights of the parties, depending on facts, remain doubtful, that would afford a fair equitable basis for a compromise.)]

8. 1943 All 101 (104, 105) [AIR V 30] : ILR (1943) All 411 (FB). (1930 All 498 [AIR V 17], Overruled; 1930 All 687 [AIR V 17], Approved.)
1959 All 473 (481) [AIR V 46 C 120] (DB).
1957 Pat 570 (572) [AIR V 44 C 175] (DB).
1957 Pat 456 (460, 461) [AIR V 44 C 137] (DB).
1944 Oudh 65 (72) [AIR V 31] : 19 Luck 320 (DB).
1930 All 687 (690) [AIR V 17] : 52 All 716 (DB).
('09) 3 Ind Cas 247 (251) (DB) (Cal).
('06) 4 Cal L Jour 323 (331).

9. 1966 S C 323 (329) [AIR V 53 C 65]. (Object of family settlement is to settle existing or future disputes regarding property amongst members of a family.)
1955 S C 481 (490, 491) [AIR V 42 C 80] : (1955) 2 S C R 22 : 1LR (1955) 2 All 177.
1943 All 101 (104, 105) [AIR V 30] : ILR (1943) All 411 (FB).
1957 Pat 570 (572) [AIR V 44 C 175] (DB).
1957 Pat 456 (460, 461) [AIR V 44 C 137] (DB). (But maintenance of family peace and harmony implies that there was some trouble existing or anticipated which was calculated to disturb family peace.)
1956 Trav-Co 217 (219) [A I R V 43 C 83] : ILR (1956) Trav-Co 277 (DB). (Relinquishment of a contingent right of inheritance of a Muhammadan heir is not valid under the Muhammadan Law but if it is supported by consideration and forms a part of a valid family settlement, it is valid.)
1952 Cal 473 (477) [AIR V 39] : ILR (1953) 1 Cal 208 (DB). (Compromise for benefit of estate.)
1949 Oudh 1 (5, 6) [A I R V 36 C 1] : 23 Luck 231 (DB). (An agreement settling a *bona fide* dispute between the members of a family with the loudable object of saving the estate from litigation which might not only have involved considerable expense but might have kept *bona fide* disputes alive for considerable time cannot but be regarded as a family arrangement. It is not essential that all the members of the family need be parties to the transaction : 1937 Oudh 347 [AIR V 24] and 1927 Oudh 97 [AIR V 14], Rel. on.)
1946 Nag 377 (390) [A I R V 33 C 108] : I L R (1946) Nag 433 (DB). (Compromise entered into for preservation of family property and to avoid family dispute is binding on parties.)
1944 Oudh 65 (72) [A I R V 31] : 19 Luck 320 (DB).
1937 Oudh 189 (190) [A I R V 24] : 12 Luck 684 (DB).
1937 Oudh 433 (434) [AIR V 24] (DB).
1937 Oudh 99 (102, 103) [AIR V 24] : 12 Luck 639 (DB).
1930 All 687 (690) [AIR V 17] : 52 All 716.
1929 Oudh 134 (142, 143) [AIR V 16] (DB).
('09) 3 Ind Cas 247 (251) (DB) (Cal).
('06) 4 Cal L Jour 323 (331).
[*See also* 1943 Cal 162 (165) [A I R V 30]. (Avoidance of a likely future dispute is a good consideration for a family arrangement.)]

10. 1943 All 101 (104, 105) [AIR V 30] : ILR (1943) All 411 (FB).
1957 Pat 570 (572) [AIR V 44 C 175] (DB).
1957 Pat 456 (460) [A I R V 44 C 137]. (Forbearance from litigation, bona fide settlement of disputed claims or rights and preservation of peace may constitute a good consideration for a family arrangement.)
1944 Oudh 65 (72) [AIR V 31] : 19 Luck 320 (DB).
[*See also* 1959 Assam 109 (111) [A I R V 46 C 24] : I L R (1959) 11 Assam 59 (DB). (*Held* on facts that there was consideration for the family arrangement entered into by the parties.)
1956 Nag 261 (263) [A I R V 43 C 89] : I L R (1956) Nag 591 (DB). (A remote expectancy cannot be regarded as a consideration at law for a valid family arrangement—English doctrine is not applicable in India—S. 6 prohibits dealings with mere expectancy.)]

11. 1966 S C 323 (329) [AIR V 53 C 65].

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namely, that there must be a dispute or at least an apprehension of a dispute, to support a family arrangement, was expressed in the undermentioned cases.(12) It is submitted this view is not correct. Where the title of *A* to property *x* is *undisputed* and there is no question of any claim by *B* to it, an arrangement between *A* and *B* by which *x* is transferred to *B* is not a "family arrangement" but will be a "transfer of property" within the meaning of this Act.(13) The *form* of the transaction is not material. It is the *substance* of the transaction that must be regarded in arriving at a conclusion as to what the transaction really is.(14) It has been held in the following Allahabad decision(14a) that though a family arrangement will not be binding on such members as had not joined in it and it would be open to them to challenge it, it would bind such members as had joined in it. But a contrary view appears to have been taken in the undermentioned Assam case(14b) that if the concurrence of the member who was not a party to the arrangement is not obtained, the arrangement would not be binding even on the members who had joined in it. The validity of a family arrangement of disputed rights depends on the facts existing at the time of the transaction and will not be affected by subsequent judicial determinations, showing that the rights of parties were different from what was supposed, or that one party

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1955 S C 481 (490, 491) [AIR V 42 C 80] : (1955) 2 S C R 22 : ILR (1955) 2 All 177.

1943 All 101 (104, 105) [A I R V 30] : ILR (1943) All 411 (FB). (Consideration to convert *spes successionis* into a certainty by giving immediate possession of property held sufficient consideration to uphold family arrangement.)

1959 All 473 (481) [AIR V 46 C 120] (DB). (The converting of an expectancy to a certainty and avoiding chance litigation in future is good consideration.)

1957 Pat 456 (460, 461) [A I R V 44 C 137] (DB).

1957 Pat 570 (572) [AIR V 44 C 175] (DB).

1944 Oudh 65 (72) [AIR V 31] : 19 Luck 320 (DB).

('09) 3 Ind Cas 247 (251) (DB) (Cal).

('06) 4 Cal L Jour 323 (331) (DB).

12. 1957 Pat 456 (460) [AIR V 44 C 137] (DB).

1953 Mad 161 (162, 163) [AIR V 40 C 50].

1943 Oudh 196 (200) [AIR V 30] : 19 Luck 37 (DB).

1941 Oudh 185 (187) [AIR V 28]. (Note—The arrangement in this case being the adjustment of conflicting claims can be supported as valid. But the authority of the general observations in this case, which is a decision by a single Judge, that the essence of a family arrangement is whether the parties had laid any claim against each other and whether those claims had been settled by virtue of the agreement termed the "family settlement" (1927 Oudh 572 [AIR V 14], Rel. on), is shaken in view of the Division Bench decision in 1944 Oudh 65 [AIR V 31].

1938 Cal 490 (498) [AIR V 25]. (1932 Cal 600 [AIR V 19] followed.)

1937 Oudh 347 (348) [AIR V 24] : 13 Luck 365. (Note—Authority of this decision by a single Judge may be doubted in view of the decision by a Division Bench of the same Court in 1944 Oudh 65 [AIR V 31].)

1932 Cal 600 (612) [AIR V 19] : 59 Cal 859 (DB). (There must be a dispute or an apprehension of dispute which is avoided by the policy of giving and taking. Otherwise all transfers and surrenders will pass under the cloak of family arrangement.)

13. 1955 S C 481 (491) [AIR V 42 C 80] : (1955) 2 S C R 22: ILR (1955) 2 All 177.

1928 All 641 (643) [AIR V 15] : 51 All 79 (FB). (Oral contract followed by family arrangement.)

† 1938 Oudh 97 (98) [AIR V 25] : 14 Luck 9. (Father's title clear— No family arrangement if father gifts that property to sons.)

[*See also* 1937 All 578 (580) [AIR V 24] : I L R (1937) All 817 (FB). (Family settlement may include some transfer of property as well.)]

14. 1929 All 788 (789) [AIR V 16] (DB). (The mere fact that document following upon the settlement took the form of a sale deed is not by itself conclusive.)

14a. 1950 All 320 (321) [AIR V 37 C 124].

14b. 1959 Assam 109 (111) [AIR V 46 C 24] : ILR (1959) 11 Assam 59 (DB). (In this case the

had nothing to give up.(14c) A family arrangement can be validly arrived at orally also.(14d)

Settlement of doubtful claims.

A settlement of disputed claims between persons who may not be members of the same family, by which the claim of one person is relinquished and the existing rights of the other are acknowledged, is not a "transfer of property" for there is no conveyance by one person who has a title, to another who has no title to the property sought to be transferred.(15) But where one party has no title to the property and yet the party in whom the title for the time-being lawfully vests agrees to the transfer of such title to the first party, the transaction operates as a transfer of property regardless altogether of the fact that the transfer is made during the pendency of the suit and purports to be a compromise or settlement of the suit.(15a)

Release, relinquishment and surrender.

A release or relinquishment of one's rights in favour of another is not a transfer of property.(16) But a deed called a release deed can, by using words of

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family arrangement was held binding and enforceable as against the consenting parties because the person not party to the arrangement was considered by the members as not constituting a member of the family and interested in the property.)

14c. 1956 S C 162 (165) [AIR V 43 C 35].

14d. 1966 S C 292 (295) [AIR V 53 C 61]. (Writing recording terms of the arrangement intended to serve as a memorandum of what had been agreed upon and not as a proof of the arrangement does not require registration.)
1968 J & K 35 (37) [AIR V 55 C 10].

15. 1958 Him Pra 5 (7) [AIR V 45 C 2]. (Existing rights of defendants recognised to some extent and compromise arrived at.)
1951 All 823 (824) [AIR V 38 C 202].
1951 Nag 171 (172) [AIR V 38 C 34] : ILR (1950) Nag 618. (Each agreeing to recognise a part of the title claimed by the other—The transaction is not a sale, gift or exchange because on the facts agreed to by such a compromise, there is no transfer from one to the other.)
1929 All 788 (789) [AIR V 16] (DB).
('10) 33 Mad 473 (482) (DB). (Relinquishment of claim by Hindu widow.)
('09) 34 Bom 139 (141) (DB).
[But see 1923 All 77 (78) [AIR V 10] : 45 All 162. (Where by a compromise property is conveyed by one person to another it is a transfer of property and must be registered.)]

15a. 1967 S C 1395 (1397) [AIR V 54 C 292] : (1967) 1 S C R 275.
1947 Lah 175 (176) [AIR V 34 C 32]. (Suit for pre-emption of land—During pendency of suit, C claiming to be reversioner suing for declaration that his reversionary right cannot be affected by sale of land—Compromise of suit by vendee by which possession of land given to C on payment of purchase price—C held to be transferee of land from vendee.)

16. 1965 Andh Pra 177 (183) [AIR V 52 C 47] : ILR (1965) Andh Pra 771 (FB). (Relinquishment of interest in joint family property by member of Mitakshara joint Hindu family.)
1960 Mad 33 (41) [AIR V 47 C 10] : ILR (1959) Mad 552 (DB). (Release deed can only feed title but cannot transfer title.)
1957 Pat 706 (709) [AIR V 44 C 209] (DB). (No valid title can be created by relinquishment or release. The release presupposes the existence of title in a third person and does not purport to reconvey that title to him. It is tantamount to an admission of existing facts by the ostensible owner.)
1956 Cal 669 (671) [AIR V 43 C 189] : ILR (1957) 3 Cal 614 (DB). (Mere release is ineffective to pass title. It does not create, extinguish or transfer title to land.)
1954 Bom 95 (99) [AIR V 41 C 23] : ILR (1953) Bom 1281 (DB). (Relinquishment means the extinction of a right or the destruction of a property and if the property is destroyed or the right is extinguished there is nothing left to transfer or sell.)
1935 Rang 448 (449) [AIR V 22].
1924 Pat 185 (186) [AIR V 11]. (Deed of relinquishment does not confer a title.)
† ('12) 13 Ind Cas 455 (457) (DB) (Cal).
✠('06) 33 Cal 967 (984) (DB).
[*See* 1935 P C 73 (74) [AIR V 22]. (*Held* on construction of deed executed by widow that she had released her interest in her husband's property—Question whether it amounted to transfer was not adverted to.)]
[*See also* ('59) 1959 Ker L Jour 395 (396) (Cochin Nambudiri Act (17 of 1114), S. 14 — Giving up right in illom—Mere statement or affirmation that person executing release deed had no right except life interest specified, without adequate words of conveyance, will not extinguish right.)
1938 Oudh 65 (67) [AIR V 25] (DB).]

sufficient amplitude, transfer title to one having no title before the transfer.(16a) A *surrender* is the yielding up of an estate, such as that for life or for a term of years to him that has an immediate estate in reversion or in remainder, wherein the estate for life or for years, as the case may be, may merge by mutual agreement. It is the falling of a lesser estate into the greater and is not a transfer of property.(17) Thus, a document by a widow consenting to give possession of her husband's property to the reversioners because they are reversioners was held not to be a transfer of property.(18) In the undermentioned cases.(19) however, it has been held that a surrender in which

[But see 1961 Madh Pra 15 (17) [AIR V 48 C 11] (DB). (Release is a sort of surrender of rights in favour of another person and for all intents and purposes it is a transfer of the rights.)

1925 Oudh 73 (73) [AIR V 12] : 27 Oudh Cas 378. (Relinquishment by Hindu widow is 'transfer' which reversioners can challenge.)]

16a. 1967 S C 1395 (1397) [AIR V 54 C 292] : (1967) 1 S C R 275.

17. 1954 S C 61 (62) [AIR V 41 C 19] : 1954 S C R 339. (Radical idea involved in the doctrine of surrender is totally different from what is implied in the merger of a life interest in the reversionary estate under the English law — True nature and effect of surrender discussed. 1950 Bom 55 [AIR V 37], Affirmed; 1927 All 258 [AIR V 14]; 1935 Pat 175 [AIR V 22]; 1925 Mad 1267 [AIR V 12], Overruled on another point.)

1952 SC 207 (212) [AIR V 39] : 1952 S C R 793 : ILR (1953) 2 All 195. (Surrender of estate by a Hindu widow.)

1952 S C 109 (111) [AIR V 39] : 1951 S C R 655. (Surrender by Hindu widow.)

('57) 1957 (2) Mad L J 610 (615, 616). (Section 9-A of the Madras Agriculturists Relief Act (4 of 1938) cannot apply to a surrender by Hindu widow as it applies to transfers.)

1957 Punj 197 (200) [AIR V 44 C 77] : ILR (1957) Punj 1146.

1954 Bom 451 (454) [AIR V 41 C 123] (FB). (In the case of a surrender it is not the alienation which is the foundation of the title of the next reversioner, but it is the fact that he is the heir of the husband.)

1952 All 875 (876) [AIR V 39] (DB). (Surrender by widow of her entire estate in favour of reversioner—Reversioner is not in position of transferee or grantee — He succeeds as immediate heir in his own right.)

1952 Hyd 20 (21) [AIR V 39] : ILR (1951) Hyd 551 (DB). (Surrender by widow).

1952 Pat 32 (32, 33) [AIR V 39] : 30 Pat 1158 (SB). (Surrender by a Hindu widow).

1950 Bom 55 (58) [AIR V 37 C 17] : ILR (1949) Bom 869 (FB). (Under the Hindu Law, the basic principle of surrender is the destruction by the widow by her voluntary act of her life-interest in her husband's estate. The act of transfer or the act of conveyance is a subsidiary thing to which the same importance cannot be attached as the destruction of the life estate. AIR 1928 Bom 26 [AIR V 15], Overruled.)

1948 Cal 84 (94) [AIR V 35 C 43] (DB). (Surrender by Hindu widow).

1948 Nag 100 (103, 104) [AIR V 35 C 38] : ILR (1947) Nag 455 (DB). (Surrender by widow.)

1947 All 177 (178) [AIR V 34 C 84].

1947 All 94 (96) [AIR V 34 C 51] : ILR (1946) All 837. (Surrender by Hindu widow.)

1940 Nag 175 (176) [AIR V 27] : ILR (1940) Nag 177. (Surrender is no transfer — Doctrine of part performance not applicable.)

1933 Cal 467 (468) [AIR V 20] : 60 Cal 379 (DB). (1919 Pat 120 [AIR V 6], Dissented from; 1916 Cal 31 [AIR V 3], Referred to.)

1927 Nag 44 (45, 46) [AIR V 14] : 22 Nag L R 169. (Surrender of a life interest by a widow.)

1925 Nag 455 (457) [AIR V 15]. (Surrender is not 'alienation' within the meaning of the Civil Procedure Code.)

[*See also* 1948 Nag 373 (374) [AIR V 35 C 127] : ILR (1948) Nag 418. (A surrender by the widow of a permanent tenant in favour of the landlord under S. 36 of the Berar Alienated Villages Tenancy Law is not a "transfer" within the meaning of S. 48 (4) of that law. To be a "transfer", it must be in favour of a person other than the landlord.)

1952 Nag 295 (298) [AIR V 39] : ILR (1953) Nag 69 (DB). (Gift by widow in favour of daughter who was immediate reversioner and also secondary reversioner in equal shares—Daughter retaining half share and not completely effacing herself of property—Gift deed does not operate as valid surrender in favour of secondary reversioner.)]

18. ('38) 1938 Nag L Jour 123 (124).

1926 Oudh 69 (72) [AIR V 13] (DB).

[See however 1946 All 267 (267) [AIR V 33] : ILR (1946) All 341 (DB). (Surrender by Hindu female with limited estate, in favour of next reversioner is "transfer" within S. 7, U. P. Encumbered Estates Act.)

See also cases cited in foot-note 17.

19 ✠ 1939 Bom 496 (501) [AIR V 26]. (Execution of a surrender deed by a widow in favour of her daughters.)

1936 Nag 166 (167) [AIR V 23] : I L R (1936) Nag 69.

Also see S. 53. Note 5.

the prominent idea is to *convey* property to the next reversioner and not merely her self-effacement is a transfer of property.

Partition.

In some decisions(20) a partition has been held to be a "transfer of property" within the meaning of this section. But a contrary view has been taken in the undermentioned decisions.(21) The former view is no longer good law in view of the

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20. 1957 Mad 472 (477) [AIR V 44 C 48] (DB). (It is a mixture of surrender and conveyance of rights in property and is a transfer of property within the meaning of Transfer of Property Act. It partly extinguishes a right to the joint property and partly creates a right to it.)

1956 Mad 642 (650) [AIR V 43 C 210] : I L R (1956) Mad 785 (DB). (A transfer involved in a partition would be a 'transfer' within the scope of item 8, in List 3 of Sch. 7, of Government of India Act, 1935.)

1955 Raj 167 (171, 172) [AIR V 42 C 51]. (Provisions of S. 109 can be applied to person who receives property leased in his share by partition.)

1952 J & K 18 (18, 19) : 10 J & K L R 176.

1951 Bom 94 (97) [AIR V 38 C 20] : ILR (1951) Bom 679 (DB).

1936 Bom 10 (12, 13) [AIR V 23] : 60 Bom 34 (DB).

1936 Lah 220 (222) [AIR V 23].

('26) 97 Ind Cas 70 (70) (Mad).

†1925 Mad 492 (493) [AIR V 12] (DB).

[*See also* 1966 Mad 419 (423) [AIR V 53 C 134]. (Co-owners A and B — Partition — Properties X and Y — A not sole owner of property X and B not sole owner of property Y — A giving X property to B and B giving Y property to A — There is no exchange and S. 118 does not apply.)

1965 Madh Pra 1 (2) [A I R V 52 C 1] : ILR (1964) Madh Pra 122. (Though a partition might not be a transfer of property for the purposes of some of the provisions of the T. P. Act, for the purpose of S. 109, however it is a transfer in the general sense of the term.)

1963 Pat 108 (112) [A I R V 50 C 29] (DB). (Muhammadan Law — Partition - Partition by mother as de facto guardian — Partition effected by deed itself — Partition is transfer of property and mother not competent to act for minors. 1916 Cal 645 [AIR V 3]; 1936 Bom 10 [AIR V 23]; 1936 Lah 220 [AIR V 23] and 1959 Ker 235 [AIR V 46] Ref.)

1958 Cal 177 (179) [AIR V 45 C 37] : ILR (1958) 2 Cal 339. (Partition — Property allotted to one co-sharer exclusively — Though it involves transfer of interest of shares of other co-sharers, such allotment is not sale by one co-sharer to another.)

1916 Cal 645 (646) [AIR V 3] : 43 Cal 504 (DB). (A partition signifies a surrender of a portion of a joint right in exchange for a similar right of a co-sharer. The essence of partition is that property is transformed into estates in severalty and one of such estates is assigned to each of the former occupants for his sole use and as his sole property.)]

21. 1965 Punj 450 (453) [AIR V 52 C 144]: ILR (1965) 2 Punj 233 (DB). (Partition does not amount to 'transfer' or 'an acquisition of property by transfer' within meaning of the Delhi Rent Control Act, 1958, S. 14 (6) — Affirmed in 1966 S C 432 [AIR V 53].)

1963 Ker 66 (67) [AIR V 50 C 19] : ILR (1963) 1 Ker 1 (FB). (1959 Ker 208 [AIR V 46] Approved; 1959 Ker 235 [AIR V 46] Overruled.)

('62) ILR (1962) Andh Pra 989 (992).

1962 Mad 26 (31) [AIR V 49 C 5]. (Income tax Act (1922), S. 16 (3) (a) (iv) — Assessee blending his self-acquired property with joint family property and subsequent partition — There is no transfer of property.)

1961 Mad 518 (525) [AIR V 48 C 154] : I L R (1961) Mad 908 (FB). (1923 Mad 577 [AIR V 10] Overruled.)

('61) ILR (1961) Mys 932 (938). (Partition — Condition imposed on one of coparcener's power of alienation —Condition not hit by S. 10.)

('59) ILR (1959) Andh Pra 227 (232) (DB). (Partition is not a transfer within the meaning of S. 5 of the Madras Hereditary Village Offices Act (3 of 1895).)

('59) ILR (1959) Bom 424 (DB).

1959 Ker 208 (211) [AIR V 46 C 74] (DB). (Approved in 1963 Ker 66 [AIR V 50] (FB).)

('57) 1957 Nag L Jour 296 (297). (All that partition effects is a change of mode of enjoyment of property.)

1957 Pat 570 (574) [AIR V 44 C 175] (DB).

1954 Sau 46 (48) [AIR V 41 C 24] (DB).

('54) 7 Sau L R 23 (27) (DB).

1951 Mad 213 (217) [AIR V 38 C 43] : ILR (1951) Mad 607 (DB).

('50) 86 Cal L Jour 198 (212, 213).

1948 Mad 505 (506) [A R V 35 C 249] (DB). (Partition is a renunciation of mutual rights and does not involve any transfer by one co-sharer of his interest in the properties to the others.)

1946 Cal 129 (133) [AIR V 33 C 34] : ILR (1945) 2 Cal 651 (DB). (By partition a co-sharer gets a separate allotment by virtue of his antecedent title as co-sharer. There is thus no acquisition of property in another independent right. It is neither a conveyance nor an exchange. The separate allotment is not obtained by another independent title — 25 Cal 210 and 3 Ind Cas 247 (Cal) holding that it is exchange dissented from.)

undermentioned Supreme Court decisions.(21a)

Covenant for renewal of lease.

A covenant for the renewal of a lease after a time is not a conveyance of property after the specified time but is merely an agreement to renew the lease after that time, and is not a transfer of property.(22)

Creation of a charge.

The creation of a *charge* on property is not a *conveyance* of any interest in the property to another and is not a "transfer of property."(23) It merely secures payment out of certain properties without there being any *transfer* of an interest.(24)

Assignment by one partner of his rights to another.

The definition of "transfer of property" is sufficiently wide to cover cases in which, on the dissolution of a partnership certain partners are paid off and in return give up or assign their interest in the assets of the partnership to the other partners. An arrangement that the latter are to be entitled to the debts due to the firm is an arrangement amounting to a *transfer* of an actionable claim.(25)

5. "Property." — The word "property" is nowhere defined in the Act. In its narrowest sense it includes nothing more than corporeal property, that is, the concrete thing which is the subject of ownership.(1) In its most comprehensive sense it includes all legal rights of a person, except his *personal* rights which constitute his status or personal condition.(2) In *Jones* v.

('45) 49 Cal W N.779 (782, 783) (DB). (As partition under the Dayabhaga Law effects only a severance of the joint possession and enjoyment and does not involve the acquisition of fresh title, there can be no question of transfer of any property from one co-sharer to another either by exchange or otherwise. 1946 Cal 129 [AIR V 23] Foll.).

1937 Pat 232 (234) [AIR V 24] (DB). (Compromise decree under which there is an exchange of shares amongst co-owners is not a transfer of immovable property — The case purports to follow 25 Cal 210 which, however, holds that a partition, though involving the transfer of ownership of parts of the undivided property is not an exchange.)

1923 Mad 297 (299) [AIR V 10]: 46 Mad 349, (*Obiter.*)

†1920 Mad 20 (24) [A I R V 7] (DB). (*Per* Spencer J.).

1919 All 80 (81) [AIR V 6] (DB). (Per Walsh, J.— Transfer of Property Act does not apply to partition of joint Hindu family property.)

('98) 25 Cal 210 (213) (DB). (Partition is not exchange.)

[*See also* 1951 Bom 4 (5, 6) [A I R V 38 C 2]: ILR (1951) Bom 148 (DB). (Division of self-acquired property by father between his sons —Transaction does not amount to gift — It effects severance of status between sons.)]

21a. 1966 S C 432 (435) [AIR V 53 C 90].

1965 S C 866 (868) [AIR V 52 C 134]. (Partition of joint Hindu family property is not transfer in strict sense — Income-tax Act (1922), S. 16 (3) (a) (iii) and (iv) — 'Transfer' — Meaning of —Property partitioned — There is no transfer.)

22. 1921 Mad 541 (541) [AIR V 8]: 44 Mad 230 (DB).

23.†1940 All 458 (461) [AIR V 27]: I L R (1940) All 568. (Debenture bond creating charge— debenture-holders are security holders.)

1924 Oudh 209 (215) [AIR V 11] (DB). ((1884) 12 Q B D 347, followed.)

1914 All 187 (189) [AIR V 1]: 36 All 201 (DB). (Covenant to repay the principal and covenant not to alienate the property.)

[*See also* ('08) 35 Cal 837 (843) (DB).]

24.† ('08) 35 Cal 837 (844) (DB).

25. 1939 Sind 288 (289) [AIR V 26]: I L R (1939) Kar 344 (DB).

Also see S. 130, Note 13.

Section 5 — Note 5

1. Salmond on Jurisprudence, 8th Edition, p. 444.

1949 All 433 (436, 437) [AIR V 36 C 164]: I L R (1949) All 746 (DB). ("Property" classified.)

1939 All 415 (425) [AIR V 26]: I L R (1939) All 607 (FB). (Per Allsop, J.—"Property" may be used in the objective sense of the concrete thing which is the subject of ownership.)

2. Salmond on Jurisprudence, 8th Edn., p. 443.

1959 Punj 510 (512, 513) [AIR V 46 C 157]: I L R (1959) Punj 1332 (DB). (A licence or lease for working mine upon another's land is a personal right arising out of contract and not property—Reversed on another ground in 1960 S C 606 [AIR V 47.)

1964 Bom 1 (3) [AIR V 51 C 1]: I L R (1963) Bom 509 (DB).

Skinner,(3) Lord Langdale, M. R., described the word "property" as being "the most comprehensive of all the terms which can be used, inasmuch as it is indicative and descriptive of every possible interest which the party can have." It is in this comprehensive sense that the word "property" is used in this Act.(4) Thus, it will include an actionable claim.(5) an annuity,(6) a copyright in a literary composition(7) and all rights relating to physical objects(8) such as an equity of redemption,(9) a charge(10) or a vested remainder in immovable property.(11) An interest of a female

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1957 Punj 201 (205) [AIR V 44 C 78] : I L R (1957) Punj 1097 (DB). (Proprietary rights man's land, chattels, shares and debts due to him are property but not man's life, liberty or reputation.)

1949 All 433 (436, 437) [AIR V 36 C 164] : I L R (1949) All 746 (DB).

[*See also* 1960 Bom 35 (42) [AIR V 47 C 12] : ILR (1959) Bom 98 (DB). (Additional solatium of 15 per cent. payable under S. 23 (2), Land Acquisition Act on compulsory acquisition of land cannot be regarded as a right to property under S. 299, Govt. of India Act, 1935.)

(1959 Madh Pra 353 (355) [AIR V 46 C 121] : I L R (1959) Madh Pra 343. (Though property includes incorporeal rights those rights must be cver some thing which can be acquired or disposed of—Right to vote is not property within the meaning of Arts. 19 and 31 of the Constitution.)

1958 Bom 300 (303) [AIR V 45 C 87) : I L R (1958) Bom 645 (DB). (Monetary right in the shape of emoluments which are attached under law to office of patwari or patel is "property" within the meaning of Arts. 19 (1) (f) and 31 cf the Constitution.)

1957 Pat 515 (528) [AIR V 44 C 159] : 36 Pat 557 (DB). ((Obiter): Passage benefit is not property. It is at best a right which a member of Indian Civil Service may be entitled to so long as he is in service and on terms as stated in the Superior Civil Services (Revision of Pay and Pension) Rules.)]

3. (1835) 42 R R 274 (276) : 5 L J Ch 87.

4. ('07) 29 All 385 (396) (FB). (Sub-mortgagee's interest.)

1964 Bom 1 (3) [AIR V 51 C 1] : ILR (1963) Bom 509 (DB). (Transfer may either be of entire property or of any interest in property—Subsequent mortgage of property for consideration and without notice of prior charge created over said property prevails—Such mortgage is transfer of property in hands of mortgagee.)

1959 Assam 61 (62) [AIR V 46 C 15] : I L R (1958) 10 Assam 407 (DB). (Tenancy right the enjoyment of which is not restricted to tenant personally by the terms of the lease or by statute is property.)

1957 Punj 201 (205) [AIR V 44 C 78] : I L R (1957) Punj 1097 (DB). (Judgment-debt is property.)

1939 All 415 (425) [AIR V 26] : I L R (1939) All 607 (FB). (Per Allsop, J.)

[*See also* 1956 Pat 345 (349) [AIR V 43 C 87] (DB). (Occupant of Gayawali gaddi does not hold priestly or religious office—What he holds is business carried on under name and style of gaddi — He has right of property in both business and name.)]

5. See Section 8, last paragraph "where the property is a debt or other actionable claim."

1960 Punj 428 (429) [AIR V 47 C 155] : I L R (1960) 2 Punj 402 (DB).

1949 All 433 (436, 437) [AIR V 36 C 164] : I L R (1949) All 746 (DB).

('48) 50 Pun L R 210 (211) (DB).

('87) 14 Cal 241 (244) (DB). (Portion of the property reserved by the donor though not in his possession.)

[*See also* ('99) 4 Cal W N 70 (75). ("Property" in the Official Trustees Act, 1864, includes actionable claim.)]

6. (1883) 31 W R (Eng) 956 (956) : 8 P D 159, Jump v. Jump. (Deed of separation containing weekly allowance.)

7. (1907) 23 T L R 45 (48) : (1907) 1 Ch 107, Macmillan & Co. v. Dent.

(1769) 98 E R 201 (257) : 4 Burr 2303, Miller v. Taylor.

8. 1960 Ker 212 (213) [AIR V 47 C 98] : ILR (1960) Ker 417 (DB). (Right to enjoy property is a right in property—Right or estates transferred to a lessee.)

1949 All 433 (436, 437) [AIR V 36 C 164] : I L R (1949) All 746 (DB).

('97) 20 Mad 35 (39) (DB). (Sub-mortgagee's rights.)

[*See also* 1955-2 W L R 510 (516). (Share in proceeds to arise from sale of land is an "interest in land" within S. 40 of the English Law of Property Act, 1925.)]

9.+('07) 29 All 385 (401, 408, 414). (Dissenting from 13 All 432 (FB).)

('97) 20 Mad 35 (39) (DB). (Do.).

[*See* 1967 Mad 424 (425) [AIR V 54 C 137. (Right to enjoy property for life by which the person entitled to enjoy has to eke out his livelihood from the income is not like the equity of redemption available to a mortgagor which is an asset.)]

10.†1924 Oudh 209 (215) [AIR V 11] (DB). (Right to hold immovable property as a security for repayment of loan charge.)

[*See also* 1928 Pat 587 (588) [AIR V 15] : 7 Pat 584 (DB).

†('10) 6 Nag L R 20 (25, 26). (Mortgage is not a mere right to sue but is a right in immovable property and hence is capable of transfer by assignment.)]

11. ('91) 18 Cal 164 (176, 177) : 17 Ind App 201 (PC).

1957 Andh Pra 619 (622) [AIR V 44 C 205] (DB) (Interest of a lessor.)

member of a Hindu family, specified in S. 8 (1), Hindu Law Women's Right to Property Act (Mys. Act 10 of 1933) in the family property, until it is separated off, was held to be a vested interest which is heritable and transferable.(11a) An undertaking or business as a going concern is property.(11b) Even a *contingent* interest (not being a mere possibility) is a well recognised form of property, which is capable of being transferred.(12) The interest of a person in possession without title is also transferable property.(13)

But in order to constitute "property" there must be a right in *existence*. A person not having any right *in praesenti* cannot be said to have any "property." It would, in fact, be a contradiction in terms to say that a person *has* got *future* property. As remarked by Mr. Justice Chitty in *In re The Streatham and General Estates Co. (Limited)*,(14) "to use the word future does not add anything to the meaning of the word 'property'." A person to whom money may become due in the course of business with a Railway Company cannot be said to have "property" with respect to such monies (15) The High Court of Patna has held that a person entitled to an annuity from out of the future income of certain dedicated properties, cannot be said to have an interest in "property" as such future income cannot be said to be existing property which alone is contemplated by S 5.(16) The uncalled share capital of a company is not "property"(17) though the *right* of the company to call up the uncalled capital is an existing right and is property.(18)

All properties need not be transferable.(18a) The fact, therefore, that a right is not *enforceable* or an interest cannot be *transferred* does not necessarily mean that

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1947 Bom 185 (187) [AIR V 34 C 58]: ILR (1947) Bom 636. (Vested remainder in immovable property is present interest in property and can be sold or attached in execution of a decree. 32 Bom 172, Rel. on.)

11a. ('48) 53 Mys H C R 278 (280) (DB).

11b. 1959 Cal 352 (353) [AIR V 46 C 98] : ILR (1960) 1 Cal 615 (DB).

12. 1930 P C 17 (18) [AIR V 17] : 8 Rang 8 : 57 Ind App 10.

1921 P C 138 (144) [AIR V 8]. (Case under Roman Dutch law in Ceylon.)

1960 Cal 609 (615) [AIR V 47 C 167] (DB).

1967 Guj 161 (164) [AIR V 54 C 31] : (1966) 2 ITJ 893 : 63 ITR 133 (DB). (Gift to person contingent on his surviving upto certain date is a form of property wh(ch is assignable and not a mere spes successionis which is not transferable.)

1937 Sind 181 (189) [AIR V 24] : 31 Sind L R 98 (DB). (Endowment policy creates a contingent interest which may be assigned.)

†1936 Cal 802 (803) [AIR V 23] : ILR (1937) 1 Cal 583 (DB).

1924 All 625 (635) [AIR V 11] : 46 All 575 (DB). (Contingent interest; in case widow does not adopt the gift of such contingent interest is valid.)

[*See also* (1846) 3 Moo Ind App 435 (446) (PC).]

[But see 1936 Sind 65 (66) [AIR V 23] : 30 Sind L R 50 (DB).]

13. 1943 Oudh 330 (332) [AIR V 30] : 18 Luck 286. (Possessory title.)

†1927 All 669 (670) [AIR V 14] (DB). (Occupancy holding mortgaged though opposed to law — Mortgagee has possessory title.)

1924 Oudh 209 [AIR V 117 DB).

('08) 11 Oudh Cas 337 (339, 340). (Trespasser's possession is a valid title against any one except the rightful owner — It is transferable interest in property.)

†('07) 29 All 52 (60) (DB). (Per Aikman, J.)

('05) 27 All 169 (171) (DB). (Property gifted when in possession—Subsequent transfer invalid.)

('01) 24 All 157 (159) (DB).

14. (1897) 45 W R (Eng) 105 (106) : 1 Ch 15. (Uncalled capital is future property.)

15. (1882) 31 W R (Eng) 661 (662) : L R 22 Ch D 782, Ex parte Nichollas. (Bankrupt transferring his profits in business after an act of bankruptcy.)

16. 1936 Pat 527 (529) [AIR V 23]. (12 Moo Ind App 275, followed.)

17 (1898) 46 W R (Eng) 514 (515) : 2 Ch 149, In re Russian Spratt's Patent, Ltd.

(1897) 45 W R (Eng) 105 (106) : 1 Ch 15, In re Streatham General Eastes Co.

18. †(1888) 36 W R (Eng) 801 (804) : 38 Ch D 156, Howard v. Patent Ivory Co.

18a. 1949 All 433 (436, 437) [AIR V 36 C 164]: ILR (1949) All 746 (DB). (For example, benefits arising out of contract.)

[*See also* 1957 Andh Pra 1034 (1036) [AIR V 44 C 333] : ILR (1959) Andh Pra 1089 (DB). (Restrictions against alienation of cash grants are not sufficient to exclude the grants from being property under Art. 31 of the Constitution.)]

such right or interest is not property. Thus, a right to a pension may not be enforceable under law, but it is nevertheless "property".(19) In *Ex parte Huggins*,(20) Jessel, M. R., observed as follows :

> "There are many classes of property which are undoubtedly property, although no judicial tribunal can enforce the contract out of which they arise ..... It cannot, then, be a good definition of property to say that it must at any rate be a *chose in action*; and inability to sue for a thing does not, therefore, make it the less 'property'."

It has been held that a *power of appointment* which a person may have is not property.(21) The law does not recognise transfer of a trade-mark *per se* separate from the goodwill or the business and a sale deed assigning trade-marks *simpliciter* conveys no valid title in the trade marks to the transferee.(21a) In *Reddaway* v. *Banham*,(22) Lord Herschell doubted whether it was accurate to speak of there being "property" in a trade-mark, though the word "property" had been sometimes applied to what was termed a trade-mark at Common law. In the undermentioned case(23) it was held that *alimony* payable by a husband to his wife was not in the nature of property, being simply an allowance for the daily maintenance of the wife. As to whether shebaitship is property, see the undermentioned cases.(24) A sharebroker's card which confers on the holder a right to do broker's business in the stock exchange is not by itself property in the legal sense of the term.(25)

As to whether the chance of an heir apparent to succeed to the property or a mere right to sue is "property" see Notes on S. 6.

6. Legal and equitable estates. — The Indian law does not recognise legal and equitable estates in property.(1) As early as the year 1872, their Lordships of the Privy Council in *Jitendramohan Tagore* v. *Ganendramohan Tagore*(2) observed : "The anomalous law which has grown up in England of a legal estate which is paramount in one set of Courts, and an equitable ownership which is paramount in Courts of Equity, does not exist in and ought not to be introduced into Hindu law." And in *Webb* v. *Macpherson*(3) Lord Davey observed that "the law of India, speaking broadly, knows nothing of the distinction between legal and equitable property in the sense in which that was understood when equity was administered by the Court of Chancery in England."

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19. ILR (1965) 2 Punj 1 (10) (DB).
(1882) 30 W R (Eng) 878 (879) : 21 Ch D 85. (Re Huggins. (Bankrupt's pension is a property.)

20. (1882) 30 W R (Eng) 878 (879): 21 Ch D 85.

21. (1886) 34 W R (Eng) 709 (710) : 17 Q B D 521, Ex parte Gilchrist; In re Arm strong.
(1927) 96 L J Ch 104 (109) : 1 Ch 283 (287), In re Mathieson.

21a. 1951 Mad 681 (682) [AIR V 38 C 211] : ILR (1950) Mad 267 (DB).

22. (1896) 44 W R (Eng) 638 (640) : (1896) App Cas 199.

23. (1884) 33 W R (Eng) 17 (17) : 27 Ch D 160 Re Robinson. (Per Cotton, L. J.)

24. 1955 S C 493 (496) [AIR V 42] : (1955) 2 S C R 186 : 34 Pat 530. (Right to religious office such as that of pujari with duties attached is a property under Hindu Law, 1915 Mad 561 [AIR V 2], Overruled.)
1951 S C 293 (298) [AIR V 28]: 1951 S C R 1125: ILR (1952) 2 Cal 209 (SC). (Shebaitship is a form of property recognised by the Hindu Law.)
1949 Cal 278 (284, 285) [AIR V 36 C 85]. (It is species of property with peculiar characteristics and limitations — But it is not such property as can be partitioned in ordinary way or capable of being disposed of by will by shebait— Reversed on another point in 1951 S C 293 [AIR V 38].)

25. 1945 Bom 28 (32) [AIR V 32] : ILR (1944) Bom 619.

Section 5 —Note 6

1. 1931 P C 196 (202) [AIR V 18] : 58 Ind App 279 : 10 Pat 851.
1943 Cal 417 (426) [AIR V 30] : ILR (1943) 2 Cal 605 (FB). (All interests in property, whether the full ownership or an interest carved out of full ownership, are rights in rem.)

2. ('72) 18 Suth W R 359 (367) : Ind App Sup Vol. 47 : 9 Beng L R 377 (PC).

3. ('04) 31 Cal 57 (72) : 30 Ind App 238 (PC).
Also see S. 48 Note 10 ; S. 54 Note 23 and S. 58 Note 39.

See also the undermentioned cases.(4)

It has been held by their Lordships of the Privy Council in *Hem Chandra* v. *Suradhani Debya*(5) that though the beneficial interest of a person under a trust is not technically regarded as an equitable estate in India, there is nothing to prevent such person from transferring such interest.

7. "In present or in future."— It has already been seen in Note 5 that the word "property" denotes a right in existence and that it would be inaccurate to say that a person has "future property." The words "in present or in future" must therefore be held to govern the word "conveys" and not the word "property."(1a) The existence of the comma after the word "property" and before the expression "in present or in future" shows that the latter expression goes with the word "conveys" and not with the word "property."(1)

Where A, an owner of property, does an act by which he conveys property to B in such manner that B takes it *immediately*, A will be said to convey property to B *in present*. But where A conveys property to B in such manner that B will take it, not immediately but only at some *future* time, A will be said to convey property to B *in future*.

Illustrations.

(1) X transfers property to A for life, then to B for life and then to C. Here there is a conveyance "in present" to A, and "in future" to B and C.

(2) X transfers property to A for life, with remainder to B if he should have attained the age of 21 at the time of A's death. Here there is a conveyance "in present" to A and "in future" to B.

It would be noticed that though property is conveyed in future to B and C in illustration (1), they get a *vested* interest. In illustration (2), B gets a *contingent* interest. Thus, a conveyance in future may create either a vested or a contingent interest. In the undermentioned case(2) arising under S. 17 of the Registration Act in which the words "create . . . . . in present or in future any right, title or interest whether vested or contingent" occur, it was held by the High Court of Bombay that the words "in future" had reference to estates in remainder or in reversion in property or to estates otherwise deferred in enjoyment. In *Balasubramania Nadar* v. *Sivaguru Asari*,(3) it was held that this section and S. 21 recognise the principle of a valid mortgage being created on the happening of a condition, where the condition itself is first stipulated and the condition happens afterwards. See also the cases cited below.(4)

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4. 1923 P C 211 (214) [AIR V 10] : 51 Cal 86 : 1 Rang 637 : 50 Ind App 283.
1941 Cal 436 (439) [AIR V 28].
1932 Cal 589 (593) [AIR V 19] : 59 Cal 781 (DB).

5. 1940 P C 134 (136) [AIR V 27] : 67 Ind App 309 : ILR (1940) Kar P C 271 : ILR (1940) 2 Cal 436.
Also See S. 58 Note 23.

Section 5 — Note 7

1a. 1955 S C 376 (398) [AIR V 42 C 66] : 1955 S C R 1369. (*Per* Bhagwati J.)
1919 Mad 718 (725) [AIR V 6] (DB).

1.† 1919 Mad 718 (725) [AIR V 6] (DB).

2. ('78) 2 Bom 353 (356) (DB). (Registration Act —Property mortgaged for below Rs. 100 with a condition of redeeming it after 5 years—Future interest need not be taken into account while taxing.)

3. ('11) 11 Ind Cas 629 (632) (DB) (Mad). (14 Cal 687 and 3 All L Jour 221 dissented.)

4. 1960 Cal 609 (617, 618) [AIR V 47 C 167] (DB). (Lease of property not in possession of lessor — Lease to take effect from date lessor gets back possession.)
1958 Pat 589 (593) [AIR V 45 C 194] : 37 Pat 339 (DB). (The mere fact that an agreement provides that the lease is to commence from a future date will not make the transaction a merely executory agreement and not a lease.)
1957 Andh Pra 619 (622) [AIR V 44 C 205] (DB). (Lease, during subsistence of current lease, to take effect after expiry of the term of the subsisting lease.)
1956 Bom 749 (751) [AIR V 43 C 295] : I L R (1956) Bom 51 (DB). (Lease of agricultural land for four years in favour of A—Subsequent lease for 12 years in favour of B, an industrial com-

Where, what is sought to be transferred has no *existence* at all, there cannot be any transfer of property. A person cannot, in equity any more than at law, assign to another what is not in existence.(5) If he does make such an assignment, however, it will be regarded only as a *contract* to assign property which is to come into existence in future. When it does come into existence, equity treating that as done which ought to be done, fastens upon the property and then the contract to assign will become a completed assignment.(6) (See also S. 6 N. 3).

It has accordingly been held that an assignment by way of charge on future property is perfectly valid in equity which will attach to the property when it comes into existence.(7) A mortgage of future crops(8) or of other property that may come into existence in future(9) is not governed by this Act or by the Contract Act, but is in the nature of an agreement to mortgage property when it comes into existence.

Where by a compromise decree a permanent lease of all the palash trees in the village was given to the defendants and they were to remain in possession generation

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pany with a right to recover rent and a right to recover possession from A after expiry of A's lease —Transfer is of limited interest of landlord and by virtue of Ss. 5 and 109 such transfer was legal.)

1952 Madh B 16 (17) [AIR V 39] (DB). (Present charge for discharging a contingent liability can be validly created— A charge to secure a liability which will arise only, if at all, infuture is a present charge under S. 100.)

1938 Rang 145 (148) [AIR V 25]. (Charge to take effect on future contingency is valid.)

1937 Pesh 76 (78) [AIR V 24] (DB). (Hypothecation for meeting future possible liability.)

5.† 1931 P C 203 (206) [AIR V 18].
1932 Cal 524 (527) [AIR V 19] : 59 Cal 667 (DB).
1967 All 484 (485) [AIR V 54 C 142].
(1882) 30 W R (Eng) 70 (71) : 19 Ch D 342, *Collyer* v. *Isaacs*. (Per Jessel, M. R.)
[*See also* ('07) 30 Cal 265 (274, 275) (DB).]

6. 1955 S C 376 (398) [AIR V 42 C 66] : 1955 S C R 1369 (Per *Bhagwati J.*)
('72) 18 Suth WR 140 (141): 11 Beng LR 36 (PC).
('67) 12 Moo Ind App 275 (306, 308) : 2 Beng L R (PC) 111.

1945 Cal 355 (358) [AIR V 32]: ILR (1945) 2 Cal 375 (DB). (Transfers of non-existent, or as it is conveniently called after acquired property, provided they are not of the nature contemplated by S. 6 (a) are perfectly valid. Such transfer would be regarded as contrast to transfer after the vendor has acquired title and would fasten upon the property as soon as the vendor acquires it. Contract for sale of property which the vendor thinks of acquiring by purchase later on is not bad in law.)

1932 Cal 524 (527) [AIR V 19] : 59 Cal 667 (DB).
(1882) 30 W R (Eng) 70 (71) : 19 Ch D 342, *Collyer* v. *Isaacs*. (Mortgage of all existing chattels and assignment of all future chattels.)

(1883) 31 W R (Eng) Dig 23 : 11 Q B D 808, *Clements* v. *Mathews*. (Sale of present crop and crop growing at any time thereafter.)

[*See also* 1960 Cal 609 (611) [AIR V 47 C 167]. (Though S. 43 may not strictly apply to transfer of non-existent property, its underlying principle, namely, that of feeding the estoppel, would obviously apply to give effect to the particular transfer.)

('24) 93 L J Q B 33 (37) : 1924 App Cas 1, *Performing Right Society* v. *London Theatre of Varieties*.

1933 Cal 154 (159) [AIR V 20]: 59 Cal 1372(DB).

7. ('45) 49 Cal W N 494 (495) (DB). (*Collyer* v. *Isaacs*, (1881) 19 Ch D 342, Relied on.)
1939 Cal 715 (716) [AIR V 26] : ILR (1939) 2 Cal 341 (DB).
†1938 Cal 606 (608) [AIR V 25]. (But there must be an intention to assign or create a charge.)

†1938 Rang 426 (427, 428) [AIR V 25] : 1938 Rang L R 480 (DB). (Hypothecation of future debts as security for default in payment.)

('02) 1902 Pun Re No. 57 p. 209 (217) (DB). (For the advance of money lien or charge can be created upon the goods to be manufactured.)

('93) 16 Mad 429 (434) (DB). (*Collyer* v. *Isaacs*, (1882) 30 W R (Eng) 70, followed.)
[*See* 1939 Rang 8 (10) [AIR V 26] : 1938 Rang L R 542 (DB). (There may be an assignment of future property which creates an interest in it and gives the assignee a security which he can enforce even after the assignor's insolvency. But it must be future property in which the assignor has an interest to transfer.)]

8. 1924 All 833 (833, 834) [AIR V 11].
('86) 13 Cal 262 (264) (DB).
('88) 10 All 133 (135) (DB).

9. 1939 Rang 8 (10) [AIR V 26] : 1938 Rang L R 542 (DB). (Mortgage of future book-debts.)

1933 Cal 154 (159) [AIR V 20]: 59 Cal 1372 (DB). (13 Cal 262, followed.)

†('04) 31 Cal 667 (675) (DB). (Mortgage of future property is enforceable.)

Also see S. 3, Note 4.

[See however 1931 Rang 160 (160) [AIR V 18]. (Such a mortgage is not valid against *third* parties, 13 Cal 262 referred to.)]

after generation by paying the rental, it was held, that the compromise decree must be held to include not only the existing trees but also the trees that might come into existence and therefore the defendants had a right to rear lac on the new trees.(10)

8. "Or to himself." — These words were inserted by S. 6 of the Transfer of Property (Amendment) Act, 1929. Before this amendment it had been held that a person could make a transfer either to *another* living person or persons or *to himself and another* living person or persons, but not simply *to himself*.(1) The Special Committee in their Report on the Bill to amend the Act state as follows :

"We have amended S. 5 to make it clear that a transfer can be made by a person to himself as, for instance, by a person making a settlement or trust in which he constitutes himself a trustee."

Where the settlor and the trustee are the same individual, no formality of a transfer need be gone through and declaration of trust is sufficient. The effect of declaration is to divest the settlor of the property and to vest it in himself as the trustee, which is a transfer of property.(2)

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6. Property of any kind may be transferred, except as otherwise provided by this Act or by any other law for the time being in force.

What may be transferred.

(a) The chance of an heir-apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman, or any other mere possibility of a like nature, cannot be transferred.

(b) A mere right of re-entry for breach of a condition subsequent cannot be transferred to any one except the owner of the property affected thereby.

(c) An easement cannot be transferred apart from the dominant heritage.

(d) An interest in property restricted in its enjoyment to the owner personally cannot be transferred by him.

[a][(dd) A right to future maintenance, in whatsoever manner arising, secured or determined, cannot be transferred.]

(e) A mere right to sue [b][* * *] cannot be transferred.[c]

(f) A public office cannot be transferred, nor can the salary of a public officer, whether before or after it has become payable.

(g) Stipends allowed to military [d][naval], [e][air-force] and civil pensioners of [A][Government] and political pensions cannot be transferred.

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10. 1955 Pat 402 (404) [AIR V 42 C 103] (DB). (Coming up of new trees only meant that there was an increase in the number of trees.)

Section 5 — Note 8

1. ('11) 35 Bom 403 (407, 408) (DB).
('03) 13 Mad L Jour 364 (366) (DB).

2. 1961 S C 1023 (1026) : [A I R V 48 C 168] : (1961) 3 S C R 351.

(1956) 1 Mad L J 503 (510) (DB). (Usufructuary mortgage right in favour of joint family set apart for family trust at time of partition subsequently transferred to trust by registered deed—Held there was transfer of the right to trust since joint family was a different legal entity from the trust though the trust is to be managed by the seniormost member of the groups constituting the family.)
('58) 1958-33 I T R 383 (388, 389).

(*h*) No transfer can be made (*1*) in so far as it is opposed to the nature of the interest affected thereby, or (*2*) f[for an unlawful object or consideration within the meaning of section 23 of the Indian Contract Act, 1872,] or (*3*) to a person legally disqualified to be transferee.

g[(*i*) Nothing in this section shall be deemed to authorize a tenant having an untransferable right of occupancy, the farmer of an estate in respect of which default has been made in paying revenue, or the lessee of an estate under the management of a Court of Wards, to assign his interest as such tenant, farmer or lessee.]

a. *Inserted* by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), S. 7.
b. The words "for compensation for a fraud or for harm illegally caused" were *omitted* by the Transfer of Property Act, 1900 (II of 1900), S. 3.
c. For exception to this, see the Marine Insurance Act, 1963 (XI of 1963), S. 90 [1-8-1963].
d. *Inserted* by the Amending Act, 1934 (XXXV of 1934), S. 2 and Schedule.
e. *Inserted* by the Repealing and Amending Act, 1927 (X of 1927), S. 2 and Schedule I.
f. *Substituted* for "for an illegal purpose" by the Transfer of Property Act, 1900 (II of 1900), S. 3.
g. *Inserted* by the Transfer of Property Act (1882) Amendment Act, 1885 (3 of 1885), S. 4.

Synopsis

1. Scope of the section.
2. "Property of any kind may be transferred."
2a. "Or by any other law for the time being in force."
3. Clause (a)—General.
4. "The chance of an heir-apparent succeeding to an estate."
5. "The chance of a relation obtaining a legacy."
6. "Any other mere possibility of a like nature."
7. Applicability of S. 43 to transfers of expectations and possibilities.
8. Clause (b)—Mere right of re-entry.
9. Clause (c)—Easements.
10. Clause (d)—Interest restricted in its enjoyment.
11. Grant of property for maintenance.
12. Right of pre-emption.
13. Clause (dd)—Right to future maintenance.
14. Clause (dd) is not retrospective.
15. Transfer of restricted right opposed to public policy.
16. Clause (e)—Mere right to sue.
17. Rights under a contract.
18. Right to mesne profits.
19. Rights under the decree.
20. Right to impeach prior transactions.
21. Right to sue for accounts.
22. Right in partnership.
23. Clause (f)—Public office.
24. Clause (g)—Pensions.
25. Clause (h).
26. Transfer opposed to the nature of interest affected thereby.
26a. Transfer of service tenures.
27. Transfer for unlawful object or consideration—General.
28. Consideration and object.
29. Consideration partly unlawful.
30. Forbidden by law.
31. Defeat of provisions of law.
32. Fraudulent transfers.
33. Transfers involving injury to property of third person.
34. Transfers for immoral objects.
35. Transfers opposed to public policy.
36. Person legally disqualified to be a transferee.
37. Clause (i).
38. Muhammadan law.

1. Scope of the section. — The general policy of the law is to promote free alienation and circulation of property(1)—*alienatio rei praefertur juri accrescendi*

Section 6 — Note 1

1. 1964 Pat 214 (217) [AIR V 51 C 58] (DB).
† ('12) 15 Oudh Cas 67 (74) (DB). (Restriction by agreement or decree of Court excepted.)

(alienation is favoured by the law rather than accumulation). The transferability of property is, therefore, the general rule, its non-transferability, an exception.(2) This section accordingly enacts that property of any kind may be transferred except as otherwise provided by this Act or by any other law for the time being in force. The burden of proof that a particular property is not transferable is on the person alleging it.(3)

The only test to determine whether a property is transferable or not is to see whether such a transfer is prohibited either by the provisions of this Act or by any other provision of law. If there is no such prohibition, it is transferable. In some cases(4) the test has been applied, namely, whether the property can be *attached and sold* in execution of a decree under S. 60 of the Code of Civil Procedure. This is not a correct or a conclusive test.(5) There are various kinds of property which can be transferred by private sale, but which cannot be attached and sold in execution of a decree.(6) Thus, the tools of an artisan can be transferred by him in private sale, but cannot be attached in execution of a decree.(7)

Where a transfer, which is prohibited by any of the clauses of this section or by any other law, is made, it is a nullity and no equities can arise out of such a transaction. See Notes 3 and 7.

2. "Property of any kind may be transferred."—As to the meaning of the word "property," see Note 5 on section 5 and the undermentioned case.(1)

2a. "Or by any other law for the time being in force". — A religious office cannot be transferred by sale both under the Hindu law(1) and the Mahomedan

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2. ('50) 1950 All W R 498 (500) (DB).
1936 Oudh 121 (123) [AIR V 23] : 11 Luck 588 (DB).
1932 Lah 518 (519) [AIR V 19]. (All rights are transferable in absence of prohibition by law, custom or agreement.)
1927 Oudh 297 (298, 299) [AIR V 14]. (For example Oudh custom in case of grove-holders.)
1924 All 795 (796) [AIR V 11] : 47 All 55 (DB).
1922 Mad 290 (294) [AIR V 9] (DB).

3. ('50) 1950 All W R 498 (499) (DB).
1936 Oudh 121 (123) [AIR V 23] : 11 Luck 588 (DB).
1927 Oudh 297 (298, 299) [AIR V 14].
1922 Mad 290 (294) [AIR V 9] (DB).
[*See also* 1959 Assam 61 (62) [AIR V 46 C 15] : ILR (1958) 10 Assam 407 (DB). (Where the enjoyment of tenancy right has not been restricted to the tenant personally under the terms of the lease or there is no enactment which restricts the enjoyment of the tenancy right to the tenant himself, the right of the tenant is a property.)
1927 Cal 220 (223) [AIR V 14]. (A non-permanent tenure created after the passing of the T. P. Act but before Bengal Tenancy Act came into operation is transferable under S. 6.)
1917 Cal 176 (176) [AIR V 4] (DB). (A lease from year to year is transferable under S. 6 T. P. Act and on general principles heritable unless there is anything to the contrary in the contract of lease.)]

4. 1926 Nag 357 (358) [AIR V 13]. (Right to sue for accounts is not attachable under C. P. C.; so such right cannot be transferred.)

5. *See* ('11) 34 Mad 7 (9) (DB).

6. 1915 Mad 296 (299) [AIR V 2] : 38 Mad 867 (DB). (Grant for maintenance.)
[*See also* ('11) 34 Mad 7 (9) (DB).]

7. 1917 Mad 79 (82) [AIR V 4] : 40 Mad 302(DB).

Section 6 — Note 2

1. 1957 Pat 515 (527) [AIR V 44 C 159] : 36 Pat 557 (DB). (Property is defined to be 'the unrestricted and exclusive right to a thing; the right to dispose of the substance of a thing in every legal way'. Section 6 in making exceptions to the capability of transfer of property must be understood to use the term in its widest and most generic legal sense. Otherwise the exceptions would be wholly unnecessary — Obiter.)

Section 6 — Note 2a

1. *See* Mulla Hindu Law 9th Edn. p. 489 (520.)
1953 SC 125 (127, 130) [AIR V 40 C 34] : 1953 S C R 503. (The alienation of the shebaiti rights by a shebait in favour of stranger is absolutely void in Hindu Law and cannot be validated even on the footing of a custom.)
ILR (1966) 1 Mad 374 (378) (DB).
('12) 5 Sind L R 107 (115) (SB). (Private alienation of vritti may be allowed by customs.)
1951 Cal 490 (493) [AIR V 38 C 139]. (Shebaitiship cannot be transferred unless by way of renunciation of entire rights accelerating the

law.(2) Property dedicated to the maintenance of religious worship and of charities connected with it cannot also be transferred under the Hindu(3) as well as under the Mahomedan law.(4) It has been held that a Gayawali Gaddi is not a religious or priestly *office* but a *business* and that the right therein of the holder of the Gaddi is *property* which he could validly transfer.(4a) It has been held by Rajasthan High Court that except on the occasion when by necessity he has to officiate as a priest there is no office which a *purohit* holds, and hence, the holding of the *Birat Jajmani* is not *per se* the holding of any religious office. If the *Biratdar* therefore enters into an arrangement with another by which the latter has to officiate as priest at functions and receive the income subject to their arrangement regarding the division thereof such an agreement is not opposed to public policy.(4b) (See also Note 6).

According to the law prevailing in some provinces in India an undivided share of a coparcener in a Mitakshara joint Hindu family cannot be transferred without the

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interest of the next person in the line of succession.)

1948 Bom 233 (235) [AIR V 35 C 63] : ILR (1947) Bom 789 (DB). (Office of worship in public temple—Transfer of turn of worship by one member of family to another member is not objectionable if permitted by custom.)

1938 Mad 713 (714) [AIR V 25] (DB). (A transfer of the office of trustee of a temple for a monetary consideration is opposed to public policy.)

1937 Sind 237 (239) [AIR V 24] : 31 Sind L R 161 (DB). (Vritti — Land in Sind — Yajman vritti not partible or alienable.)

† 1933 Pat 306 (415) [AIR V 20] : 12 Pat 359 (DB). (Shebaitship.)

1930 Cal 180 (182) [AIR V 17] (DB). (Shebait cannot sell office.)

1923 Bom 358 (359) [AIR V 10] : 47 Bom 529 (DB) (Office of pujari.)

† 1916 Lah 98 (100) [AIR V 3] : 1917 Pun Re No. 9. (Bungas attached to the golden temple at Amritsar.)

1915 Mad 971 (972) [AIR V 2] (DB).

1915 Mad 561 (568) [AIR V 2] : 38 Mad 850 (DB).

1914 Bom 318 (319) [AIR V 1]: 39 Bom 26 (DB).

('13) 18 Ind Cas 475 (476) (DB) (Mad).

('08) 8 Cal L Jour 499 (503). (Mahantship).

('08) 12 Cal W N 98 (102) (DB). (Shebaiti right.)

('04) 27 Mad 435 (439) (DB). (Mahantship.)

('99) 23 Bom 131 (136) (DB). (Private alienation of vritti may be allowed by custom.)

('97) 1 Cal W N 493 (496) (DB). (Priestly office with emoluments attached to it.)

('92) 15 Mad 389 (391) (DB). (Office of Dharmakarta of a temple.)

('71) 16 Suth W R 171 (171) (DB). (Right to officiate at funeral ceremonies is incapable of transfer.)

('89) 1889 All W N 169 (169) (DB). (Do.)

('88) 12 Bom 366 (367) (DB). (Vrittis.)

('82) 4 Mad 391 (392) (DB). (Archaka cannot sell his office.)

('81) 4 All 81 (83) (DB). (Right to manage a temple.)

('79) 3 Cal L R 112 (115) (DB). (The trustee of an endowment has not as such the power of transferring his trust to any other person.)

('71) 6 Beng L R 727 (729) (DB). (Pallah — Right of worship.)

('67) 7 Suth W R 266 (266) (DB). (Right to surplus profit of sheba.)

[But see 1927 Pat 7 (8) [AIR V 14] : 6 Pat 245 (DB). (Right to pala or turn of worship held transferable under custom. Submitted wrong in view of S. C. decision in 1953 S C 125 [A I R V 40].)]

2. 1942 Mad 485 (486) [AIR V 29] (DB). (Right to hereditary office of a 'Khatila' cannot be assigned.)

1919 Cal 1064 (1064) [AIR V 6] (DB).

1931 Lah 379 (382) [AIR V 18] : 12 Lah 590 (DB). (Office of a sajjadanashin or a mutwalli.)

('97) 24 Cal 83 (92) (DB). (Office of Khadim.)

3. See Mulla, Hindu Law, 9th Edn., Page 481. (Section 415.)

†('96) 23 Cal 645 (655) (DB). (Dedication to an idol.)

[*See also* ('10) 8 Mad L T 224 (225) (DB). (Property burdened with a charge in favour of charity—It can be transferred subject to such charge.)

('09) 10 Cal L J 610 (611) (DB). (Mortgage made for the purpose of carrying on the worship of the idol is valid.)]

4. †(1840) 2 Moo Ind App 390 (422) (PC).

1924 Lah 652 (653) [AIR V 11] (DB). (Takia—Inalienable.)

('09) 37 Cal 179 (191) (DB). (Corpus cannot be transferred.)

(1900) 24 Bom 170 (176) (DB). (Waqf.)

('99) 3 Cal W N 158 (160) (DB). (Waqf.)

† ('87) 11 Bom 492 (505). (Do.)

('82) 8 Cal 732 (735) (DB). (Endowment for the office of mutwalli.)

('68) 10 Suth W R 299 (299) (DB). (When whole property is not waqf, it can be transferred subject to trust.)

('71) 15 Suth W R 75 (79) (DB).

[See however 1930 Mad 582 (583) [AIR V 17] (DB). (A sale by a mutwalli is valid during his lifetime provided he has a beneficial interest in the property.)]

4a. 1956 Pat 345 (349) [AIR V 43 C 87] (DB).

4b. 1953 Raj 144 (144) [AIR V 40 C 50] : I L R (1952) 2 Raj 116.

consent of all members(5) though according to other provinces it can be transferred for value without such consent.(6)

An impartible estate, though generally alienable, may, in some cases, be inalienable by *custom*.(7)

The law does not recognise transfer of trade mark per se apart from the goodwill or the business. Therefore, a sale deed which assigns simply the trade mark transfers no valid title to the assignee in the trade mark.(8)

3. **Clause (a) — General.** — As has been seen in Note 5 on S. 5, the term "property" refers to some *right in existence*. The chance, etc., referred to in clause (a) cannot be said to be rights in existence, and do not constitute "property."(1) They

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5. ('12) 34 All 296 (299) : 39 Ind App 109 (PC). (Elder brother mortgaging for immoral debts of the father.)
† ('93) 15 All 339 (351): 20 Ind App 116 (PC).
('11) 33 All 783 (788) (FB).
1937 Pat 546 (549) [AIR V 24] : 16 Pat 230 (DB). (Transfer is voidable and not void.)
1935 Pat 349 (351) [AIR V 22] (DB). (Cannot sell or mortgage.)
(1933) Lah 343 (344) [AIR V 20] : 14 Lah 584. (If he alienates joint family property, the alienation is liable to be set aside as a whole. 12 Beng L R 90 and 1893 Pun Re No. 6 considered to be no longer good law after 1917 P C 41 [AIR V 4].)
('12) 14 Oudh Cas 295 (297) (DB). (Cannot mortgage.)
('11) 33 All 654 (656) (DB).
('11) 11 Ind Cas 654 (658) (DB) (All).
('09) 31 All 507 (508) (DB). (Father, the head of the family, cannot mortgage without legal necessity—In case of mortgage this is a further restriction.)
('09) 1 Ind Cas 83 (84) (DB) (All).
('07) 10 Oudh Cas 289 (291) (DB).
('98) 20 All 325 (326) (DB).
('94) 16 All 369 (370) (DB). (Not even to another member of the same family.)
(1894) 1894 Pun Re No. 103 p. 383 (387). (The punjab.)
('93) 1893 Pun Re No. 6, p. 46 (49) (DB). (Note.—As to whether the alienation is liable to be set aside as a whole or not, this case is no longer good law in view of AIR 1917 P C 41—See AIR 1925 Lah 130.)
('80) 2 All 898 (899) (DB).
('79) 1879 Pun Re No. 21 p. 42 (45) (DB). (The Punjab.)
Also see S. 7 Note 7.

6. ('80) 5 Bom 48 (61) : 7 Ind App 181 (PC).
('04) 27 Mad 162 (166) (SB). (Cannot gift away.)
('03) 25 Mad 690 (704) (FB). (Per Bhashyam Iyengar, J.)
('91) 14 Mad 408 (417) (FB).
1951 Mad 318 (321) [AIR V 38 C 81]. (Gift of undivided share or any portion thereof is void in toto.)
('74) 8 Mad H C R 6 (10) (FB).
('73) 10 Bom H C R 162 (164) (FB).
1924 Bom 170 (172) [AIR V 11].
1915 Mad 113 (114) [AIR V 2] (DB). (Gift by father to his son or by coparcener to other coparcener is valid.)
('10) 35 Bom 169 (181) (DB).
('06) 8 Bom L R 550 (551) (DB).
('06) 2 Nag L R 52 (53).
('05) 15 Mad L Jour 486 (486).
('93) 6 C P L R 60 (62, 63).
('91) 15 Bom 673 (675) (DB).
('90) 3 C P L R 126 (127).
('86) 9 Mad 273 (275) (DB). (Cannot gift away to a relative.)
('84) 7 Mad 357 (365) (FB).
('75) 12 Bom H C R 229 (231).
†('74) 11 Bom H C R 76 (81).
('73) 10 Bom H C R 139 (160) (DB).
('70) 5 Mad H C R 166 (170) (DB).
† ('69) 6 Bom H C R 247 (249) (DB).
(1865) 2 Mad H C R 416 (417) (DB).
(1864) 1 Bom H C R 182 (183) (DB).
(1863) 1 Bom H C R 39 (40) (DB).
(1863) 1 Mad H C R 471 (473) (DB).
Also see S. 7, Note 7.

7. 1927 P C 159 (160, 161) [AIR V 14] : 54 Ind App 289 : 54 Cal 955.
('27) 106 Ind Cas 646 (647) (PC).
1915 P C 30 (33) [AIR V 2] : 42 Cal 1179: 42 Ind App 192 (PC).
('09) 36 Cal 943 (954) : 36 Ind App 176 (PC).
('99) 22 Mad 383 (396) : 26 Ind App 83 (PC).
†('88) 10 All 272 (288) : 15 Ind App 51 (PC).
('82) 8 Cal 199 (206): 8 Ind App 248 (PC). (Affirming 5 Cal 113 on appeal.)
('09) 36 Cal 481 (482) (FB).
('05) 32 Cal 158 (160) (DB).
('98) 20 All 537 (538) (DB).
('95) 18 Mad 287 (305) (DB).
('90) 13 Mad 197 (?94) (DB).
('81) 7 Cal 461 (464) (DB).

8. 1951 Mad 681 (682) [AIR V 38 C 211] : I L R (1950) Mad 267 (DB).

Section 6 — Note 3

1. ('08) 35 Cal 777 (789, 794) (SB).
✠('71) 7 Beng L R 341 (346) (FB).
1952 All 662 (665) (Pr 18) [AIR V 39] : ILR (1951) 1 All 740 (DB).
1929 Lah 295 (302) [AIR V 16]: 10 Lah 613 (DB).
† 1928 Nag 262 (263) [AIR V 15]. (Interest of Hindu reversioner expectant upon death of female is not property.)
1921 Cal 501 (504) [AIR V 8] : 48 Cal 536 (DB). (15 Suth W R 17 (FB), Followed.)

cannot, therefore, be subjects of transfer.(2) for, as was stated by Sir George Jessel, M. R. in *Collyer* v. *Issaacs*,(3) a person cannot, in equity, any more than at law, assign to another what is not in existence.(4)

In England an assignment of what is not in existence will, however, be regarded as a *contract to assign* the property which may come into existence. When it does come into existence, equity, treating that as done which ought to be done, fastens upon the property and then the contract to assign will become a completed assignment.(5) This principle is recognised in S. 43 of this Act(5a) and by S. 18 of the Specific Relief Act, 1877. (See S. 13 of Specific Relief Act, 1963).

The principle above mentioned is in England applicable even to transfers of *spes successionis* inasmuch as such transfers are not *illegal* there.(6) It was applied in this country also to such cases arising prior to this Act,(7) and has been applied in cases arising in provinces to which this Act does not apply.(8)

1920 Lah 74 (77) [AIR V 7] (DB).
(1890) 59 L J Ch 666 (672) : 45 Ch D 51 : 62 LT 929 : 38 W R (Eng) 712, Re Parsons; Stockley v. Parsons.
(1911) 80 L J Ch 623 (625) : (1911) 2 Ch 275 : 105 L T 360, Re Green; Green v. Meinall.
[*See also* ('07) 31 Bom 165 (172) (DB). (Quaere.)]

2. ('67) 33 Cut L T 155 (168).
1936 Lah 753 (755) [AIR V 23] (DB). (Sale of reversionary right in widow's estate.)
('09) 1 Ind Cas 590 (591) (Cal). (Muhammadan cannot transfer spes successions just as a Hindu cannot.)
('07) 30 Mad :201 (202) (DB). (The transfer is a nullity.)

3. (1881) 19 Ch D 342 (351) : 45 L T 567 : 51 L J Ch 14 : 30 W R (Eng) 70.

4. 1967 All 484 (485) [AIR V 54 C 142] : 1967 All L J 88 : 1967 All W R (H C) 182.
See cases cited in Note 7 on S. 5.
See also Broom, Legal Maxims, 6th Edition, Pages 465, 466.

5. See Section 5 Note 7.
('69) 12 Moo Ind App 292 (307) (PC).
1964 Cal 470 (474) [AIR V 51 C 90] (DB).
1953 Bom 101 (103) [AIR V 40 C 33].
('45) 49 Cal W N 494 (497, 498). (Agreement by A in favour of B assigning or creating a charge on amounts which might become due from C for work done under contract — Agreement creates a valid or equitable charge.)
1945 Cal 355 (358) [AIR V 32] : ILR (1945) 2 Cal 375 (DB). (This English Law principle has been applied in India to transfers of non-existent or after-acquired property where they are not of the nature contemplated by S. 6 (a).)
1939 Cal 715 (716) [AIR V 26] : ILR (1939) 2 Cal 341 (DB).
1927 Sind 78 (84) [AIR V 14] : 22 Sind L R 1. (Following observation of Sir George Jessel, M. R. in (1882) 19 Ch D 342.)
('10) 5 Ind Cas 373 (373) (DB) (All). (Future crops.)
('07) 29 All 163 (165) (DB).
('04) 31 Cal 667 (675) (DB).
('88) 10 All 133 (135) (DB). (Hypothecation of future indigo produce.)
('86) 13 Cal 262 (264) (DB). (Mortgage of future crops.)
[*See also* 1923 Bom 107 (113) [AIR V 10]. (Quaere — Whether these principles apply to the Transfer of Property Act.)]
Also see S. 43, Note 2.

5a. 1967 All 484 (485) [AIR V 54 C 142].

6. 1938 Mad 881 (882) [AIR V 25].
1921 Cal 501 (508) [AIR V 8] : 48 Cal 536 (DB).
('07) 31 Bom 165 (172) (DB).
('07) 30 Mad 255 (262) (DB).
(1904) 73 L J Ch 365 (368) : (1904) 2 Ch 385 : 52 W R (Eng) 567 : 90 L T 177, In re Dallas.
(1828) 57 E R 757 (761) : 2 Sim 183 : 29 R R 77 Wethered v. Wethered. (It is not contrary to public policy.)
(1887) 56 L J Ch 642 (645) : 35 Ch D 109, Combe v. Carter. (Confirmed in (1887) 36 Ch D 348.)
(1833) 39 E R 839 (843) : 1 My & K 683 : 36 R R 415, Lyde v. Mynn.
(1706) 23 E R 967 (967) : 2 Vern 563, Thomas v. Freeman. (See notes to the case.)
[*See* ('04) 31 Cal 667 (675) (DB). (Where passages from Ashburner's Principles of Equity are cited.)]

7. But in order to be enforced as a contract in equity the ingredients of a valid contract must exist. Thus, it must be for consideration, and the property must be capable of ascertainment. See the following cases :
(1903) 72 L J Ch 218 (219) : (1903) 1 Ch 697 : 87 L T 714 : 51 W R (Eng) 315, Re Ellenborough; Towry Law v. Burne. (An assignment for value binds the conscience of the assignor.)
(1914) 83 L J Ch 243 (247) : (1914) 1 Ch 115: 109 L T 781, Re Mudge.
(1843) 41 E R 662 (664) : 13 L J Ch 28, Meek v. Kettlewell.
(1840) 49 E R 91 : 3 Beav 234, Hinde v. Blake.
(1838) 58 L J Q B 75 (78): 13 App Cas 523: 60 LT 162 : 30 W R (Eng) 513, Tailby v. The Official Receiver, Trustee of H. G. Ison (a bankrupt). (Property must be capable of ascertainment.)
('84) 1884 Bom P J 174 (DB).

8. 1954 Trav-Co 357 (358) [AIR V 41 C 121]. (The Act was not in force in Travancore and,

But the position is different in cases to which this clause applies. The clause not merely recognises that the things referred to therein are not capable of being transferred, but does not permit such transfer on grounds of public policy.(9) If such a transfer is regarded as an agreement to transfer, the result would be that the agreement would be void under S. 23 of the Indian Contract Act as being one to do a thing which, if permitted, would defeat the provisions of law, as enacted in this clause.(10) The transfer cannot, therefore, be regarded as valid contract to transfer property that may come into existence.(11) The doctrine of feeding a grant by estoppel cannot apply to the case, for there can be no estoppel against the express provisions of a statute.(12) Nor can the doctrine that equity will treat that as done which ought to be done, be applied to that which the Legislature has expressly stated ought *not* to be done.(13) A transferee of *spes successionis* cannot, therefore, in cases to which this section applies, obtain any relief under S. 43(14) or under S. 18 of the Specific Relief Act, 1877, (S. 13

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therefore, an agreement to convey property to be acquired in the future is enforceable in spite of S. 6.)
1934 Lah 996 (997) [AIR V 21].
1926 Lah 39 (40) [AIR V 13]. (Following 1899 Pun Re No. 13.)
1930 Lah 928 (929) [AIR V 17] (DB). (Do.)
('23) 75 Ind Cas 246 (248, 249) (Pesh). (As against the vendor if the title opens in his favour, the vendee can proceed under S. 18, Specific Relief Act, and claim specific performance.)
('23) 73 Ind Cas 120 (121, 124) (Pesh).
1919 Lah 319 (321) [AIR V 6].
('13) 20 Ind Cas 556 (557) (Lah).
('99) 1899 Pun Re No. 13 p. 89 (90).
† ('94) 1894 Pun Re No. 58, p. 185 (188) (DB). (Transfer for consideration of rights of succession to accrue in future allowed.)
[*See also* 1933 Lah 378 (379) [AIR V 20].]
[But see 1955 Punj 215 (219) [AIR V 42 C 80] : ILR (1955) Punj 988 (DB). (Even though the provisions of T. P. Act do not apply to Punjab its principles based on justice, equity and good conscience are applicable. Hence the right of expectancy is not transferable even apart from the provisions of the T. P. Act.)]

9. ('61) 65 Cal W N 1115 (1117). (Agreement between husband and wife — Wife giving up her right to inherit husband's property — Agreeing to a maintenance and separate residence — Also agreeing not to claim anything more than fixed maintenance Validity — First and third conditions held contrary to law and against public policy and therefore void — Second condition held valid.)
1956 Nag 261 (263) (Pr 12) [AIR V 43 C 89] : ILR (1956) Nag 591 (DB).
('07) 30 Mad 255 (263) (DB).

10. 1964 Ker 200 (203) (Prs 7, 8] : [AIR V 51 C 59] : ILR (1964) 1 Ker 355 (DB).
1959 Mad 131 (133, 134) [AIR V 46 C 42] (DB).
1945 Cal 355 (358) [AIR V 32] : ILR (1945) 2 Cal 375 (DB). (S. 6 (a) in terms applies only to transfers but where an actual conveyance of a thing would be illegal by reason of S. 6 (a), as for instance, the sale of the so-called interest of a Hindu reversioner of the last male owner when his widow is alive, an agreement to sell that interest would also be bad by reason of S. 23, Contract Act, as such an agreement if permitted, would defeat the provisions of this section.)
1931 All 589 (591) [AIR V 18] (DB).
1924 Oudh 234 (237) [AIR V 11] : 26 Oudh Cas 368.
1916 Mad 579 (580, 581) [AIR V 3] : 39 Mad 554 (DB).
The observations in the following cases that this section does not prohibit the transfer of a chance, but merely declares it void are, it is submitted, not correct :
1920 Lah 74 (77) [AIR V 7] (DB).
1935 All 244 (246) [AIR V 22] : 57 All 474 (DB).

11. 1950 Pat 488 (489, 490, 491) [AIR V 37 C 124] (DB).
1938 Mad 881 (883) [AIR V 25].
[*See also* ('58) 1958 Ker L Jour 521 (528, 529) (DB). (Where there is a contract for the transfer of property not in existence the agreement by itself, proprio vigore does not transfer the property when it is subsequently acquired. It is only when the transferor voluntarily executes a deed of transfer or is compelled to do so by a decree for specific performance that the legal title of the transferor in the property passes from him to the transferee.)]

12. ('30) 1930 Mad W N 1054 (1057). (Section 43, T. P. Act, has no application.)
1928 Nag 262 (263) [AIR V 15]. (Section 43, T. P. Act, has no application.)
1921 al 501 (505, 506) [AIR V 8] : 48 Cal 536 (DB).

13. 1918 Mad 123 (126) [AIR V 5] : 41 Mad 418 (FB). (No equities can arise out of a transfer prohibited by law.)
1921 Cal 501 505, 507) [AIR V 8] : 48 Cal 536 (DB).
('12) 15 Oudh Cas 122 (126).
('08) 11 Oudh Cas 301 (304).
('07) 31 Bom 165 (172 (DB).
Also see Note 7.

14. See Note 7.

of Specific Relief Act, 1963) after the transferor becomes entitled to the property.(15) In *Jaganadha Raju* v. *Veerah Lakshmi Narasimma*,(16) Wallis, C. J., observed :

> "It seems futile to forbid such transfers of expectancies if contracts to transfer them are to be enforced as soon as the estate falls into possession."

And Mr. Justice Tyabji, in the same case observed :

> "It would be defeating the provisions of the Act to hold that though such hopes or expectations cannot be transferred in present or future, a person may bind himself to bring about the same results by giving to the agreement the form of a promise to transfer, not the expectations, but the fruits of the expectations, by saying that what he has purported to do may be described in a different language from that which the Legislature has chosen to apply to it for the purpose of condemning it."

In *Annadamohan* v *Gour Mohan*,(17) their Lordships of the Privy Council approved of these observations, and stated :

> "It is impossible for them (i.e., their Lordships) to admit the common sense of maintaining an enactment which would prevent the purpose of the contract, while permitting the contract to stand as a contract."

The undermentioned cases(18) holding that a transfer of an expectancy may be good as a contract to convey property when it falls into possession can no longer, in view of the above discussion, be considered as good law.

But though a transfer or a contract to transfer an expectancy is void, there is nothing to prevent a person from admitting by way of settlement of a disputed claim that certain property never formed part of the estate of the person to whose estate he is the expectant heir,(19) or from undertaking a personal obligation to pay a certain sum of money periodically if he succeeds to the estate to which he is the expectant heir.(20) Whether the transaction in any particular case is a transfer or a contract to transfer the expectancy or is an admission of the nature referred to above must be decided with reference to the *substance* of the transaction taken as a whole.(21)

4 "The chance of an heir-apparent succeeding to an estate." — The clause is intended to apply to cases of a mere *hope* or expectation which may be defeated by the act of some person having the present disposal of property(1) and, as seen in the previous Note, is not "property" at all. As was observed by Kay, J., in *In re Parsons : Stockley* v. *Parsons*,(2)

> "it is indisputable law that no one can have any estate or interest, at law or in equity, contingent or other, in the property of a living person to which he hopes to succeed as heir-at-law or next-of-kin to such living person. During the life of such person no one can have more than a *spes successionis*, an expectation or hope of succeeding to his property."(3)

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15. ('28) 108 Ind Cas 390 (391) (Lah).

16. 1916 Mad 579 (580, 581) [AIR V 3] : 39 Mad 554 (DB).

17. ✠ 1923 P C 189 (193) [AIR V 10] : 50 Ind App 239 : 50 Cal 929. (1921 Cal 501 [AIR V 8], Confirmed.)

18. 1919 All 371 (372, 373) [AIR V 6] : 41 All 611 (DB).
('11) 9 Ind Cas 243 (244) (Oudh).
('93) 17 Bom 232 (234) (DB).

19. † 1925 Mad 1043 (1044) [AIR V 12] (DB).
1919 All 371 (372) [AIR V 6] : 41 All 611 (DB).
1915 All 486 (486) [AIR V 2] (DB). (There is nothing illegal in a person, for good consideration, contracting not to inherit on the event of his becoming entitled to inheret in the decease of a living person.)
1924 Pat 736 (752) [AIR V 11] (DB). (Do.)
1936 All 573 (575) [AIR V 23] : 58 All 834 (DB). (Do.)
1926 Lah 148 (149) [AIR V 13]. (Agreement not to contest gift that may be made in future is not illegal.)
See also Note 4.

20. 1944 All 104 (111, 112) [AIR V 31] : ILR (1944) All 141 (DB). (In such a case, there is no transfer of the chance of the heir succeeding and there must be a transfer, before clause (a) can apply.)

21. 1925 Mad 1043 (1045) [AIR V 12] (DB). (Per Srinivasa Iyengar, J.)
1934 Mad 552 (554) [AIR V 21].

Section 6 — Note 4

1. ('06) 30 Bom 304 (316). (25 Cal 778 followed.)

2. (1890) 59 L J Ch 666 (667) : 45 Ch D 51 (55) : 62 LT 929 : 38 W R (Eng) 712.

3. *See also* 1932 Bom 244 (246) [AIR V 19]. (The expectancy of an heir apparent, during lifetime

Certain properties were acquired by Government in 1865 and 47 years later, in 1912, the Government resolved that the land should be restored to the persons from whom they had been acquired. The original owners having died the benefit of the restoration went to the heirs of such owners. After the date of the resolution and before possession was handed back, one of the heirs transferred his interest in the property to X. It was held by the High Court of Bombay that the transfer was not of any chance of an heir apparent, but of a right which had actually accrued to the transferor heir, at the time of the transfer.(4)

A son's right under the Travancore Nayar Act, being only a right to succeed to the father's estate in case the father died intestate, is only a *spes successionis* while the father is alive and therefore is an interest which cannot be transferred.(4a)

The interest of a Hindu presumptive reversioner expectant on the determination of the interest of a female heir, is a mere *spes successionis*(5) though for reasons of

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of his ancestor, is less than a possibility.)
1932 Cal 600 (609) [A I R V 19] : 59 Cal 859 (DB).
('68) 4 Mad H C R 60 (61).

4. 1932 Bom 244 (246) [AIR V 19].

4a. 1952 Trav-Co 351 (353) [A I R V 39] : I L R (1952) Trav-Co 329 (DB). (Divorce between father and mother—Latter in consideration of the payment of a certain sum of money relinquishing on behalf of minor all rights to any share in father's property — *Held* agreement did not extinguish son's right to inherit his share of property on father's death intestate.)

5. *1940 P C 181 (182, 183) [A I R V 27]: 67 Ind App 386 : ILR (1940) All 719 : I L R (1940) Kar P. C. 366.
1925 P C 272 (276) [A I R V 12] : 28 Oudh Cas 352 : 52 Ind App 398 : 47 All 883.
1924 P C 56 (60) [A I R V 11] : 51 Ind App 145 : 47 Mad 181.
1922 P C 403 (404) [AIR V 9] : 26 Oudh Cas 223 : 45 All 179 : 50 Ind App 69.
1918 P C 196 (202) [AIR V 5] : 42 Mad 523 : 46 Ind App 72.
1918 P C 140 (145) [A I R V 5] : 46 Cal 566 : 46 Ind App 1.
1918 P C 70 (73) [AIR V 5] : 40 All 487 : 45 Ind App 118.
1917 P C 95 (97) [AIR V 4] : 45 Cal 590 : 45 Ind App 95.
1916 P C 117 (118) [A I R V 3] : 39 Mad 634 : 43 Ind App 207. (Reversionary heir's interest though contingent he has right to demand that the estate be kept free from waste and free from danger during its enjoyment by widow.)
('02) 24 All 94 (107) : 29 Ind App 1 (PC).
('97) 1897 Pun Re No. 66, p. 298 (307) (FB).
('66) 1966 Raj L W 600 (603).
1964 Mad 387 (389) [A I R V 51 C 122] : I L R (1964) 1 Mad 570 (DB).
1963 Pat 277 (281) [AIR V 50 C 79] (DB).
1955 Andhra 68 (72) [A I R V 42 C 26] : I L R (1955) Andhra 217.
1955 Andhra 49 (53) [AIR V 42 C 21]. (Overruled on another point in 1955 Andh W R 150 FB and reversed on another point in (1860) 1 W R 352.)
1952 Nag 317 (321) [A I R V 39] : I L R (1953) Nag 413 (DB).
1950 Hyd 37 (41) [AIR V 37 C 6] : I L R (1951) Hyd 136 (DB).
1939 Cal 116 (119) [AIR V 26] : ILR (1938) 2 Cal 250. (Share given to Hindu widow on partition amongst sons in lieu of maintenance goes back on her death to sons—Sons' interest in such property during her lifetime is not mere spes successionis.)
1927 Nag 312 (314) [AIR V 14].
1927 Mad 1184 (1184) [AIR V 14] (DB).
1926 All 715 (717) [AIR V 13] : 48 All 637 (DB).
1925 Mad 941 (941) [AIR V 12].
1925 Lah 341 (341) [AIR V 12] : 6 Lah 87 (DB). (11 Ind Cas 211 and A I R 1915 Lah 353 held overruled by A I R 1917 P C 95 and A I R 1922 P C 403.)
1921 Lah 133 (134) [AIR V 8] (DB).
1926 Oudh 119 (120) [AIR V 13].
1924 Mad 75 (77) [AIR V 11] (DB).
1921 Cal 501 (503) [AIR V 8] : 48 Cal 536 (DB).
1921 Bom 446 (447) [AIR V 8] : 45 Bom 1167 (DB).
1920 Bom 355 (357) [A I R V 7] : 44 Bom 488 (DB).
1920 Oudh 265 (267) [A I R V 7] : 23 Oudh Cas 238 (DB).
1919 Cal 828 (829) [AIR V 6] (DB).
1917 Pat 538 (540) [AIR V 4] (DB).
1916 Nag 100 (102) [AIR V 3] : 13 Nag L R 187 (DB).
('11) 9 Ind Cas 26 (28) (All).
('10) 32 All 88 (91) (DB).
('09) 31 All 53 (55) (DB).
('08) 30 All 497 (497) (DB).
('06) 29 Mad 120 (120) (DB).
('02) 29 Cal 355 (359) (DB). (25 Cal 778 held overruled by 25 Ind App 183).
('98) 22 Bom 984 (986) (DB).
('97) 21 Bom 319 (323) (DB).
('95) 17 All 125 (134) (DB).
('66) 6 Suth W R 34 (34) (DB).
('69) 3 Beng L R O C 70 (72).
(1864) 1 Suth W R 338 (338) (DB).

[*See also* 1919 Low Bur 121 (122) [AIR V 6). (Heir-apparent, under Burmese Buddhist law, cannot transfer his chance of succeeding.)

policy he is recognized by Courts of law as having a right to demand that the estate be kept free from waste and free from danger during its enjoyment by the female heir.(6) A transfer or other dealing involving a transfer of such interest is therefore void under this section.(7)

But as has been seen already in Note 3, a transaction, which does not involve a transfer of an expectancy, but which is a family arrangement or a settlement of a disputed claim in which the reversioner, for a consideration, gives up his claim, is not bad.(8) Similarly, an agreement between parties at a partition that neither party would claim any right to the properties allotted to the other on the death of either of the parties is not hit by any rule of Hindu law or by the provisions of this clause.(8a)

1918 All 184 (185) [AIR V 5] : 40 All 384 (DB).
1922 All 217 (219) [AIR V 9] : 44 All 428 (DB).
Also see S. 91, Note 16.

6. 1940 P C 181 (182, 183) [A I R V 27] : I L R (1940) Kar P C 366 : I L R (1940) All 719 : 67 Ind App 386.
1925 P C 272 (276) [A I R V 12] : 28 Oudh Cas 352 : 52 Ind App 398 : 47 All 883.
1916 P C 117 (118) [A I R V 3] : 39 Mad 634 : 43 Ind App 207. (Reversionary heir appealing to Court for conservation and just administration does so in a representative capacity.)

7. See the cases cited in foot-note 5.
1955 Andhra 49 (53) [AIR V 42 C 21]. (Overruled on another point in 1955 Andhra 87 [AIR V 42] (FB) and reversed on another point in 1961 Andh Pra 430 [AIR V 8].)
1955 Punj 215 (217) [A I R V 42 C 80] : ILR (1955) Punj 988 (DB). (Such a transfer is void also under Hindu law.)
1951 All 522 (527) [AIR V 38 C 123] : ILR (1953) 1 All 437 (DB).
1943 Oudh 196 (199) [A I R V 30] : 19 Luck 37 (DB). (Sale).
1942 Mad 720 (721) [AIR V 29].
1938 Bom 121 (125) [A I R V 25] : ILR (1937) Bom 895 (DB). (Relinquishment of reversionary interest is void.)
1938 Oudh 94 (95) [AIR V 25] (DB).
1932 Cal 600 (611) [AIR V 19] : 59 Cal 859 (DB).
1922 Bom 437 (438) [AIR V 9] (DB).
1921 Cal 501 (503, 504) [A I R V 8] : 48 Cal 536 (DB).
('03) 13 Mad L Jour 323 (324) (DB).
[*See also* 1929 Oudh 63 (64) [AIR V 16] : 4 Luck 181 (DB). (Transfer of spes successionis by reversioners — Transferee suing for possession after widow's death — Compromise entered between transferor and transferee – Compromise and decree are valid. 30 Mad 255, Distinguished.)]
1918 Oudh 348 (354) [AIR V 5] (DB). (Such a transfer was held void even under the Hindu law apart from the Act.)
('09) 1909 Pun Re No. 67, p. 219 (221) (DB).

8. 1919 P C 27 (29) [AIR V 6].
1959 All 473 (481) [AIR V 46 C 120] (DB).
('59) ILR (1959) 9 Raj 1264 (1276).
1954 Madh Bha 153 (154) [AIR V 41 C 76] : ILR (1954) Madh Bha 372.
('54) 1954-2 Mad L Jour (Andhra) 251 (255).
1953 All 213 (214, 216) [AIR V 40 C 97).
1950 All 320 (322) [AIR V 37 C 124].
1942 Lah 138 (142) [AIR V 29] : ILR (1943) Lah 161 (DB).
1938 Oudh 190 (192) [AIR V 25] (DB).
1930 All 687 (691) [AIR V 17] : 52 All 716 (DB).
1930 All 498 (501) [AIR V 17] (DB). (Family arrangement is not transfer.)
1930 All 430 (431) [AIR V 17].
1929 Lah 485 (487) [AIR V 16] (DB).
('28) 103 Ind Cas 440 (441) (Nag).
1925 Mad 1043 (1043) [AIR V 12] (DB).
1926 All 715 (717) [AIR V 13] : 48 All 637 (DB).
1921 Cal 501 (504) [AIR V 8] : 48 Cal 536 (DB).
1921 Oudh 105 (106) [AIR V 8] : 24 Oudh Cas 151.
1921 Pat 260 (263, 265) [AIR V 8] : 6 Pat L Jour 604 (DB).
1915 All 441 (442) [AIR V 2] : 38 All 107 (DB).
[*See also* 1950 Pat 488 (489, 490, 491) [AIR V 37 C 124]. (Suit by A, B and C against widow. Death of A pending suit—D his son substituted—B and C belonging to a family different from A's family—Agreement between D, B and C that D would get A's share in property left by widow is not a family arrangement but an agreement dealing with spes successionis.)
1943 Oudh 196 (204) [AIR V 30] : 19 Luck 37 (DB). (Alienation of joint family property by Hindu widow to A, one of reversioners—A transferring it to B—*Held* that S. 6 (a) did not bar the operation of S. 43, if the latter section is otherwise applicable — On facts, section 43 did not apply as B was aware of the defective title of A and A did not make any fraudulent or erroneous representation.)]
[But see 1926 Mad 609 (611) [AIR V 13] (DB).]

8a. 1965 S C 1752 (1754) [A I R V 52 C 301] : (1965) 3 S C R 335. (Co-widows — Inheriting husband's property take as joint tenants with rights of survivorship — Partition of properties absolutely and relinquishment of right to survivorship not repugnant to S. 6 (a).)
1962 Mad 482 (484) [A I R V 49 C 140] (DB). (Reversed on another point in 1965 S C 1752 A I R V 52)].
1962 Pat 28 (35) (Pr 12) [AIR V 49 C 10] (DB).
1948 Pat 362 (369) [AIR V 35 C 127] (DB).
1914 Mad 327 (328) [AIR V 1] (DB). (Partition between Hindu female heirs consisting of mutual relinquishment of respective life interests is valid.)

Whether a transaction dealing with *spes successionis* involves a transfer or not depends upon the facts of the particular case. *A* and *B* were reversioners and *admittedly entitled* to eight annas interest in the expectancy. The widow set up a will by her husband in her favour and in order to contest this claim it was agreed between *A* and *B* that *A* should expend money for the litigation and that if *A* and *B* succeed in it, *B* should get from *A* an annual allowance, and should not claim his half of the estate. It was held that this was not a settlement of any dispute *between A* and *B*, that the agreement was merely one, either to transfer or to relinquish *B's* interest in favour of *A* and that this was void.(9) In the undermentioned case,(10) however, a Full Bench of the Allahabad High Court observed :

> " The *bare* transfer of such interest as he had, therefore was void. This however, does not necessarily conclude the matter. If the *transfer* was part and parcel of a family settlement or a compromise in a dispute between rival claimants to property it would not necessarily be invalid."

It is submitted that this observation cannot be supported on principle. If there is a *transfer* of an expectancy it will clearly be bad in whatever form it is sought to be made. A family arrangement by which each of the parties thereto merely admits and acknowledges the title of the others is not a "transfer" of any property(11) and if as part of the arrangement a reversioner whose claim is disputed abandons his claim, there is no *transfer* of any expectancy and it is on this ground that such arrangement though dealing with a *spes successionis* can be held good.

On the principle referred to in Note 3 a *contract* by a reversioner to transfer the property to which he may succeed in the future is also void. But an agreement to divide the property in a certain proportion when the estate falls is, it has been held in a number of cases,(12) to be good. A contrary view has been held in the undermentioned cases.(13)

An agreement *not* to divide *spes successionis* does not contravene the provisions of clause (a) of this section, but is otherwise not binding on the parties.(14)

If under a settlement an interest created is always ready from its commencement to end, to come into possession the moment the prior estate determines, it is a vested remainder and not mere *spes successionis*.(15) It has been held that the right

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9. 1937 Pat 280 (282) [AIR V 24] (DB).

10. 1939 All 689 (692) [AIR V 26] : ILR (1939) All 950 (FB).

11. 1914 P C 44 (45) [AIR V 1].
('74) 1 Ind App 157 (166) (PC).
1956 Trav-Co 217 (219) [A I R V 43 C 83] : I L R (1956) Trav-Co 277 (DB). (Muhammadan heir apparent renouncing his chance of succession as part of valid family settlement supported by consideration.)
1951 All 823 (824) [A I R V 38 C 202]. (There is no transfer at all in such cases.)
1951 All 522 (527) [AIR V 38 C 123] : ILR (1953) 1 All 437 (DB). (When an agreement decides an antecedent title to the estate, in the hands of the widow, the compromise is valid even though indirectly it affects the rights of a reversioner.)
('08) 31 Mad 474 (478) (DB).
[*See also* 1955 S C 481 (490) [A I R V 42 C 80] : 1955-2 S C R 22 : ILR (1955) 2 All 177. (Compromise or family arrangement is based on the assumption that there is an antecedent title of some sort in the parties and the agreement acknowledges and defines what that title is.)]

12. (1911) 33 All 414 (419) (DB). (I L R 8 Cal 138, Followed.)
1933 Pat 165 (173) [AIR V 20] (DB). (Agreement was before Transfer of Property Act — Not illegal.)
1915 Mad 1191 (1191) [AIR V 2] (DB).
('11) 33 All 457 (462) (DB). (Case was after the Transfer of Property Act—But 8 Cal 138 which was a case before the Act was followed.)
('07) 30 Mad 486 (492) (DB).
('82) 8 Cal 138 (145) (DB). (Case before Transfer of Property Act — According to principles of English law, such agreements were not illegal and these principles were applied to this country before the Act.)

13. 1919 Mad 937 (937) [AIR V 6] (DB).
[*See also* 1914 Mad 623 (623) [A I R V 1] (DB). (Question raised but not decided.)]

14. ('10) 34 Mad 527 (532) (DB).

15. 1927 Rang 165 (167) [A I R V 14] : 5 Rang 145 (DB).

which a female specfied in S. 8 (1) (d) of the Mysore Hindu Law Women's Rights Act has to a share in the joint family property is a vested right and not a mere expectancy or other contingent or possible right and is therefore transferable.(16)

It has been held that the right of the owner of a property under attachment for non-payment of revenue is a right in praesenti and not a mere *spes successionis* and therefore his agreement to transfer the property under attachment is not hit by the provisions of this section.(17)

As the principles underlying the rule which prohibits the transfer of the chance of an heir apparent succeeding to an estate are based on justice, equity and good conscience they would apply even in areas where the Act itself is not in force.(18)

See also Note 3.

5. "The chance of a relation obtaining a legacy." — The chance of a relation obtaining a legacy is also a mere possibility. It cannot under the provisions of clause (a) be transferred.(1) This is so even if the testator has agreed with the legatee that he would give him a legacy. The breach of the agreement may give the legatee a right to sue for damages, but will not give him any right or interest in the property itself so as to be capable of being transferred.(2)

6. "Any other mere possibility of a like nature." — There has been a difficulty in the interpretation of this phrase, by reason of the words 'of a like nature." It was held in the undermentioned case(1) by the High Court of Madras that the words "of a like nature" are merely an express statement of the general rule of *ejusdem generis* applicable in the interpretation of statutes, and that, therefore the possibility prohibited by the section must belong to the same category as the chance of an heir-apparent succeeding to an estate or the chance of a relation obtaining a legacy. The assignment of property which the transferor expects to obtain in the event of his succeeding in a suit which he has filed, was accordingly held not to be a transfer "of a mere possibility of a like nature" within the meaning of this clause.

The general trend of opinion is, however, that the phrase is not limited to possibilities depending on or arising out of succession or bequest but includes any other possibility depending on chance. In *Soloman* v. *Official Assignee*,(2) the question arose as to whether a mortgage of a :gratuity which under the City of Rangoon Municipal Act, 1922, the Corporation may in its discretion give to its officers, was prohibited by this clause. In holding that it was so prohibited Roberts, C. J., observed as follows:

> "Two kinds of chances are named, depending on *spes successionis* or expectation of succession. If the words 'of a like nature' were not included in the section, and it were enacted that 'any other mere possibility cannot be transferred,' such a possibility would have to be read as *ejusdem generis* with the expectation of succession. But the words 'of a like nature' have been included, and thus the Act has forbidden not only mere possibilities dependent on the hope of succession to the estate or part of an estate of a deceased person but all possibilities of a like nature. It was urged on behalf of the appellant that if the sub-section ended with the words 'any other mere possibility' this would cover every kind of chance, but that the words 'of a like nature' are words of limitation and show that the possibility must be one arising from

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16. ('48) 53 Mys H C R 278 (281) (DB).

17. 1955 Hyd 101 (104) (AIR V 42 C 25] ; ILR (1954) Hyd 822.

18. ('66) 1966 Raj L W 600 (603).

Section 6 — Note 5

1. ('06) 9 Oudh Cas 55 (62) (DB).

2. ('06) 9 Oudh Cas 55 (62) (DB).

Section 6 — Note 6

1. 1919 Mad 718 (726) [AIR V 6] (DB).

2. 1939 Rang 8 (9, 10) [A I R V 26] : 1938 Rang L R 542 (DB).

succession in order to fall within the sub-section. I cannot accept that view. It appears to me that not only is a transfer of the expectations of an heir or legatee forbidden, but that through the inclusion of the words 'of a like nature' the sub-section prohibits any transfer of a similar kind of possibility. It is not the circumstances in which the chance arises which sanction or forbid its transfer, but the inherent qualities of the chance itself.

"Some possibilities are not chances within the meaning of this sub-section. They do not depend on the good fortune of being entitled at a future date to receive an interest in or a right to property at the present unrestricted disposal of some other person. But, where they are so dependent they appear to me to be forbidden by the sub-section to be transferred."

The following have been held to be "mere possibilities of a like nature" within the meaning of clause (a) :

(1) The chance of a person deriving income in future from scavenging work which he expects to get, but which he has no right to insist on getting.(3)

(2) The chance which a party to litigation will be liable to pay to the other party if the litigation is decided in a particular way.(4)

(3) The chance of obtaining rent in respect of a future possible lease that may come into existence as a result of a renewal.(5)

(4) The chance of inalienable Karnam service inam lands being enfranchised in the name of the transferor.(6)

See also the undermentioned case.(6a)

There is a difference of opinion as to whether a right to offerings which future worshippers may give to a temple is a mere possibility of a like nature to the chances referred to in the clause, and cannot therefore be transferred. According to the High Courts of Calcutta(7) and Patna(7a) such a right is a mere possibility and cannot be transferred. But according to the High Courts of Allahabad,(8) Bombay(8a) and Lahore,(8b) the Chief Court of Oudh(9) and the Judicial Commissioner's Court of Nagpur,(10) it is not a mere possibility but is property capable of being transferred. The reason for this view is that though the *amount* of offerings may largely depend upon the number of votaries, their generosity and their charitable disposition, the fact that offerings large or small are *bound to be made* is a certainty and not a mere possibility.

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3. 1961 All 518 (519, 520) [A I R V 48 C 129]. (Scavenging rights — Birt Khakrobi — Right is not transferable and cannot be validly leased.)
1951 Madh B 120 (121) [AIR V 38 C 57].
1938 Mad 881 (882) [AIR V 25].

4. 1956 Mad 681 (682) [A I R V 43 C 217]. (Relinquishments by father of rights in family property to sons and grandsons—Latter undertaking to maintain him — Suit for past and future maintenance — *Held* that there was no assignable right before decree because there was only an expectancy of the Court decreeing the claim.)
('12) 15 Ind Cas 383 (384) (DB) (Mad). (Charge on the debt of Rs. 1000 which would become due on reversal of decree — Per Sundara Aiyar J.)

5. 1923 Mad 316 (316) [AIR V 10].

6. 1925 Mad 885 (886) [AIR V 12].

6a. ('81) 3 All 12 (14) (DB). (Right which vendor of immovable property has in purchase-money agreed to be paid on execution of conveyance is, so long as conveyance is not executed, a mere possibility and is not attachable under the Civil Procedure Code.)

7. 1916 Cal 269 (271) [AIR V 3]: 43 Cal 28 (DB) [*See also* ('02) 29 Cal 470 (472) (DB). (Not saleable under the Civil Procedure Code.)]

7a. 1916 Pat 62 (63) [AIR V 3] (DB).

8. 1928 All 721 (725) [A I R V 15] : 50 All 394 (DB). (If the right to receive offerings is independent of services of priestly nature it is transferable.)
1917 All 115 (116) [A I R V 4] : 39 All 196 (DB). (The right of Maha Brahmin to receive dues at funerals of Hindus is an existing right and a mortgage of such a right is not null and void.)

8a. 1927 Bom 143 (145) [AIR V 14] (DB).

8b. 1942 Lah 284 (285) [AIR V 29] : ILR (1943) Lah 780 (DB). (Right to share income of a fair held in connection with a Mandir — Right to receive offerings and right to receive emoluments attached to a priestly office, distinguished.)

9. 1937 Oudh 15 (16) [AIR V 24] : 12 Luck 358 (DB).
1919 Oudh 126 (127) [AIR V 6].

10. 1929 Nag 81 (82) [AIR V 16].

According to the Punjab Chief Court, a *birt jajmani* or the so-called right of *purohits* to receive offerings that may be made to them by *jajmans* is a mere *spes successionis*.(11)

A *contingent right* is, as has been seen in Notes on S. 5, property and not a mere possibility and is not prohibited from being the subject of transfer.(12).

Where property has been given as security, a charge is created on the property for the amount for which it is given as security. The surety has a proprietary interest in the surplus amount that may remain after payment of the charge, and such interest is not prohibited from being transferred by any of the clauses of this section.(13) The interest of a coparcener in a joint Hindu family is a vested interest and is not within clause (a).(14) So also any vested interest in property, though not in possession.(15)

7. Applicability of section 43 to transfers of expectations and possibilities. — Section 43 is based, as will be seen from the Notes on that section, partly on the English Common Law doctrine of "feeding a grant by estoppel,"(1) and partly on the equitable doctrine that equity will regard that as done which ought to be done. As has been seen in Note 3, there can be no estoppel against the express provisions of a statute. Nor can the equitable doctrine be applied so as to validate what is prohibited by statute on grounds of public policy.(1a) It follows that S. 43 cannot be applied so as to give effect to a transaction which is not permitted by clause (a) of this section.(2)

Where a transfer *purports* to be of a *spes successionis*, there cannot be any question of an erroneous representation that the transferor is "authorised" to transfer it; for the parties will be charged with the knowledge of the rule of law that a *spes successionis* cannot be transferred. Section 43 cannot, therefore, apply to such cases.(3)

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11. 1921 Lah 138 (138) [AIR V 8].
('11) 1911 Pun Re No. 96 (DB). (It cannot form the basis of declaratory decree under S. 42, Specific Relief Act.)
[*See also* 1942 Lah 284 (285, 286) [A I R V 29] : ILR (1943) Lah 780 (DB). (Where emoluments are attached to a priestly office in which case the holder has to render service of a personal nature as a consideration for the receipt of the offerings, they are not, in the absence of custom or usage to the contrary transferable.)]

12. See Section 5 Note 5.

13. 1930 All 225 (242) [AIR V 17] : 52 All 619 (FB).
('64) 1964 M P L J (Notes) 27.

14. 1942 Mad 97 (99) [AIR V 29] (DB).
1919 Pat 482 (484) [AIR V 6] (DB).
[*See also* 1921 Cal 202 (203) [AIR V 8] : 48 Cal 1059. (Sons have vested interest in the share allotted to her for maintenance in partition during the lifetime of their mother.)]
1947 Bom 185 (187) [A I R V 34 C 158] : I L R (1947) Bom 636. (Vested remainder in immovable property.)

15. †1929 Oudh 22 (24) [A I R V 16] : 4 Luck 185 (DB).
1918 All 115 (119, 120) [A I R V 5] : 40 All 692 (DB). (Adoption by widow — Agreement postponing son's estate during widow's life time — Interest of son is vested interest—Clause (a) does not apply.)
('69) 11 Suth W R 134 (134) (DB). (It is the practice of the Courts in this country to give effect to sales of property made by persons out of possession, and to recognize the title of the purchaser to maintain a suit.)
Also see S. 19, Note 8.

Section 6 — Note 7

1. 1925 Oudh 16 (18) [AIR V 12] (DB).
[*See also* ('30) 1930 Mad W N 1054 (1057).]

1a. ('07) 31 Bom 165 (172) (DB).

2. †1918 Mad 123 (126) [A I R V 5] : 41 Mad 418 (FB).
('30) 1930 Mad W N 1054 (1057).
1929 Oudh 185 (187) [A I R V 16] : 4 Luck 622 (DB). (An estoppel cannot have the effect of making void transfer valid.)
1917 Nag 215 (226) [A I R V 4] : 13 Nag L R 130 (FB).
1915 Mad 998 (1001) [A I R V 2] : 39 Mad 930 (DB).
('13) 19 Ind Cas 881 (882) (DB) (Mad).

3. 1938 Bom 228 (231) [AIR V 25] : ILR (1938) Bom 155 (DB).
('30) 1930 Mad W N 1054 (1057).
1917 Oudh 230 (231) [A I R V 4] : 20 Oudh Cas 155. (Mortgage of a reversionary interest is void and cannot be enforced though the transferor has acquired an estate in possession.)
†('07) 30 Mad 255 (262) (DB).
('07) 10 Oudh Cas 277 (279).

The same will be the case where, though the transfer *purports to be that of a present interest in property*, both the parties are aware that the transferor has only a *spes successionis*, for in such a case, the parties must necessarily be taken to have intended to transfer the chance, whatever may be the form in which the language of the document is couched.(4)

There had, however, arisen a conflict of opinion in cases where the transferor having in fact only a *spes successionis purports to transfer a present interest* in the property and the transferee is not aware of the defect of title. The conflict arose out of the illustration to S. 43 which runs as follows ;

> "A, a Hindu, who has separated from his father B, sells to C, three fields *x*, *y* and *z*, representing that A is authorised to transfer the same. Of these fields *z* does not belong to A, it having been retained by B on the partition; but on B's dying, A as his heir obtains *z*. C, not having rescinded the contract of sale, may require A to deliver *z* to him."

According to one view, clause (a) of this section applied to every case where the transferor has only *a spes successionis in fact*, whether or not he purports to transfer only the *spes* or a present interest in the property and whether or not the transferee has knowledge of the defect of title. The result according to this view is that in the case stated above, the transfer cannot, notwithstanding the illustration to S. 43, operate on any interest which the transferor may obtain later on in the property.(5-6)

A contrary view had been taken in the undermentioned cases,(7) namely that clause (a) of this section applies only where the transfer is intended in substance to be a transfer of a *spes* to the knowledge of both parties, and not where the transfer purports to be one of a present interest in property and the transferee is not aware of the defect of title. In the latter case S. 43 will apply and operate on any interest which the transferor may subsequently obtain in the property. There is no repugnancy between clause (a) and section 43.

It is submitted that the latter view seems to be sound on principle. It is a cardinal rule of interpretation of statutes that the various provisions in an Act must be harmoniously construed and not to make one provision derogate from another.(8)

[*See also* 1921 Cal 501 (505) [A I R V 8] : 48 Cal 536 (DB.)]

4. 1938 Bom 228 (231) [AIR V 25] : ILR (1938) Bom 155 (DB).
1935 All 244 (246) [AIR V 22] : 57 All 474 (DB).
1925 Oudh 16 (18) [AIR V 12] (DB).
[*See also* 1943 Oudh 196 (204) [A I R V 30] : 19 Luck 37 (DB). (Hindu widow alienating property to A, one of reversioners—A subsequently transferring the same to B—Transferee B aware of the title and interest of A and the possibility that the deed of alienation by widow was voidable — A not making any fraudulent or erroneous representation that he could sell the property as absolute owner—S. 43 held could not apply and no estoppel against A or his transferees arose.)
1919 Mad 798 (803) [A I R V 6] : 41 Mad 749 (DB). (Facts not clear but it appears that the parties were aware at the time of transfer that one of the transferors had only an expectancy.)]

5-6. 1929 Oudh 185 (187) [AIR V 16] : 4 Luck 622 (DB).
1928 Nag 262 (263) [AIR V 15].
[*See also* ('02) 29 Cal 355 (361) (DB). (Mortgage of property in which mortgagor has no present right but only a spes successionis — Mortgagee cannot even if earlier part of S. 43 applies avail of the benefit of that section as against a bona fide transferee for value from mortgagor).]

7. 1953 Mad 637 (639, 640) [AIR V 40 C 250] : ILR (1953) Mad 427 (FB). (1933 Mad 795 [AIR V 20], Overruled.)
1938 Bom 228 (231) [AIR V 25] : ILR (1938) Bom 155 (DB).
('37) 1937 Mad W N 416 (418).
1935 All 244 (246) [AIR V 22] : 57 All 474 (DB).
1931 Nag 51 (52) [AIR V 18] : 27 Nag L R 199.
1930 Mad 688 (690) [AIR V 17] : 53 Mad 750 (DB).
1929 Oudh 185(187) [AIR V 16]:4 Luck 622 (DB).
1920 All 34 (35) [AIR V 7] : 42 All 596 (DB). (Partition fair and not fraudulent — Mortgagee takes property allotted to mortgagor's share.)
1915 Mad 972 (974) [AIR V 2] (DB).
[*See also* 1930 All 786 (790) [AIR V 17] (DB). (Transferee is protected believing the title of the transferor under a document.)
1939 Pat 116 (117) [AIR V 26] (DB).

8. 1935 All 244 (246) [AIR V 22] : 57 All 474 153 Ind Cas 163 (DB). (Shaym Narain Misir v. Mangal Prasad Misir.)

Further S. 43 would be rendered practically useless if it be held to cover also case falling under clause (a) of this section. For whenever a person transfers property to another, which he erroneously represents to be his, it can always be said that he transfers a mere possibility (inasmuch as there may always be a hope that he might subsequently get the property in some way), and that S. 43 cannot be applied to the case as otherwise it would be giving effect to a transaction prohibited by law.(9)

The conflict has now been set at rest by the Supreme Court(10) upholding the latter view.

See also the undermentioned case taking a similar view.(11)

8. Clause (b) — Mere right of re-entry. — It will be seen in the Notes on S. 10 that a "condition" is a quality *annexed to the estate to which it relates.* A right of re-entry on breach of a condition subsequent(1) is thus annexed to the property affected by it. A party in whom there is no right to the property cannot have the right of re-entry on it.(2)

Under the English law, on the transfer by the lessor of lease-hold property, a condition of re-entry to which the lease is subject passes with the property, and the transferee can enforce such condition.(3) The same principle was applied in this country also in cases which arose before the Act(4) and in the undermentioned case(5) to which this Act did not apply. It would seem to be recognised by this Act also in S. 109. Under that section the transferee of leased property possesses, in the absence of a contract to the contrary, *all the rights of the lessor* as to the property transferred. In the case noted below(6) of the Bombay High Court, Mr. Justice Heaton was of opinion that a condition on breach of which the lessor was entitled to re-enter and which had been broken prior to the transfer, but in respect of which the notice required by S. 111, cl. (g) had not been given to the lessee, could be enforced by the transferee by virtue of S. 109 of the Act after giving the necessary notice. In this respect he agreed with Mr. Justice Shah who had decided the case in the first instance. Mr. Justice Beaman however, held that S. 109 had no application to the case, that after the condition was broken, the lessor had nothing more than a mere right to sue which he could not transfer. But he nevertheless held purporting to apply the English law, that the transferee could enforce such a condition. It is submitted that this view of Beaman, J., does

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9. 1962 S C 847 (850) [AIR V 49 C 119] : 1962 Supp (2) S C R 554. (To hold that transfers by persons who have only a spes successionis at the date of the transfer are not within the protection afforded by S. 43 would destroy its utility to a large extent.)
[*See* 1931 Nag 51 (52) [A I R V 18] : 27 Nag L R 199 : 130 I C 822. Bismilla v. Manulal Chabildas.

10. 1962 S C 847 (853) [AIR V 49 C 119] : 1962 Supp (2) S C R 554. (1933 Mad 795 [AIR V 20], Overruled, 1915 Mad 972 [AIR V 2], Approved, 1953 Mad 637 [AIR V 40] (FB), Affirmed.)

11. 1965 All 504 (506) [AIR V 52 C 140]. (1962 S C 847 [AIR V 49], Foll.)

Section 6 — Note 8

1. As to the meaning of the expression "condition subsequent," see S. 10 Note 5.

2. (1832) 149 E R 101 (102) : 2 C & J 232, Doe d Barney v. Adams.
(1900) 69 L J Q B 856 (859) : (1900) 2 Q B 535 : 83 L T 353 : 49 W R (Eng) 40, Matthews v. Usher. The mortgagor under an English mortgage of lease-hold property is not the legal owner of the property and cannot have a right of re-entry reserved to him on breach of condition by lessee.)
(1811) 128 E R 235 (235) : 4 Taunt 23. Deo d Barber v. Lawrence.
[*See also* (1832) 149 E R 283 (284) : 2 C & J 674 : 1 L J Ex 256. Deo d Barkar v. Goldsmith.]

3. 32 Henry VIII, C 34.
Law of Property Act, 1925 (15 Geo V, C 20).
(1846) 136 E R 274 (280) : 3 C B 685 : 16 L J C P 6 : 71 R R 459, Wright v. Burroughes. (Case under 32 Henry VIII, Ch. 34.)

4. ('87) 14 Cal 176 (183). (Principle of 32 Henry VIII, Ch. 34, Applied.)

5. ('92) 15 Mad 125 (126) (DB).

6. 1918 Bom 79 (80) [A I R V 5] : 43 Bom 28 (DB).

not seem to be correct. It is not clear why S. 109 has no application to the case. It is also not correct to say that a right of re-entry after the condition is broken is a mere right to *sue*. The remedy of the party having the right to re-enter is not confined merely to a *suit*. He can, without recourse to a suit, enter on the land in pursuance of his right.

If, then, from the above discussion, the position is that, on a transfer of lease-hold property, the transferee gets by virtue of S. 109 the benefit of the right of re-entry on breach of a condition, and the transferor himself, not being the owner after the transfer, cannot reserve to himself any such right of re-entry, the question arises as to the meaning of the words "cannot be transferred to any one *except the owner of the property* affected thereby." They obviously seem to imply that there may be cases where a person has a right of re-entry on property of which another person may also be an owner and the transfer is made to such person. Such a case would seem to be possible only in the following case : *A*, *B* and *C* are *joint* owners of a property each of them being entitled to it *per my et per tout*.(7) *A* leases a portion of the property to *X* with a condition for re-entry, and subsequently transfers the right of re-entry alone to *B* and *C*. In this case what is transferred is a mere right of re-entry and the persons to whom it is transferred are already owners of the whole property including the part leased.

9. Clause (c) — Easements. — An "easement", according to the English law, is a right which the owner or occupier of certain land possesses *as such for the beneficial enjoyment of that* land, to utilise certain land belonging to another in a particular manner not involving the taking of the natural produce of that land or of any part of its soil or a right to prevent the owner of land from utilising his land in a particular manner.(1) The Indian Easements Act, 1882, has practically adopted the English definition of easements but with the addition that a *profit a prendre* (i.e. the taking of the natural produce of that land) will also be an easement provided it is appurtenant or *annexed to a dominant tenement*.(2)

Whether the word "easement" in this Act has the meaning attributed to it by the English law or by the Easements Act, it is clear that it applies only to a right which an individual, by virtue of his being the owner or occupier of property *x* has, over property *y* belonging to another, and not to a right *in gross* i.e., a right exercisable by an individual on another's land, but irrespective of the ownership or occupation by that individual of any dominant heritage.(3) In other words it is a right attached to the

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7. That is 'by half and the whole.' Joint tenants are by reason of their each being the owner of the whole as well as of every part are said to be seised per my et per tout. (Wharton, Law Lexicon.)

Section 6 — Note 9

1. See AIR Commentaries on Limitation Act 4th (1964) Edition, S. 25.

2. See AIR Commontaries on Limitation Act 4th (1964), Edition, S. 25.
[*See also* ('99) 23 Bom 397 (402) (DB). (Profit a prendre is an easement.)]

3. See AIR Commentaries on Limitation 'Act 4th (1964) Edition, S. 25.
[*See also* (1862) 31 L J C P 226 (229) : 6 L T (N S) 356 : 12 C B (N S) 91 : 133 R R 295, Bailey v. Stephens. (To gather wood upon another's land—Right in gross.)
(1799) 4 R R 708 (714) : 8 T R 396, Benson v. Chester.
(1792) 2 R R 532 (534) : 5 T R 46, Scholes v. Hargreaves.
1926 All 538 (540) [AIR V 13]:48 All 560 (DB). (Right of passage which the public have over a road is not an easement.)
('84) 6 All 497 (501) (DB). (Customary right—Right to burn Holi on particular land is not easement.)
('95) 17 All 87 (91) (DB).
1926 All 130 (133) [AIR V 13] (DB). (Customary right of the Hindus of the city to perform 'Ramlila' drama on a certain land for 3 days during every year.)
('83) 6 All 39 (40) (DB). (Customary right unconnected with any dominant heritage.)].

dominant heritage and runs with it.(4) From its very nature it can be transferred only *along with the dominant heritage*(5) and not apart from it.(6) For if such a right were transferable apart from the property to which it is annexed, the transferee will have a *right in gross* and such a right, as has been seen already, will not be an easement. As has been observed in the undermentioned case(7) this clause does no more than express the rule that there cannot be an easement *in gross*.

The clause clearly contemplates the transfer of an easement *which has already been created*. There can obviously be no bar to the *creation* of the easement itself.(8)

10. Clause (d) — Interest restricted in its enjoyment. — The law recognises the creation of restricted as well as absolute interests in property. This clause recognises that an interest in property may be created which is restricted *in its enjoyment* to the owner of the right personally.(1) A right so restricted cannot obviously, be transferred to another, for *B* cannot enjoy a right which *ex hypothesi* is restricted in its enjoyment to *A*. The statutory non-transferability enacted in this clause is thus based on the *impossibility of transfer inherent in the nature of the right* sought to be transferred.(2)

The question whether an interest in property is restricted in its enjoyment will depend, where such right is created by an instrument, upon the intention of the parties creating such interest as gathered from the language of the instrument creating it and the surrounding circumstances.(3) A right of *residence* such as a Hindu widow's right to live in a portion of the family house is a restricted right and cannot be alienated under this clause.(4) A *heritable* right cannot be said to be one restricted in its enjoyment to the owner of the right personally.(5)

A right *based on the ownership* of property is not a restricted right within the

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4. ('11) 7 Nag L R 1 (1).

5. 1917 Low Bur 110 (112) [A I R V 4] : 9 Low Bur Rul 24.

6. ('12) 15 Ind Cas 278 (279) (DB) (Mad).

7. 1917 Cal 681 (685) [A I R V 4] (DB).

8. 1929 Mad 79 (79) [AIR V 16]. (Creation of easement is not a sale of any ownership in the land; creation is different from transfer.)
✠('09) 31 All 612 (620) (DB).

Section 6 Note 10

1. 1967 Guj 192 (195) [AIR V 54 C 36]. (Deed by father imposing on himself restrictions on his power of disposition over the share of the minor sons in the joint family property Restriction is one which can be recognised in law as valid — 1923 Bom 276 [AIR V 10] Rel. on.)
1964 Pat 214 (217) [AIR V 51 C 58] (DB).
1923 Bom 276 (277) [A I R V 10] : 47 Bom 597 (DB).

2. 1938 Cal 405 (408) [AIR V 25].
[*See also* (1900) 1900 Pun Re No. 8, p. 26 (29) : 1900 Pun L R No. 56, p. 139 (142). (Case not under Transfer of Property Act - Right to residence and maintenance.)]

3. 1964 Orissa 59 (62) [A I R V 51 C 25] : I L R (1963) Cut 830 (DB) (Partition between Hindu father and sons — Eldest son even though having no interest in family properties given some properties by way of maintenance of his family with no power of alienation - *Held* on a fair construction of the deed of partition that the only interest in the property given to the eldest son was the interest described in Cl. (d) of S. 6 of the Transfer of Property Act restricted in its enjoyment to him personally.)
1964 Pat 214 (217) [AIR V 51 C 58] (DB).
1958 Andh Pra 658 (660) [AIR V 45 C 191] : ILR (1958) Andh Pra 510 (DB).
1947 Pat 356 (358, 359) [A I R V 34 C 119] (DB). (Deed of transfer stating "under this deed of gift the said Khas got the right of possession of the zarapeshgi interest as also the right of realisation . . . . . and she has also got the right to appropriate the produce of the other aforesaid properties" it was held that only a restricted right of a life interest was given to K.)
1930 All 593 (594) [AIR V 17] : 52 All 705 (DB). (Deed transferring property to widow — No restriction on alienation — Widow can transfer for her period.)
1929 All 281 (285) [AIR V 16] : 51 All 612 (DB).
1924 Mad 22 (26) [AIR V 11] : 46 Mad 659 (FB).

4. 1935 Mad 848 (848) [AIR V 22].
('08) 31 Mad 500 (501) (DB).
(1900) 1900 Pun Re No. 8, p. 26 (29). (This results from the nature of the right itself.)
('93) 1893 All W N 199 (199) (DB).

5 See Note 13.
[*See also* 1932 All 686 (689) [AIR V 19] (DB). (Owner of heritable property without power of alienation has not a restricted right.)]

meaning of this clause.(6) Thus, the interest possessed by a grove-holder is not a restricted right and is not inalienable.(7)

The following rights have been held to be personal rights restricted in their enjoyment to the owner of the right and therefore inalienable :

(1) A right to *kharch-i-pandan* i.e., betel leaf expenses, even if the payment is a charge on property.(8)

(2) A right to *parwarish* granted for the lifetime of the grantee.(9)

The right to exercise the calling of a broker is not a personal right and is assignable in law.(10) The right of a *wargdar* to receive *moggu* allowance from *walawargdars* is not a right restricted personally to the *wargdar*.(11) "*Jajmani bahis*" (books containing names of pilgrims) are not property, the alienation of which is prohibited by this clause.(12) It has been held that a Gayawali gaddi is not an interest restricted in its enjoyment to the owner of the gaddi personally.(13)

11. Grant of property for maintenance. — Where an *interest in property* is transferred to a person in lieu of maintenance, the question may arise whether such interest is restricted in its enjoyment to the grantee personally. The mere fact that the grant is for maintenance does not necessarily show that the enjoyment of the properties is restricted to the grantee personally.(1) Whether it is a restricted interest or not, will, as has been seen in Note 10, depend upon the intention of the parties, gathered from the instrument of grant and the surrounding circumstances. If the intention is to create such a restricted right, the property cannot be transferred by the grantee.(1a) Otherwise, it can be transferred. In *Lachhmeswar Sahai* v. *Mt. Moti Rani Kunwar*,(2) decided by their Lordships of the Privy Council in 1939, the facts were as follows: A, a Hindu governed by the Mitakshara law, and his three sons B, C and D entered into a partition by which each got one-fourth share in certain properties. They covenanted that after the death of A, his share should remain in possession and occupation of his wife during her lifetime with life interest, that during her lifetime she would have a right to appropriate the rents and profits of the property *without any power of making any mortgage or other transfers of the property*. It was held by their Lordships that only a right restricted in its enjoyment to the widow personally was intended to be created by the document.(2a)

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6. 1958 Andh Pra 658 (660) [AIR V 45 C 191] : ILR (1958) Andh Pra 510 (DB).

1919 Mad 538 (539) [AIR V 6] (DB). ("The right of a member of a Malabar tarwad or of an Aliyasanthana family to maintenance is based on ownership of property, and not because he is entitled to be paid a fixed allowance by the karnavan who must be regarded as the true owner of the property.").

See Note 13.

7. 1930 All 377 (378) [AIR V 17].

8. 1929 All 281 (286) [A I R V 16] : 51 All 612 (DB).

9. 1952 All 662 (665) [AIR V 39] : ILR (1951) 1 All 740 (DB).

1927 Oudh 436 (438) [AIR V 14].

10. 1914 Cal 202 (203) [AIR V 1] (DB).

11. ('11) 10 Ind Cas 665 (665) (DB) (Mad).

12. ('07) 4 All L Jour 712 (712) (DB).

13. 1956 Pat 345 (349) [AIR V 43 C 87] (DB).

Section 6 — Note 11

1. 1915 Mad 296 (298) [A I R V 2] : 38 Mad 867 (DB). (Maintenance may be derived out of the property without enjoying the property personally.)

1a. 1964 Orissa 59 (62) [AIR V 51 C 25] : I L R (1963) Cut 830 (DB).

1947 Pat 356 (358, 359) [A I R V 34 C 119] (DB).

2. 1939 P C 157 (159) [AIR V 26] : I L R (1939) Kar P C 274.

2a [*See also* 1946 Pat 55 (58) [AIR V 33 C 17]. (Compromise petition giving possession to widow in lieu of her maintenance with condition against alienation—Instrument did not involve 'transfer,' but only admitted a restricted interest such as that of the enjoyment of the usufruct only which was not alienable under S. 6.)]

1926 Rang 186 (187) [AIR V 13]. (A gift of rents for the life of the grantee without power of alienation was held to fall within clause (d).)

The view taken broadly in some cases(3) that where property is transferred to a Hindu widow for maintenance, the transfer by such widow of the property is not prohibited by clause (d) does not appear to be correct. Nor is the view, taken in the undermentioned case(4) that whenever an interest in property is assigned to a person by way of maintenance, such interest is inalienable, correct.

12. **Right of pre-emption.**—It has been held that a right of pre-emption is a purely personal right and cannot be transferred.(1) Even if a decree is obtained for pre-emption, it has been held that such a decree cannot be transferred.(2) A contrary view is however taken by a Full Bench of the Allahabad High Court in the undermentioned case.(2a) According to the Chief Court of Oudh,(3) where the pre-emptor *transfers his property* and along with it a right of pre-emption, such right passes as an incident of the property and can be enforced by the transferee. A similar view has been expressed in the undermentioned case.(4) In *Audh Behari* v. *Gajadhar*(5) their Lordships of the Supreme Court have held that a right of pre-emption, though it does not create an interest in the property itself, is not a mere personal right but it attaches to the property. Hence the decisions holding that the right is personal must be held to be not good law.

13. **Clause (dd) — Right to future maintenance.** — In its primary sense a "right to future maintenance" means the right of a person to receive from another boarding, lodging, clothing and other necessaries of life.(1)

Before the introduction of clause (dd) by the amending Act XX of 1929, the question whether such rights were assignable was decided by reference to clause (d) of this section and to clause (n) of S. 60 (i) of the Civil P. C., under which a right to future maintenance is declared not to be attachable in execution of decrees. There was a conflict of decisions on this point. In one class of cases it was held that such a right arising under the personal law of the parties and not resting on the ownership of any property, was not "property" at all and was, therefore, inalienable.(2) In

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1923 Bom 276 (278, 280) [A I R V 10] : 47 Bom 597 (DB).
('05) 15 Mad L Jour 7 (9) (DB).

3. 1958 Andh Pra 658 (660) [AIR V 45 C 191] : ILR (1958) Andh Pra 510 (DB).
1916 Cal 644 (645) [AIR V 3] (DB).
1938 Cal 405 (408) [AIR V 25]. (The decision assumes that when property is transferred in lieu of maintenance, there is no impossibility of transfer inherent in the nature of the right — This is not correct for if the transfer is intended to restrict the enjoyment to the owner, there is such an impossibility — This aspect was not considered in the case.)
1932 All 662 (663) [AIR V 19] : 54 All 366 (DB). [*See also* 1947 Pat 404 (405, 406) [AIR V 34 C 134] : 25 Pat 705 (DB). (The crucial question is whether the right is a *bare* right of maintenance or whether the person entitled to the right is the holder of an *estate* in property in lieu of maintenance.).
See also N. 13.

4. ('93) 15 All 371 (372).

Section 6 — Note 12

1. ('11) 36 Bom 139 (143) (DB).
('01) 1901 Pun Re No. 95, p. 320 (323, 324).
('94) 1894 Pun Re No. 139, p. 522 (530) (DB).

2. 1922 Lah 300 (301) [AIR V 9] : 2 Lah 282 (DB).

2a. 1956 All 1 (3, 4) (Pr 10) [AIR V 43 C 1]: ILR (1956) 1 All 143 (FB). (Right of pre-emption is personal so long as a decree is not passed in his favour. 7 All 107 must be held to be overruled.)

3. 1922 Oudh 289 (296) [AIR V 9]: 25 Oudh Cas 319 (DB).

4. (47) 1947 Marwar L R (Civ) 65 (67) (DB).

5. 1954 S C 417 (422) [AIR V 41 C 102].

Section 6 — Note 13

1. 1957 All 94 (101) [A I R V 44 C 23] : I L R (1954) 2 All 556 (DB). ('Maintenance and support" in S. 3, Mussalman Wakf Validating Act —Scope is wider than the phrase 'maintenance allowance" in S. 60 Civil P. C. and S. 6 T. P. Act.)
1944 All 91 (93) [AIR V 31]: I L R (1944) All 216 (DB). (A right to receive allowance is not strictly speaking a right to maintenance although an allowance may be paid in lieu of maintenance.)
1935 Mad 815 (815) [AIR V 22].

2. ('80) 5 Bom 99 (103).

another class of cases it was held that such a right was one restricted in its enjoyment to the owner personally and was consequently not assignable under clause (d).(3) In a third class of cases it was held that where in pursuance and recognition of such right, the amount of the maintenance had been ascertained by *agreement* of parties or by *decree* of Court, the case was outside clause (d) and the right was assignable.(4) In a fourth class of cases it was held that even a right granted by agreement of parties without any pre-existing liability under the personal law of the parties for maintenance, was not alienable if the intention of the parties creating the right was to give only a personal right restricted in its enjoyment to the owner personally.(5)

This clause has been inserted in the Act with the object of settling the conflict of views.(5aa) In introducing this clause the Special Committee observed as follows:

"Section 6, which enumerates property of different kinds which cannot be transferred, includes in clause (d) an interest in property restricted in its enjoyment to the owner personally. A right to receive maintenance is a personal right, although any particular property or the income thereof may be charged with it. It is in accordance with public policy that these rights which are generally created for the maintenance or personal enjoyment of a qualified owner, e.g., a Hindu female, ought to be inalienable; but in some cases it has been held that if the amount of maintenance is fixed by an agreement or by a decree, it can be assigned (ILR 5 Bom 99, 38 Cal 13). Although an agreement or a decree would make such right definite, it is nevertheless a right created for the personal benefit of the qualified owner and should not be alienable. Section 60 of the Code of Civil Procedure, 1908, which protects such right from the process of a civil Court does not make any exception in the case of maintenance fixed by agreement or decree. The above reasoning, however, does not apply to arrears of maintenance which have accrued due. To make the position clear, we suggest that the following clause should be inserted as clause (dd)."

The words "in whatsoever manner arising" appear to include cases where a right to future maintenance may arise under an agreement of parties independent of any pre-existing right to such maintenance arising under the personal law of the parties.(5a) It has, however, been held by the High Court of Patna that clause (dd) does not apply unless the right to maintenance is traceable to a pre-existing right to such maintenance under the personal law of the parties.(6) It is submitted that this view does not appear to be correct on principle. The word 'maintenance" itself imports only a *personal* right to be maintained and a *personal* enjoyment of the right.(7) Consequently, it ought to make no difference, so far as alienability of the right is concerned, whether such right arises under the personal law of the parties, or is created for the first time by agreement of parties or by a decree of Court(7a).

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3. 1924 Mad 22(25) [AIR V 11]:46 Mad 659(FB). [*See also* (1900) 1900 Pun Re No. 8, p. 26 (29). (1865) 3 Suth W R Misc 16 (16) (DB).

4. 1928 Mad 713 (716) [AIR V 15] (FB) (Decree.)
† '11. 38 Cal 13 (22) (DB). (Do.)
[*See also* 1935 Mad 815 (815) [AIR V 22].
See however ('71) 15 Suth W R 188 (189) (DB). (Right of maintenance allowed by decree cannot be attached.)]

5 † ('10) 7 Ind Cas 80 (85) (DB) (Cal). (Case under the Civil Procedure Code, S. 60 — Allowance to married daughter for maintenance — Inalienable.)
[*See* 1917 Mad 79(82) [AIR V 4]:40 Mad 302(DB).]
5aa. [*See* 1957 Andh Pra 215 (218, 220) [A I R V 44 C 75]: I L R (1955) Andhra 370 (DB). (S. 60 (1) (n) Civil P. C. and S. 6 (dd) T. P. Act were enacted for a limited purpose. They were intended to protect maintenance-holders against themselves and to see that they are not deprived of their livelihood.)]

5a. 1944 All 91 (94) [AIR V 31]: ILR (1944) All 216 (DB). (The right of maintenance mentioned in the clause is not a right which accrues merely under some personal law.)

6. 1939 Pat 506 (509) [AIR V 26].
[*See also* 1936 Pat 527 (530) [AIR V 23]. (Maintenance is referable to a duty to maintain on the one hand and right to be maintained on the other— A right to an allowance granted by waqf, to a person to whom the grantor had no duty to maintain is not maintenance.)]

7. ('99) 9 Mad L Jour 113 (115) (FB). (Per Subrahmania Aiyar, J.)
1937 Oudh 420 (421) [AIR V 24]: 13 Luck 35 (DB).
1936 Oudh 76 (79) [AIR V 13] (DB).
1935 Nag 133 (135) [AIR V 22]: 31 Nag L R 239. (Impartible estate — Specific share of profits allotted to juniors in lieu of maintenance.)
[*See also* 1953 Mad 202 (204) [AIR V 40 C 68]: ILR (1953) Mad 527.]

7a. 1952 Pat 78 (80) [AIR V 39]: 30 Pat 1146

Although, as seen above, the right of maintenance mentioned in this clause is not a right which accrues merely under some personal law, there must still be a right of maintenance if the provisions of the clause are to apply. Thus, where the trustees under a will who are directed to pay a certain monthly allowance to a certain person, are under no obligation to maintain that person under the terms of the will, no question of right to future maintenance arises and consequently this clause will not apply.(7b)

A right to an allowance not intended to be restricted in its enjoyment to the owner of the right personally cannot be called a "right to maintenance" at all even though such allowance is used or stated to be for the maintenance of the owner of the right. Thus, a *heritable* right to an allowance cannot be said to be restricted in its enjoyment to the grantee personally and is not a right to future maintenance.(8) A *babuana* grant of an allowance for the maintenance of the grantee heritable by the grantee's heirs is not a right to future maintenance and is not inalienable.(9) Where A transfers property to B and in consideration thereof B makes an allowance of an annuity to A, such allowance which is heritable is not a right to future maintenance.(10) In the undermentioned case,(11) decided with reference to cl. (d) though after the introduction of cl. (dd), A transferred certain property to B and B undertook to make a certain allowance to A. It was assumed that this was a right to "maintenance" but it was held that as such right was not in pursuance of any pre-existing right to

(DB). (Gift of entire property with obligation on donee to pay a monthly sum to donor as maintenance for life of donor.)
1942 Cal 241 (243) [A I R V 29] (DB). (Person disinherited by his father but given monthly maintenance allowance by will of his father — It is right to maintenance and monies not accrued due cannot be transferred.)
1942 Oudh 410 (411) [AIR V 29] : 18 Luck 147 (DB).
[*See* 1941 Mad 507 (508) [AIR V 28] : I L R (1941) Mad 567 (DB). (Daughter's right to maintenance under agreement or decree was assumed to fall under clause (dd), but there was no transfer in the case tho only question being whether such right was "property" — It was held that such right was "property".)]

7b. 1944 All 91 (94) [AIR V 31] : ILR (1944) All 216 (DB).

8. 1957 Andh Pra 215 (220) [AIR V 44 C 75] : ILR (1955) Andhra 370 (DB). (Provisions of S. 60 (1) (n) Civil P. C. and S. 6 (dd) of T. P. Act do not apply to cases where heritable and transferable interests such as annuities are created in favour of third parties.)
1920 Cal 746 751) [AIR V 7] (DB).
†('10) 7 Ind Cas 80 (85) (DB) (Cal). (Hereditary right is not a personal right — Pomeroy on *Remedies and Remedial Rights*, S. 147, relied upon.)
[*See* 1944 All 91 (93) [AIR V 31] : ILR (1944) All 216 (DB). (But it cannot be deduced from the fact that heritable right cannot be a right to maintenance, that a right which is not heritable must necessarily be a right to maintenance.)]

9. ('09) 36 Cal 943 (952) : 36 Ind App 176 (PC).

('08) 12 Cal W N 966 (968) (DB). (May be inalienable if the custom is proved to the effect.)
('06) 33 Cal 1158 (1161) (DB).
('05) 32 Cal 683 (689) (DB).
('02) 6 Cal W N 796 (799) (DB)

10. ('99) 9 Mad L Jour 113 (115) (FB). (Otherwise it would be a trick to avoid creditors.)
1942 Oudh 410 (411) [AIR V 29] : 18 Luck 147 (DB). (A transferring property to B under hiba-bil-ewaz in consideration of his receiving monthly allowance which was not transferable except to B and his heirs.)
1928 Mad 1201 (1204) [AIR V 15] : 52 Mad 465 (DB). (Settlor reserving allowance to himself from trust property — Such allowance is transferable interest.)
('28) 110 Ind Cas 403 (403) (DB) (Mad). (Grant of annuity charged on immovable property.)
1919 Cal 822 (823) [AIR V 6] (DB). (Under an arrangement with the brothers of her husband a widow got an annuity.)
1919 Nag 62 (63) [AIR V 6]. (Sale by A to B— B undertaking to make an allowance to A and his heirs.)
('06) 10 Cal W N 1102 (1104). (Annuity by will is not a right to future maintenance.)
('01) 23 All 164 (165) (DB). (Sale by A to B— Granting an annuity to A.)
('84) 10 Cal 521 (522) (DB). (A heritable right to receive a monthly allowance derived from a person's deceased wife, to whom it was assigned in lieu of her share of landed property, is not a mere right to maintenance.)
[*See also* 1957 Andh Pra 215 (220) [AIR V 44 C 75] : I L R (1955) Andh Pra 370 (DB). (S. 6 (dd) not applicable where heritable and transferable interests such as annuities are created in favour of third persons.)]

11. 1935 Mad 815 (816) [AIR V 22].

maintenance under the personal law of the parties, the right was assignable. This reasoning, as has been shown already, is not correct, though the actual decision itself is supportable on the ground that the right was not one for "maintenance" at all. In *Shanmuga Rajeswara* v. *Chidambaram Chettiar*,(12) a Raja granted certain property to B as trustee upon trust to pay him (the Raja) a certain allowance per month explaining in the settlement that it was for the purpose of making provision for his maintenance. Their Lordships of the Privy Council held that this was not a restricted interest within the meaning of cl. (d) (which was applicable to the case), "whatever difficulty might arise upon the newer clause which uses the phrase 'a right to future maintenance in whatsoever manner arising, secured or determined." It is submitted that even the new clause will apply only if the right is one for *maintenance* and this necessarily means, as has been seen before, a restricted interest or a personal right and not such a right as the one dealt with by the Privy Council in the above case.

A right to an allowance *resting on the ownership of property* is not a mere "right of maintenance" and is not inalienable.(13) Thus, where a heritable *khorposh* grant to appropriate the income of certain villages by way of maintenance was given by the proprietor of an impartible *raj*, it was held that it was not a case of a right to future maintenance within cl. (dd) and that the clause only applies to a *bare* incorporeal and personal right of future maintenance.(13a)

A right of beneficiaries under a wakf deed to allowance specially spoken of as 'Kharch parwarish' and 'parwarish' with words "gujara ke vaste," was held to be a right to receive a certain amount of money periodically during their lifetime for purposes of maintenance and was merely a right to future maintenance.(13b) Giving up of a right to get enhanced future maintenance is as bad as an alienation of a right to future maintenance.(13bb)

A right to *arrears* of maintenance is of course not within this clause.(14)

Prohibition against assignability under this clause, must be read in the light of the provisions of O. 33, R. 10 of the Civil P. C. Thus a Receiver can be appointed at the instance of the Government in respect of the decree for future maintenance in order to realise the court-fee payable to them under the decree.(15)

14. Clause (dd) is not retrospective.—It has been held in the undermentioned case(1) that cl. (dd) is not retrospective in operation. In *Shanmuga Rajeshwara* v. *Chidambaram Chettiar*,(2) where a transfer was made in 1896 of certain rights to

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12. 1938 P C 123 (126) [AIR V 25] : 32 Sind L R 448 : ILR (1938) Mad 646.

13. 1935 Nag 133 (135) [AIR V 22] : 31 Nag L R 239.

13a. 1947 Pat 404 (405, 406) [AIR V 34 C 134]: 25 Pat 705 (DB).

13b. 1952 All 662 (665) :[AIR V 39] : ILR (1951) 1 All 740 (DB).

13bb. ('61) 65 Cal W N 1115 (1117).

14. 1955 Mad 165 (169) [AIR V 42 C 41] : ILR (1955) Mad 1122 (DB). (After the preliminary partition decree has declared the right of the widow to receive maintenance her claim has ripened into a decree and it cannot be a right to future maintenance.)
1950 Orissa 220 (221) [AIR V 37 C 40] (DB).
('87) 11 Bom 528 (532) (DB).
[*See also* ('66) 6 Suth W R Misc 64 (64) (DB).]

See the Special Committee Report referred to above.

1944 All 212 (213) [AIR V 31] : ILR (1944) All 299 (DB). (Allowance in consideration for the relinquishment of a right of maintenance — Devise by will of amount accrued due — *Held* that there could be no question of any transfer of any future maintenance because there was no right of maintenance after grantees' death —Grantee could bequeath a money which had already accrued to her.)

15. 1950 Orissa 220 (224) [AIR V 37 C 40] (DB).

Section 6 — Note 14

1. 1936 Pat 527 (529) [AIR V 23].

2. 1938 P C 123 (126) [AIR V 25] : 32 Sind L R 448 : ILR (1938) Mad 646.

allowances created in 1895, their Lordships of the Privy Council observed that the validity of the transfer must be judged by reference to cl. (d) and not to cl. (dd). But though prior *transfers* are not affected, the clause applies to a right to future maintenance whether created prior to the enactment of the clause or afterwards.(3)

15. Transfer of restricted right opposed to public policy.—The Report of the Special Committee shows that cls. (d) and (dd) have been introduced on grounds of public policy. This is also the view expressed in the undermentioned cases.(1) In the case noted below(2) the Rangoon High Court held that where a mortgage of a restricted right had been made, even a money decree could not be given to the mortgagee. In a subsequent case(3) however, the same Court held that a transfer by way of mortgage in contravention of cl. (d) was not unlawful as being opposed to public policy and therefore a money decree could be given. In a Calcutta case(4) it was observed that the clause is not based upon notions of public policy. It is submitted that these last mentioned views, namely that the clauses did not rest on notions of public policy, are not correct.

16. Clause (e)—Mere right to sue.—In England choses in action were not assignable *at law*, but with one exception, were assignable in *equity*. The exception was a bare or naked right of action, and the ground of the exception was that a transfer of such a right was likely to lead to maintenance or gambling in litigation.(1)

Before the year 1900, the expression "actionable claim" was defined in S. 3 of the Act and the definition was practically the same as the "chose in action" in English law and included even mere rights to sue. The exception referred to above was enacted in a somewhat limited form in cl. (e)(2) which ran as follows:

> "(e) a mere right to sue for compensation for a fraud or for harm illegally caused cannot be transferred"

It was consequently possible to argue that even a mere right to sue can be transferred as an actionable claim provided it is not a mere right to sue for *compensation* for a tort. Act II of 1900 amended both the definition of the words "actionable claim" and cl. (e). The words "actionable claim" were limited to mean claims to debts and to beneficial

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3. 1947 Pat 404 (407) [AIR V 34 C 134] : 25 Pat 705 (DB). (Per Ray J. — The clause is intended to interdict transfer of properties answering the description of a right to future maintenance, irrespective of the time when the right accrued.)

Section 6 — Note 15

1. 1926 Rang 186 (187) [AIR V 13]. (Mortgage of life interest in certain rents—Interest created for provisions of sons—Mortgage invalid.)

†1917 Mad 79 (80) [AIR V 4] : 40 Mad 302 (DB). (Future maintenance.)

2. 1926 Rang 186 (187) [AIR V 13].

3. 1927 Rang 157 (158) [AIR V 14] (DB).

4. 1938 Cal 405 (408) [AIR V 25]. (Non-transferability here depends upon inherent nature of right.)

Section 6 — Note 16

1. 1957 Andh Pra 190 (193) [AIR V 44 C 67] : I L R (1957) Andh Pra 215 (FB). 1916 Mad 473 (1) [AIR V 3], Overruled.)

1925 Sind 72 (75) [AIR V 12].

1921 Cal 795 (797, 798) [AIR V 8] (DB). (Citing Glegg v. Bramley, 81 L J K B 1081.)

(1912) 81 L J K B 1081 (1090) : (1912) 3 K B 474 : 106 L T 825, Glegg v. Bromley.

(1913) 82 L J Ch 1 (6, 8) : (1913) 1 Ch 98 : 107 L T 593, Defries v. Milne. (Action for waste—Action in Tort.)

(1867) 15 W R (Eng) 214 (215) : LR 2 Ch App 164 : 15 L T 403, De Hoghton v. Money. (The right to complain of a fraud is not marketable commodity.)

(1835) 160 E R 196 (202) : 1 Y & C Ex 481 : 41 R R 322, Prosser v. Edmonds.

(1920) 89 L J K B 369 (375, 378) : (1920) 1 K B 399 : 122 L T 361, Ellis v. Torrington.

(1920) 89 L J K B 819 (826, 827) : (1920) 2 K B 106 : 123 L T 105, Cole v. Kelly.

(1905) 75 L J K B 329 (332) : (1905) 2 K B 364 : 93 L T 499 : 54 W R (Eng) 17, Fitzroy v. Cave.

(1883) 52 L J Q B 454 (458, 461) : 11 Q B D 1 : 31 W R (Eng) 792, Bradlawgh v. Newdegate.

2. 1924 Pat 551 (552, 553) [A I R V 11] : 3 Pat 575 (DB). (Mesne profits.)

interests in moveable property not in the possession of the claimant and the words "for compensation for fraud or for harm illegally caused" were omitted from cl. (e). The result is that a "mere right to sue" of whatever nature cannot be transferred in law.(3) The prohibition is based firstly, on grounds of public policy, though the English law as to champerty and maintenance is not as such applicable to this country(4) and secondly, on the ground that a mere right to sue is not "property" at all, but merely a title to get future property.(5) It has been held that making over of property by a person who lays a claim to such property to another person who is prepared to pay the costs of the litigation regarding the property does not amount to a transfer of a mere right to sue but amounts to a transfer of property.(5a) The words "to sue" merely mean to make a legal claim or take legal proceeding in a Court of law and not necessarily the institution of a suit by the presentation of a *plaint* as provided by the Code of Civil Procedure.(6)

The limitation as to transferability imposed by this clause is confined to contractual transactions and does not, in any way, affect a transfer by operation of law by statute or otherwise.(6a)

A "mere right to sue" means a right to sue "*unconnected with the ownership of any property*"(7) i. e., unconnected with a right *in existence*.(8) Thus, a right to unliquidated damages for the breach of a contract or for tort is unconnected with the ownership of any existing property inasmuch as the future possible award of damages is not existing property. The right to such damages is, therefore, a "mere right to sue" and cannot be transferred.(9) The right of a reversioner during the lifetime of a

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3. See cases cited in foot-notes (9), (10) and (10a).
[*See also* 1951 Pat 415 (417) [A I R V 38 C 107] (DB). (The words "right to sue" do not connote the same thing as the words "actionable claim.")
('19) 17 All L Jour 837 (840) (DB). (The purchaser at an execution of a mere right to sue for recovery of a debt due cannot sue for the debt.)

4. ('08) 35 Cal 420 (426, 427): 35 Ind App 48 (PC).

5. ('71) 14 Moo Ind App 40 (49) (PC). (Claim under a future award is uncertain and hence cannot be attached.)

5a. [*See also* 1927 Nag 405 (406) [A I R V 14]. (Assignment of right, obtainable under a decree even before it is passed, is valid. 1924 P C 162 [AIR V 11], Foll.)
1925 Oudh 71 (72) [AIR V 12].
('10) 14 Cal W N 191 (198). (Sale of share of claim with respect to property in consideration of seller agreeing to supply funds to carry on suit for recovery of possession of the property.)]

6. ('05) 7 Bom L R 138 (141).

6a. 1966 Mad 26 (28) [A I R V 53 C 11] : I.L R (1966) 1 Mad 182 (DB).
1959 Cal 352 (353) [AIR V 46 C 98] : ILR (1960) 1 Cal 615 (DB). (Transfer of a right to sue for damages for breach of contract by an order of Court—*Held*, that the transfer being by an order of a Court of competent jurisdiction, S. 6 (e) of the T. P. Act had no application having regard to S. 2 (d) of the T. P. Act.)

7. ('62) I L R (1962) Madh Pra 210 (216) (DB). (Right to recover damages for trespass on land is a mere right to sue.)
1949 All 433 (437) [AIR V 36 C 164] : ILR (1949) All 746 (DB). (A right to sue for damages arising out of an antecedent right which is a right of property is not a mere right to sue for damages. But if it arises out of an antecedent right which is not a right of property then it may be termed a "mere right to sue for damages.")
1924 Oudh 62 (64) [AIR V 11].
[*See also* 1927 Rang 39 (40) [AIR V 14]. (Person who had already transferred property beneficially transferring rents not due to him.)]

8. See Notes on Section 5.

9.† ('09) 36 Cal 345 (352) (FB).
1949 All 433 (437) [AIR V 36 C 164] : ILR (1949) All 746 (DB). (Where the Official Receiver has become entitled to the benefits of a contract between the insolvent and another person, the right to sue for damages for the breach of the contract in his hands will not be a mere right to sue for damages — AIR 1937 All 317 held obiter and distinguished.)
('57) 100 Cal L J 70 (72).
1952 Raj 187 (188) [A I R V 39] : I L R (1952) 2 Raj 5.
1947 Cal 200 (204) [AIR V 34 C 59] : ILR (1944) 2 Cal 542 (DB).
1941 Mad 389 (390) [A I R V 28] (DB). (Right to conduct suit cannot be assigned — Benefit obtainable under decree in such suit may however be assigned.)

Hindu widow to set aside an alienation made by her of her husband's properties has nothing to do with the ownership of the property by the reversioner, and is a mere right to sue.(10) Similarly, the right to profits of property that may accrue due in the future is a mere right to sue.(10a) But where *property* is transferred, a right to sue for possession or other reliefs which is *incidental* to the ownership of such property is also transferred and such transfer cannot be said to be the transfer of a mere right to sue.(11) Thus, a debt or actionable claim is

1939 Oudh 196 (202) [A I R V 26] (DB). (The transfer of all rights by vendor in property in respect of which damages are claimed is a valid transfer.)
1937 All 317 (320) [A I R V 24] (DB). (Right to sue for damages for breach of contract of the insolvent cannot pass to Receiver.)
1937 Lah 934 (935) [AIR V 24] (DB). (Right to sue agent for damages, unconnected with any ownership of any property.)
1935 Nag 135 (137) [AIR V 22] : 31 Nag L R 235.
† 1935 Nag 2 (4) [AIR V 22] : 31 Nag L R 142.
1934 Nag 78 (81) [AIR V 21] : 30 Nag L R 213.
1934 Oudh 240 (244) [A I R V 21] : 10 Luck 26 (DB). (Assignment by vendor for recovery of unpaid balance is one for ascertained sum.)
†1933 All 642 (647) [AIR V 20] : 55 All 814 (DB).
1933 Nag 6 (9) [AIR V 20] : 28 Nag L R 340. (A suit for damages for breach of agreement is a personal right and cannot vest in Official Receiver.)
† 1930 Nag 22 (23) [A I R V 17]. (Right for damages for breach of forward delivery contract of cotton seeds is not transferable.)
1930 Oudh 88 (89) [A I R V 17] : 5 Luck 547 (DB). (Claim for interest by way of damages is not actionable claim.)
1927 All 621 (623) [A I R V 14] : 50 All 82 (DB). (Even a claim for earnest money after breach is one for damages and hence not transferable.)
1925 Lah 548 (549) [AIR V 12].
1923 Bom 403 (403) [A I R V 10] : 47 Bom 719 (DB).
1923 Nag 67 (68) [AIR V 10].
1921 Cal 795 (798) [A I R V 8] (DB). (Though assignment is made after institution of suit for recovering damages.)
1917 Oudh 221 (230) [AIR V 4] (DB).
1916 Mad 595 (596) [AIR V 3] : 38 Mad 138 (DB).
1914 Lah 510 (511) [AIR V 1] : 1914 Pun Re No. 106 (DB).
('11) 10 Ind Cas 320 (321) (DB) (Mad).
('10) 6 Ind Cas 290 (292) (DB) (Mad).
('82) 5 All 207 (208 (DB). (A mere right to sue for damages for injury caused by a wrongful act, such as a wrongful attachment, cannot be made the subject of sale or assignment.)
('74) 6 N W P H C R 95 (97) (DB).
[*See also* 1959 Ker 163 (165) [AIR V 46 C 56] (DB). (Usufructuary mortgage — Mortgagee keeping portion of consideration and agreeing to pay interest on it till it was paid —Right to recover interest is not a mere right to sue.)]
[See however 1925 Sind 18 (20) [AIR V 12] : 17 Sind L R 334 (DB). (Whether a claim for damages arising out of a breach of contract or in tort is mere right to sue under S. 6 of the Transfer of Property Act and as such it cannot be assigned is a question to be decided on the facts of each case.)]

10. 1927 Lah 147 (147) [AIR V 14]. (A deed of relinquishment by reversioner of Hindu widow in favour of her mortgagee.)

10a. 1939 Nag 97 (98) [AIR V 26] : ILR (1940) Nag 37 (DB).

11. 1963 Pat 160 (163) [AIR V 50 C 48] (DB). (Mining lease—Lessee having right of indemnity in respect of payment of way-leave rent as legal incident of lease-hold property and not as personal covenant — Transfer of leasehold property—Right to indemnity also passes to transferee.)
1959 Cal 352 (354) [AIR V 46 C 98] : ILR (1960) 1 Cal 615 (DB). (A transfer of an undertaking together with the right to sue for damages for breach of contract appertaining to the undertaking is not a transfer of a mere right to sue and as such does not infringe the provisions of S. 6 (e) of the Transfer of Property Act.)
1957 Andh Pra 190 (196) [AIR V 44 C 67] : I L R (1957) Andh Pra 215 (FB). (Mere right to sue does not cover the right to recover profits which is supported by the alienation of the property out of which the profits arose and is sufficiently connected with the enjoyment of the property —AIR 1916 Mad 473 (1), Dissented from.)
('57) 100 Cal L Jour 70(72). (Where the property along with the incidental right to sue is assigned such an assignment does not come within the mischief of S. 6, Cl. (e).)
1953 Cal 321 (321) [AIR V 40 C 112].
('42) 1942 Nag L Jour 30 (32, 33). (Right to village-profits incidental to proprietary interest.)
1939 Oudh 196 (202) [AIR V 26] (DB).
('75) 23 Suth W R 163 (163) (DB). (Transfer by a person of a property within period of limitation from dispossession is valid.)
[*See* 1921 Cal 795 (798) [AIR V 8] (DB).]
[*See also* 1955 Pat 155 (157) [A I R V 42 C 33] : 1954 B L J R 364 (DB). (Right to sue for wrong relating to property is not a personal right —Death of plaintiff or defendant — Right to sue in the case of death of former and liability to be sued in the case of death of latter is transmitted to their personal representative.)
1951 Mad 817 (821) [AIR V 38 C 283]. (Alienation by guardian — Ex-minor transferring his interest — It is not transfer of mere right to sue but interest in property, though suit may be necessary to set aside alienation.)
1950 Mad 560 (560) [A I R V 37 C 234]. (Joint family consisting of minors — Alienation by

property(12) and where such debt or actionable claim is transferred, such transfer carries with it, the right to sue for the recovery of such debt or claim. It cannot be said in such a case that what is transferred is a mere right to sue.(12a) The transfer of a right to a sum of money *actually due* is a transfer of a right to *property* and not to a mere right to sue.(13) The fact that the exact amount due is to be ascertained on the taking of accounts is immaterial.(14) Where property is transferred and along with it

manager—Minor transferring his right in property after majority — Transferee entitled to sue for partition and recovery of possession without setting aside sale by manager — AIR 1939 Cal 460, Dissented from.)
1949 All 433 (437) [A I R V 36 C 164] : I L R (1949) All 746 (DB). (Benefits arising out of contract with insolvent vest in Official Receiver—He can sue for damages for breach of contract.)
1931 Cal 131 (131) [A I R V 18] : 58 Cal 128. (Immovable property belonging to minor sold by certified guardian with permission of District Judge — Sale does not purport to transfer a mere right to sue.)
('06) 2 Nag L R 17 (20) ("It is not unlawful to purchase an interest in property though adverse claims exist which make litigation necessary for realising that interest. But it is unlawful to purchase an interest merely for the purposes of litigation. In other words the sale of an interest to which a right to sue is incident is good but the sale of a mere right to sue is bad.")]
[But see ('76) 25 Suth W R 48 (48) (DB). Vendor out of possession — Purchaser can sue for possession.)]

12. See Section 8.
1955 S C 590 (596) [A I R V 42 C 92] : I L R (1955) Punj 1127 : 1955-2 S C R 402. (Debt is a chose in action and is heritable and assignable.)
1963 Assam 11 (15) [AIR V 50 C 4] : ILR (1962) 14 Assam 484 (DB). (There may be a case where a debt secured by hypothecation of movable property may not be actionable claim but the debt dissociated from the security is a property under S. 6.)
1952 Raj 187 (188) [A I R V 39] : I L R (1952) 2 Raj 5. (The right to recover money paid under a contract of sale on failure of the seller to hand over possession of the property is not a mere right to sue — It is a claim for an ascertained amount and can be transferred as an actionable claim. 1943 Nag 332 [AIR V 30], Foll.)
1943 Nag 332 (332) [AIR V 30] : ILR (1943) Nag 762. (Buyer's right under S. 61. Sale of Goods Act, to recover the money paid on failure of consideration, is an actionable claim and not a mere right to sue.)
1942 Mad 209 (210) [AIR V 29]. (Sale of land set aside at instance of real owner as vendor had no title — Right to vendee to recover purchase-money is actionable claim.)
1941 Nag 8 (10) [A I R V 28] : I L R (1941) Nag 164 (DB). (A dower debt is an actionable claim.)

12a. 1948 Mad 458 (459) [AIR V 35 C 220]. (A entrusts his property to B as agent for management. B fails to pay to A the balance due after rendering accounts. A assigns his claim against B to C. The Assignment is of property and not of a mere right to sue, and is valid. It may be that the assignee might have to institute a suit. But that would not make the assignment any the less an assignment of property.)
1942 Mad 209 (210) [AIR V 29].
1937 All 470 (471) [AIR V 24] : I L R (1937) All 666 (DB).
†1931 Nag 89 (90) [A I R V 18] : 27 Nag L R 288. (Right to recover unpaid purchase-money.)
†1926 Mad 417 (419) [AIR V 13] (DB). (Ascertained and definite sum of money.)
1926 Mad 978 (979) [A I R V 13]. (A right to receive money for license given to another to remove bark from licensor's trees is transferable.)
1923 Mad 177 (178) [A I R V 10]. (Arrears of rent.)
1922 Mad 397 (397) [AIR V 9]. (A right to contribution not being merely a right to sue for damages is assignable.)
1916 Mad 974 (975) [A I R V 3]. (Assignment of rent due.)
('13) 24 Mad L J 313 (315) (DB). (Claim to recover sums due from agent.)
[But see 1935 All 342 (343) [AIR V 22]. (Transfer of right to receive theka rent for future period is not invalid.)
1917 Nag 61 (62) [A I R V 4]. (Transfer of accrued profits is a mere right to sue—Submitted wrong.)]

13. 1932 P C 32 (33, 34) [A I R V 19] : 59 Ind App 41 : 11 Pat 266. (Lessor's assignee can recover from lessee the lease money due to lessor.)
1960 Cal 378 (379) [AIR V 47 C 95] : ILR (1960) 1 Cal 745 (DB). (Right to recover arrears of rent is a property.)
1953 Nag 335 (337) [A I R V 40 C 144] : ILR (1953) Nag 764.
†1926 Nag 396 (398) [AIR V 13] : 22 Nag L R 108 (DB). (Right of co-sharer to village profits collected by lambardar and due to the co-sharer.)

14. 1955 Mad 165 (169) [AIR V 42 C 41] : ILR (1955) Mad 1122 (DB). (After the preliminary partition decree has declared the right of the widow to receive maintenance her claim has ripened into a decree and can no longer be regarded as a mere right to sue.)
1927 Rang 165 (168) [A I R V 14] : 5 Rang 145 (DB). (A present right under a settlement to enjoy income of the property divided among

the right to sue on covenants attached to such property,(15) or for recovery of profits accrued due on such property,(16) it cannot be said that a "mere right to sue" has been transferred. It has been held that the right of a cholgeni tenant to claim the value of improvements of the property by reason of his having put up additional buildings on the land is a right annexed to the ownerehip of the land and is transferable and the purchaser of the tenant's right acquires a right to claim the value of improvements.(16a).

It has been held that the right to prosecute the suit filed by a minor by way of repudiating the transaction of alienation by his guardian is a vested right in the nature of a right to property and not a mere right to sue.(16b)

An assignment by the assured, on being indemnified by the insurer, of all his rights and remedies in favour of the latter is not a mere right to sue for damages.(16c)

It has been held by their Lordships of the Privy Council that sales, by an Official Assignee, of lands in possession of aliences from an insolvent, as being part of the insolvent's estate are, in substance if not in form, nothing more than sales of the right to litigate and assuming that they do not come within the prohibition in this clause are open to the same objections and are to be deprecated.(16d)

Whether property is transferred or only a mere right to sue or whether a right to sue is incidental to the property transferred in any particular case depends upon the facts of the case.(17) Where certain *mokhasa* inam lands were sold along with "all kinds of rights relating to the *mokhasa*" and the transferee sued for damages the agent of the transferor for negligence in management, it was held by the High Court of Madras that the right to damages if it was transferred at all, was merely a right to sue, apparently on the ground that such a right was not incidental to the property transferred.(18)

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heirs is more than a mere right to sue and can be transferred by the beneficiary and the mere fact that the actual amount due could not be determined without further enquiry is not fatal to the beneficiary's power of transfer.)

1926 Nag 396 (398) [AIR V 13] : 22 Nag L R 108 (DB). (A I R 1924 Cal 1047, Dissented from. Transfer of village-profits is valid though accounts have to be gone into.)

15. 1929 Pat 245 (247) [AIR V 16] : 8 Pat 776 (DB).

16. 1957 Andh Pra 190 (193) [AIR V 44 C 67] : ILR (1957) Andh Pra 215 (FB).

1947 All 110 (113) [AIR V 34 C 58] : ILR (1947) All 321 (DB). (Owner of property conveying it to vendee—Vendee in consideration of transfer undertaking to conduct limitation in respect of that property at his own expense and to pay fifty per cent. of value of property to vendor after successful termination of litigation — Vendor held transferred property itself and not mere right to institute suit.)

('42) 1942 Nag L Jour 30 (31). (Village-profits.)

1933 Mad 710 (710) [AIR V 20]. (Past profits are not mesne profits.)

16a. ('55) 1955-1 Mad L Jour 448 (449).

16b. 1959 Pat 278 (282) [A I R V 46 C 75] : 37 Pat 1078 (DB).

16c. 1965 Mad 159 (161) [A I R V 52 C 53] : ILR (1964) 2 Mad 901.

1964 Cal 31 (32) [A I R V 51 C 4] (DB). (Short delivery of goods consigned by Railway — Consignee getting money from insurer and assigning to him all rights against Railway— Such assignment is not hit by S. 6 (e).)

('62) 1962 Cal L J 140 (143) (DB). (Consignee assigning all rights against railway to insurer after getting value of goods short-delivered.)

[*See also* ('57) (1957) 2 All E R 266 (273), Re Miller v. Gibb & Co. Ltd. (Policy of indemnity — Insurance company agreeing to indemnify exporter against loss in respect of goods exported outside by reason of certain specified causes — Policy also containing clause giving right to Insurance Company to require exporter to transfer his rights under any contract in respect of which indemnity has been paid for purposes of their effecting recoveries — Claim under policy satisfied by insurance company— Insurance Company is entitled to exercise the right to demand — Equitable assignment under claim form which is supported by consideration.)]

16d. 1927 P C 252 (254) [AIR V 14] : 55 Ind App 7 : 6 Rang 29.

17. 1925 Sind 159 (162) [AIR V 12] : 19 Sind L R 286.

1925 Oudh 299 (300) [AIR V 12] (DB).

18. 1916 Mad 595 (596) [A I R V 3] : 38 Mad 138 (DB).

17. Rights under a contract. — The *burden* or the *liability* under an *executory* contract cannot, as a general principle, be assigned.(1) In England the *benefit* of an executory contract or a *chose in action* could not be assigned *at law* but could be assigned in equity under certain circumstances.(2) It could be assigned where the consideration has been fully executed by the assignor and it can make no difference to the person on whom the obligation lies to which of two persons he is to discharge it.(3) It could not be assigned where there are *mutual obligations* still to be enforced and it is impossible to say that the whole consideration has been executed. The reason is that in such a case the transfer of the benefit will involve a transfer of the burden of the contract also, and no party to a contract can be compelled to accept performance of the obligation thereunder from any person other than the one with whom he contracted.(4) This is all the more so where the performance of the obligation involves personal qualifications in the contractee.(5)

The same principles apply in this country also. In *Nathu Gangaram* v. *Hansraj*,(6) Russel, J., relying upon the observations of Sale, J., in *Jaffer Mehar Ali* v. *Budge-Budge Jute Mills Co.*,(7) held that the benefit of a contract, i. e., the beneficial right or interest of a party under a contract and the right to sue to recover the benefits created thereby are assignable provided that (a) the benefit is not coupled with any liability or obligation that the assignor is bound to discharge and (b) the contract has not been induced by personal qualifications or considerations as regards the parties to it. See also the undermentioned cases to the same effect.(7a) These principles find expression to a certain extent in this Act. As has been in S. 3,(8) the benefit of a contract in respect of *moveable property* not in possession of the claimant is a beneficial interest in moveable property and is an *actionable claim* transferable under S. 130.(8a) But such transfer is subject to all liabilities and equities to which transferor was subject

Section 6 — Note 17

1. Anson, Law of Contracts, 18th Edn., Page 271.

(1902) 71 L J K B 712 (715) : (1902) 2 K B 427 : 87 L T 304. Torkington v. Magee.

2. Anson, Law of Contracts, 18th Edn., Pages 237, et seq.

3. (1902) 2 K B 660 (668), Tolhurst v. Associated Portland Cement Manufacturers (1900), Ltd. (Voluntary liquidation of assignor Company does not put an end to its contracts assigned.)

4. (1902) 2 K B 660 (669), Tolkhurst v. Associated Portland Cement Manufacturers (1900), Ltd.

5. (1902) 2 K B 660 (669), Tolhurst v. Associated Portland Cement Manufacturers (1900), Ltd.

(1906) 75 L J K B 873 (876) : (1906) 2 K B 604, Kemp v. Baerselman.

6. ('07) 9 Bom L R 114 (118).:

7. ('06) 33 Cal 702 (708).

7a. 1949 All 433 (437) [AIR V 36 C 164] : I L R (1949) All 746 (DB). (Benefits arising of out contract with insolvent vesting in Official Receiver —He can sue for damages for breach of contract.)

1943 Nag 266 (268) [A I R V 30] : I L R (1943) Nag 643. (Agreement for sale or purchase of immovable property can be assigned.)

1938 Cal 377 (381) [AIR V 25] : 62 Cal 510 (DB). (Right of indemnity of agent under contract of partnership which involves an obligation to account cannot be transferred.)

1934 All 960 (962) [AIR V 21]. (There is nothing in the Indian Law which prohibits the assignment of rights and benefits under a contract.)

1918 Nag 160 (161) [A I R V 5]. (A contract of service being a personal contract is not assignable before breach.)

('06) 29 Mad 307 (309) (DB). (A covenant that the vendee will resell property to the vendor if the vendor should pay back the purchase-money by a certain day without obtaining the amount from others and by the vendor's own earnings, is a personal covenant and is not assignable,)

('03) 5 Bom L R 373 (376). (Executory contract.)

('94) 17 Mad 168 (174) (DB). (Contract based on personal considerations, the assignment of it as an executory contract was invalid without the consent of the defendants.)

('90) 17 Cal 115 (121) (DB). (*Held*, that a personal contract is not assignable as to give the assignee a right to use upon it in his own name as for breach of a contract.)

8. See Section 3 Note 24.

8a. 1936 Cal 260 (261) [AIR V 23](DB). (Transfer of arrears of maintenance due under a contract.)

1934 All 960 (962) [AIR V 21]. (Right to claim benefit of contract for purchase of goods.)

at the date of the transfer. This, it is conceived, will prevent the transferee getting any right where the benefit of the contract is coupled with any liability that the transferor is bound to discharge or the contract has been induced by personal qualifications of the transferor.(9)

This Act is, however, not exhaustive and does not deal with the transferability of the benefits of *all* kinds of contracts. In respect of contracts not dealt with by this Act, provi sions of the Specific Relief Act, 1963, may be looked to. Under S. 15 (b) of that Act the specific performance of a contract may be obtained by the representative in interest :

> "provided that, where the learning, skill, solvency or any personal quality of such party is a material ingredient in the contract, or where the contract provides that his interest shall not be assigned, his representative in interest or his principal shall not be entitled to specific performance of the contract, unless such party has already performed his part of the contract."

In other words the clause merely enacts the general principle that the benefit of a contract can be enforced by a transferee thereof except where such benefit is coupled with the obligation in the performance of which the personal qualification of the transferor is a material ingredient. In *Venkateswara* v. *Raman*(10) the right of transferee of the benefit of a contract to sell *immovable property* to sue for specific performance of the contract came into question. It was held that the benefit of such a contract, though not conferred by the provisions of the Transfer of Property Act, was assignable. Coutts Trotter, J. after referring to the terms of S. 23 (b) of the Specific Relief Act, 1877, (corresponding to S. 15 (b) of the Act of 1963) observed :

> "This seems to me to contemplate clearly that all contracts capable of specific performance may be assigned except the prohibited class."(10a)

The above discussion relates to the transferability of the benefit of a contract *before* its breach. *After* the breach of a contract by a party thereto, the other party is entitled either (a) to claim damages for the breach or (b) to claim specific performance in cases where such performance can be granted. It has been seen in Note 16 that the right to such damages, where they are unliquidated and unascertainable, is a mere right to sue and is not transferable. But a right to specific performance of the contract where such can be claimed has been held not to be a mere right to sue but one capable of assignment.(11) An agreement to lend money, for instance, is not capable of specific performance and on breach of such an agreement, the right of the promisee is only to claim damages and this right cannot be transferred.(12) But where the borrower has

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9. *See* :(1902) 71 L J K B 712 (715) : (1902) 2 K B 427 : 87 L T 304, Torkington v. Magee.

10. 1917 Mad 358 (361) [AIR V 4] (DB).

10a. *See also* 1928 P C 174 (176) [A I R V 15] : 55 Ind App 243 : 51 Mad 533. (Contract to resell it to vendor at a particular time is assignable.)
1965 Mad 506 (507, 508) [A I R V 52 C 184] : I L R (1965) 2 Mad 20 (DB). (Contract of sale of property containing option to re-purchase reserved to vendor — Option when exercised is assignable in absence of contract to contrary.)
1962 Mad 378 (379) [AIR V 49 C 102]. (A right to reconveyance of land is a property, and not a mere right to sue : Such right can be assigned and the assignee can enforce the same. 1928 P C 174 [AIR V 15] *Foll.*)
1954 Assam 95 (96) [AIR V 41 C 35]. (Contract of re-purchase can be validly assigned—A I R 1928 P C 174, *Rel. on.*)
1934 Nag 268 (270) [A I R V 21] : 31 Nag L R 203. (Executory contract for future sale of immovable property.)
Also see Section 3, Note 24.
1926 Mad 699 (700) [AIR V 13] : 49 Mad 387 (DB). (A right under an executory contract to exercise an option at a certain future date to obtain a re-conveyance of immovable property at a certain price is assignable.)
1924 Lah 709 (711) [AIR V 11] (DB).

11. 1929 Mad 251 (252) [AIR V 16] (DB).
†1921 Mad 498 (502) [AIR V 8] (DB).
1917 Mad 358 (361) [AIR V 4] (DB). (Case of assignment of executory contract—But observations are general.)

12. 1925 Mad 62(62) [A I R V 12] : 47 Mad 698.
See Notes on Section 8.

done his part of the contract as where a mortgagor under a usufructuary mortgage places the mortgagee in possession, but the mortgagee has failed to discharge the consideration, the borrower can compel the lender to perform his part of the contract and consequently the claim of the borrower can be assigned.(13)

Policy of marine insurance, assignment of.

Under Ss. 130A and 135A inserted by the Transfer of Property (Amendment) Act, 1944, a policy of marine insurance may be transferred whether before or after loss. Under the above sections, this clause has been expressly made inapplicable to such transfers.

An assignment to be effective must transfer and convey to the assignee all the interests of the assignor under the contract so that if the debtor pays the assignee he would get a complete and proper discharge.(14)

See also the undermentioned case.(15)

18. Right to mesne profits. — A claim to mesne profits is only a claim to damages for a particular kind of tort, namely wrongful possession of property. A right to such profits, independent of any interest in the property in respect of which the profits are claimed, is therefore a mere right to sue and cannot be transferred.(1)

There is a difference of opinion, however, as to a right to mesne profits transferred along with the property itself. On the one hand it has been held that the right to sue for mesne profits in such cases is a right *incidental to the property* transferred and is, therefore, not a *mere* right to sue.(2) On the other hand, it was held that the right could not be said to be incidental to the property and was, therefore, a "mere" right to sue even if the property itself was transferred to the transferee of the right.(3) In the undermentioned cases(4) it was held that a right to sue for mesne profits, even if transferred along with the property, was a mere right to sue, but the distinction between rights incidental to the property and rights which are not so incidental was not adverted to. It is submitted that the first mentioned view is to be preferred to the other views expressed.

19. Rights under the decree. — A right under a decree is not a mere right to sue and can be transferred even though the claim made in the suit was one which

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13. 1936 Lah 196 (198) [AIR V 23] (DB).

14. 1954 Bom 167 (170) [AIR V 41 C 45] : ILR (1954) Bom 424 (DB).

15. (1909-1910) 5 Low Bur R 144 (145) (DB). (The law does not recognize anything like sale of "a right to delivery.")

Section 6 — Note 18

1. ('65) 69 Pun L R 759 (761).
1951 Trav-Co 180 (181) [AIR V 38 C 67].
1916 Mad 974 (975) [AIR V 3]. (Rent due is not mesne profits.)
†1916 Mad 473 (473) [AIR V 3] : 38 Mad 308 (DB).
('98) 2 Cal W N 43 (44) (DB).
('83) 9 Cal 695 (697) (DB).

2. 1957 Andh Pra 190 (193) [A I R V 44 C 67] : ILR (1957) Andh Pra 215 (FB).
1953 Cal 321 (321) [AIR V 40 C 112].
1951 Trav-Co 180 (181) [AIR V 38 C 67] (DB).
†1932 Bom 478 (480) [AIR V 19] : 56 Bom 403.
† 1929 Cal 719 (721) [AIR V 16] (DB).
1929 All 63 (63) [AIR V 16].
1921 Mad 56 (57) [A I R V 8] : 44 Mad 539 (DB). (1916 Mad 473 [A I R V 3] and 1920 Pat 538 [AIR V 7], Dissented from; 20 Ind Cas 685 and 1916 Pat 10 [AIR V 3], Followed.)
1916 Mad 517 (519) [AIR V 3]. (Premises transferred — Right to occupation rent for use and occupation also passes.)
[*See also* ('25) 91 Ind Cas 474 (475) (DB) (Cal). (Bengal Land Revenue Sales Act — Purchaser of property under auction sale is entitled to sue for mesne profits.)]

3. 1924 Pat 551 (553) [A I R V 11] : 3 Pat 575 (DB).
1927 Mad 817 (818) [AIR V 14].

4. 1930 All 593 (595) [A I R V 17] : 52 All 705 (DB). (Claim for use and occupation against one who ceased to be lessee is like damages due to owner.)
1926 Cal 428 (430) [AIR V 13] (DB).
1917 Mad 735 (736) [AIR V 4] (DB).

could not have been transferred on the ground of its being a mere right to sue.(1) Thus, where a claim to mesne profits(2) or maintenance(2a) has been decreed, the decree can be assigned and this would be so even though the actual amount is left to be ascertained in future proceedings in the same suit.(3) So also an assignment of a right to apply under a mortgage decree for personal decree for portion not paid off by sale proceeds is not invalid.(4) Where an instalment mortgage decree has been passed against the original mortgagor under S. 34 of the Bengal Money-lenders Act the rights to redeem by instalments is not personal to the original mortgagor himself but can be validly assigned.(5)

20. Right to impeach prior transactions. — In *Dickinson* v. *Burrell*,(1) James Dickinson transferred his property to Edens under circumstances which would have entitled him (i.e., Dickinson) to set aside the transfer. He subsequently transferred the property to *AB*, and *AB* sued to set aside the transfer in favour of Edens. It was held that what was transferred to *AB* was not a bare right to sue. Romily, M. R., observed as follows:

> "I am of opinion that the right to sue was incidental to the property, and would have passed with it. If James Dickinson, after the sale to Edens, had sold his interest in the property to some one else by deed which recited that the prior sale was void, but that Dickinson was not inclined himself to take steps to set it aside, it could not be doubted that the purchaser would have been entitled to take proceedings to set the prior deed aside. If James Dickinson had on the contrary merely conveyed the bare right to set the transaction aside, without granting all his estate and the interest in the property, then certainly the assignee could not have maintained the suit."

In *Bhagwat Dayal Singh* v. *Debi Dayal Sahu*,(2) a Hindu widow entitled to a woman's estate under the Hindu law had sold the properties to *X* under circumstances not binding on the reversioners. After the death of the widow the reversioners sold the property to *Y* who sued along with reversioners to recover possession from *X* of the said properties on the ground that the sale in favour of *X* by the widow was not binding on the reversioners. It was held by their Lordships of the Privy Council that the suit would lie.(3) The question that was raised before their Lordships was, however, whether the transfer to *Y* was void as being champertous, and not whether it was a mere right to sue.

Dickinson's case has been followed by the Calcutta High Court in the undermentioned case.(4) The facts of the case were that an *ex parte* decree for rent was passed and a sale in execution thereof was held. After the sale was confirmed, the defendants transferred the property to *X* who applied to set aside the decree and sale on the ground of fraud. It was held following *Dickinson's case* that where a transfer is made of

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Section 6 — Note 19

1. 1956 Mad 681 (682) [AIR V 43 C 217].
1935 Cal 751 (752) [A I R V 22] (DB). (Right to take accounts is not assignable but preliminary decree directing accounts to be made is assignable.)

2. 1941 Mad 480 (480) [AIR V 28] (DB).
† 1921 Mad 56 (57) [AIR V 8] : 44 Mad 539 (DB).
1916 Pat 10 (11) [AIR V 3] (DB).
† 1914 Cal 60 (63) [AIR V 1] (DB).

2a. 1956 Mad 681 (682) [AIR V 43 C 217].
1955 Mad 165 (168, 169, 170) [A I R V 42 C 41] : ILR (1955) Mad 1122 (DB).

3. 1921 Mad 56 (57) [AIR V 8] : 44 Mad 539.

4. 1951 Mad 628 (629) [AIR V 38 C 180] (DB).

5. 1954 Cal 129 (131) [AIR V 41 C 48].

Section 6 — Note 20

1. (1866) 35 L J Ch 371 (375) : 1 Eq 337 : 14 W R (Eng) 412 : 147 R R 147. (Prosser v. Edmonds, (1834-42) 160 E R 196, Distinguished.)

2. ('08) 35 Cal 420 (426, 427) (PC).

3. *The following cases must be taken to be not good law in view of the Privy Council decision:*
1917 Lah 222 (223) [A I R V 4]. (31 Cal 433 which was reversed by the Privy Council was relied upon.)
('09) 1909 Pun Re No. 67, p. 219 (220) (DB).

4. 1933 Cal 454 (456) [AIR V 20] (DB).

the property which is the subject-matter of the litigation it cannot be said that a mere right to sue is transferred. See also the undermentioned case(5) holding a similar view. But a contrary view was taken by the Patna High Court in the undermentioned case.(5a) The facts were that A made a gift to *X* and subsequently conveyed the property to *Y* who sued to avoid the gift on the ground of fraud, etc. It was held, without any discussion of the question, that the option to sue to avoid the gift, which belonged to the transferor could not be transferred. It is submitted that the view is not correct.

Where a guardian alienates the property of a minor, and the latter after attaining majority purports to transfer the property to *X*, there is a conflict of views as to whether *X* can sue to set aside the alienation by the guardian.

According to one view he cannot, for the reason that what was purported to be transferred to *X* was only a *mere right to sue* which could not be transferred.(6) In the undermentioned case(7) it was held that he can, provided the transfer had been made within three years of the transferor's attaining majority. A third view is that where the minor did not sue to set aside the sale by the guardian within the time limited by Art. 44 of the Limitation Act (1908) (corresponding to Art. 60 of Limitation Act, 1963) he cannot thereafter transfer any property to a third person, for his right to property is extinguished at the expiry of the limitation period; the attempted transfer in such a case will be a mere right to sue.(8) In *Hanmantappa* v. *Dandappa Fakirappa*,(9) where the manager of a joint Hindu family consisting of himself and his minor brothers alienated the family properties and the minor after attaining majority transferred his right in the property to *X* who sued to set aside the alienation, it was held that the transfer by the quondam minor was not a mere right to sue. In a similar case, it was held by the Madras High Court that the transferee could sue for partition and recovery of possession without setting aside the prior sale by the manager.(10)

It is submitted that the view that where a minor, who has attained majority, purports to transfer the property itself for consideration to a third person before his right to set aside the alienation of such property by his guardian is barred by limitation, the transfer is only of a mere right to sue is not sound on principle.

Where a suit was brought by the transferee from the guardian against the assignee of the property from the minor it was held by the Kerala High Court that whether the right of the minor to sue to set aside the transfer was a mere right to sue which could not be transferred or whether it was otherwise, the assignee was entitled to put the transferee to proof that the transfer was binding on the property in his hands because thereby he was not seeking any relief by suit but was only resisting the suit of the transferee.(11).

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5. 1924 Oudh 62 (64) [AIR V 11]. (Transfer of a property—Owner's title in dispute—Valid.)
[*See also* 1940 Mad 16 (16) [A I R V 27]. (Benamidar releasing right in property claimed by him in suit in favour of real purchaser—Latter can file appeal against dismissal of benamidar's suit.— Release deed does not offend against S. 6 (e) of Transfer of Property Act.)]

5a. 1922 Pat 514(525) [AIR V 9]: 2 Pat 52 (DB).

6 1939 Cal 460 (464) [AIR V 26].
1933 Bom 42 (45) [AIR V 20] (DB).

7. 1929 Mad 313 (314) [AIR V 16] (DB).
[*See also* 1951 Mad 817 (821) [AIR V 38 C 283]. (Alienation by guardian — Ex-minor transferring his interest—It is not transfer of mere right to sue but interest in property, though suit may be necessary to set aside alienation.)]

8. 1939 Oudh 122 (125) [AIR V 26].
† 1929 Mad 313 (319) [AIR V 16] (DB).

9. 1934 Bom 234 (239) [AIR V 21] (DB).

10. 1950 Mad 560 (560) [AIR V 37 C 234]. (AIR 1939 Cal 460, Dissented from.)

11. 1957 Kerala 96 (97) [A I R V 44 C 54].

21. Right to sue for accounts. — The right to a sum of money which *has become due* is a right to a debt or actionable claim and is "property."(1) A right to a sum of money which has not, but which *may*, become due in the future is a mere right to sue.(2) A sum of money may have become due even though the *exact* amount due may have to be ascertained only by taking accounts.(3) Thus, where the manager of common property *has collected* the profits of the property, the right of the co-sharers to a share of such profits is a right to sue for a sum of money which has become due, though the exact amount due has to be ascertained only by taking accounts. In such cases where the right to the money which has become due is itself transferred, and along with it, the right to sue for accounts, the latter right cannot, on the principles stated in Note 16, be said to be a mere right to sue.(4) On the same principle it has been held that the transfer of a right to monies due by an agent to the principal after taking accounts, is not a mere transfer of a right to sue for accounts.(5) See also the undermentioned cases(6) to a similar effect. A contrary view has been held, namely, that a right to sue for accounts even though transferred as part of the transfer of the property itself to which such account has reference is a mere right to sue.(7) It is submitted that this view is not correct.

22. Right in partnership. — A partner's share in the partnership business is property and can be validly transferred. The right to sue for accounts is an incident of such property and a transferee of the partner's interest in the partnership gets also a right to sue for accounts. It cannot be said that what the transferee gets under his transfer is only a mere right to sue.(1)

(Assignee held entitled to call mortgagee to proof that mortgage was binding.)

Section 6 — Note 21

1. See Note 16 and Section 3, Note 22.

2. See Note 16.

[*See also* ('08) 30 All 246 (247) (DB). (Profits that may become due in future are not attachable.)]

3. 1934 Mad 461 (463) [AIR V 21]: 57 Mad 1074 (DB).

4. 1953 Nag 335 (337) [AIR V 40 C 144]: I L R (1953) Nag 764. (Where the income from Jagir has been received by the certificate holder the sharers can validly assign their right to take accounts of their share in the income of the Jagir.)

1933 Mad 710 (710) [AIR V 20].

1927 Nag 377 (377) [AIR V 14].

†1926 Nag 396 (398) [AIR V 13]: 22 Nag L R 108 (DB). (AIR 1924 Cal 1047, Dissented from.)

1925 All 765 (766) [AIR V 12].

1920 Oudh 219 (219) [AIR V 7]: 23 Oudh Cas 384 (DB).

1918 Oudh 374 (375) [AIR V 3] (DB).

[But see 1924 Nag 284 (284) [AIR V 11]. (Submitted not correct.)]

1948 Mad 458 (459) [AIR V 35 C 220]. (Agent for management of property — Claim against agent for balance due after rendering accounts — Claim is not mere right to sue.)

5. ('47) 1947 Marwar L R (Civ) 21 (24). (Statement of account submitted by agent — Account showing certain sum as due from him —Assignment of such debt is not assignment of a mere right to sue).

1933 Cal 461 (462) [AIR V 20]. (Dissenting from 1924 Cal 1047 [AIR V 11].)

1918 Cal 445 (445) [AIR V 5] (DB).

6. 1934 Mad 461 (463) [AIR V 21]: 57 Mad 1074 (DB). (Where at the time of the assignment a liquidated amount had become due to the assignors of the plaintiff, the asssignment of a right to recover this debt is more than a mere right to sue for accounts and it does not therefore offend the provisions of S. 6 (*e*), T. P. Act. The mere fact that a calculation will have to be made before determining the exact amount does not make that amount any the less a debt due to the assignors validly assignable in law.)

('13) 18 Ind Cas 138 (139,140)(DB) (Mad). (Right to sum actually due but fraudulently concealed and not accounted for.)

7. 1926 Nag 357 (358) [AIR V 13]. (A I R 1924 Cal 1047, Relied upon. But that case was dissented from in AIR 1926 Nag 396).

Section 6— Note 22

1. 1929 Mad 641 (646) [AIR V 16]: 52 Mad 563 (FB). (Attachable under S. 60, C. P. C.)

1925 Sind 72 (75) [AIR V 12].

1924 Nag 145 (146) [AIR V 11].

('90) 13 Mad 447 (449) (DB).

[*See also* 1950 Mad 824 (827) [AIR V 37 C 345]. (Transfer during pendency of appeal of interest in partnership including right to continue appeal in case of transferor's death — Transfer is of tangible interest in partnership and

23. Clause (f) — Public office. — An "office" is a position which has some duties attached to it.(1) A *public* office is a position which has a *public duty* attached to it. It does not matter whether the person holding the office receives any fee or salary for the performance of such duty or whether he receives it from the Government or otherwise.(2) The duty must be a public duty in the strict sense of the terms. It is not enough that the due discharge of the duties of the office should be for the public benefit in a secondary and remote sense.(3)

It is an essential characteristic of a public office that it cannot be divided.(3a) An office of worship in a temple which is capable of being divided according to the custom, is not a public office subject to the prohibition in this clause.(3b) As to whether a right of worship can be transferred under the Hindu law, see Note 2a. See also Note 6.

The principle underlying the prohibition of a transfer of a public office is that it is against public policy that a person chosen to a public office for qualities personal to himself should be able to substitute another person in his place.(3cc)

The prohibition of a transfer of the *salary* of a public officer is also based on grounds of public policy.(3c) In *The Corporation of Liverpool* v. *Wright*,(4) Wood V. C., observed :

> "Nobody can deal with the fees of a person who holds an office of this description, because the law presumes, with reference to an office of trust, that he requires the payment which the law has assigned to him for the purpose of unholding the dignity and performing properly the duties of that office; and therefore it will not allow him to part with any portion of those fees either to appointer or to anybody else . . . . . Any attempt to assign any portion of the fees of his office is illegal on the ground of public policy, and held, therefore, to be void."

In *Grenfell* v. *The Dean & Canons of Windsor*,(5) Lord Langdale, M. R., observed :

> "Now if it had been made out that the duty to be performed by him was a public duty, or in any way connected with the public service, I should have thought it right to attend very seriously to that argument, because there are various cases in which public duties are concerned, in which it may be against public policy, that the income arising for the performance of those duties should be assigned; and for this simple reason, because the public is interested, not only

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transferable right to sue notwithstanding the fact that suit stood dismissed at the time of tranefer.)]

Section 6 — Note 23

1. See A. I. R. Commentaries on the Code of Civil Procedure 7th (1963) Edn. S. 9 Note 35.
1964 Andh Pra 465 (466) [AIR V 51 C 124].

2. 1964 Andh Pra 465 (466) [AIR V 51 C 124].
(1828) 130 E. R. 995 (1001) : 1 Beng N C 222, *Henly* v. *The Mayor and Bengesses of Lyme*.
[*See also* ('01) 28 Cal 344 (346) (DB). (Person immediately auxiliary to the officer e. g., peon attached to office of Superintendent Salt Department is public servant.)]

3. (1891) 60 L J Q B 397 (399) : (1891) 1 Q B D 594 : 64 L T 117 : 39 W R (Eng.) 464. *In re Mirams*, (Clergyman is not public servant).

3a. AIR 1964 Andh Pra 465 (467) [A I R V 51 C 124].
1948 Bom 233 (234) [AIR V 35 C 63] : ILR (1947) Bom 789 (DB). (No office which is capable of being divided can be treated as a public office at all.)

3b. 1957 Andh Pra 876 (877) [AIR V 44 C 269] (DB).
1948 Bom 233 (234) [AIR V 35 C 63] : ILR (1947) Bom 789 (DB).

3cc. 1964 Andh Pra 465 (467) [AIR V 51 C 124].

3c. 1964 Andh Pra 465 (467) [AIR V 51 C 124].
1950 Bom 155 (157) [AIR V 37 C 40] : ILR (1950) Bom 185 (DB).
1957 Andh Pra 876 (877) [AIR V 44 C 269] (DB).
1942 Mad 391 (392) [AIR V 29] : ILR (1942) Mad 640. (Assignment by a municipal servant of a portion of his salary held opposed to the provisions of this section—Case under S. 60, C. P. C.).
1941 Bom 389 (392) [AIR V 28] : ILR (1941) Bom 415 (DB). (Postman's salary is not assignable.)

4. (1859) 28 L J (N S) Ch 868 (871) : 7 W R (Eng) 728 : 123 R R 151.
[*See also* 1957 Andh Pra 876 (877) [AIR 44 C 269] (DB). (Presumption is that emoluments are required for enabling holder to perform duties of office in proper manner.)

5. (1840) 48 E R 1292 (1294) : 2 Beav 544 : 50 R R 279.

in the performance from time to time of the duties, but also in the fit state of preparation of the party having to perform them."(6)

As to the attachability of such salaries in execution of decrees, see S. 60 of the Code of Civil Procedure.

It has been held that the right of a person, who has subscribed to a provident fund, to the provident fund amount is not "salary" but is an actionable claim which can be transferred; it is a right to get a definite sum out of the provident fund arising out of an obligation created by the rules of the provident fund.(7)

It has been held in the undermentioned case(8) that an agreement by a person, who was later appointed a public officer, in favour of his elder brother to pay the latter a specified sum every month after he had commenced to earn income in consideration of his having been brought up and educated by the latter was not hit by this clause, as the agreement did not of its own force assign or effect a transfer of any part of his salary but only related to his income and he need not have paid the amount from his salary alone.

As to transfer of a priestly office, see Note 2a.

24. Clause (g) — Pensions. — The word "pension" has not been defined in this Act or even in the Pensions Act (XXIII of 1871). But it has been held under that Act that in order to constitute a grant a "pension," two essentials are necessary—

(1) It must be a *periodical* allowance, and

(2) it must be a grant, not in respect of any *right, privilege, perquisite or office* but on *political considerations*, or on account of *past services* or *present infirmities* or as a *compassionate allowance.*(1)

The word "pension" used in cl. (g) of S. 60 of the Code of Civil Procedure, 1908, has also been construed as having the same meaning as it has under the Pensions Act.(2) The same meaning must be given to the expression in this Act also.(2a)

A grant of sum of money(3) or land revenue(4) or

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6. [*See also* (1790) 1 R R 791 (792) : 2 Drew & East 681 : 3 T R 681 *Flarty* v. *Odlum.*]
1941 Bom 389 (392) [AIR V 28] : I L R (1941) Bom 415 (DB). (Public servant getting salary below attachable limit — Agreement with creditor for attachment and deduction of part every month is illegal.)
[*See also* Snell, *Principles of Equity.* 11th Edn., page 89.]

7. 1935 Cal 756 (758) [AIR V 22] : 63 Cal 578 (DB).

8. 1960 Mad 188 (189, 190) [A I R V 47 C 58] : I L R (1960) Mad 87.

Section 6 — Note 24

1. ('62) ILR (1962) Andh Pra 1103 (1107) (DB).
('82) 4 Bom 432 (436) (FB). (Toragaras hak is not pension.)
1929 All 781 (786) [AIR V 16] (DB). (Per Sen J. —Grant of land revenue is not pension.)
1922 All 22 (23) [AIR V 9] : 44 All 354 (DB).
('09) 31 All 382 (385) (DB).
('07) 30 Mad 153 (154, 155) (DB). (Grant of land revenue is not pension.)
('02) 1902 All W N 161 (162) (DB). (Assigned Government revenue or profits from estate is not pension.)

2. ('92) 16 Bom 537 (540) (DB).
('84) 7 Mad 191 (195) (DB). (Grant of land free of revenue does not come within purview of Pensions Act.)

2a. 1931 P C 160 (161) [AIR V 18] : 58 Ind App 215 : 59 Cal 1. (Rent drawn as limited owner of property is not pension.)
1929 All 781 (786) [AIR V 16] (DB).

3. ('82) 5 Mad 272 (273) (DB). (Bonus to officer compulsorily retired on account of reduction in public service.)

4. ('07) 30 Mad 153 (155) (DB).
1930 Nag 134 (134) [AIR V 17]. (Sum payable by Government as compensation for Jagir land taken over by Government.)
1930 Lah 816 (817) [AIR V 17] (DB). (Pattidari Jagir in Ambala District.)
1929 All 781 (786) [AIR V 16] (DB). (Per Sen J., Ashworth J., contra.)
('02) 1902 All W N 161 (162) (DB). (Share of revenue in Gursair estate in Jhansi District.)
('78) 1878 Pun Re No. 27, p. 114 (116). (Revenue granted for the benefit of the shrine is not a pension.)
[*See also* ('09) 4 Ind Cas 1057 (1057) (DB) (Mad). (Unenfranchised inam can be attached.)]

land(5) is not a pension as it is not a *periodical* allowance. A *tora-garas hak* is not a pension as it is a grant in respect of a right, privilege, perquisite or office.(6) A grant by the Government of annual sum of money as *compensation* for resumption of the grantee's land is not a pension(7) for it is not granted on political grounds or for past services or present infirmities or as a compassionate allowance, but on account of a right. A *malikana* allowance payable from a Government treasury is in the nature of a pension.(8)

A pension granted by Government by virtue of a treaty obligation contracted with another State(9) or for other reasons of State is a *political* pension.(10) A *jaghir* may be a political pension.(10a) Political and other Government pensions are incapable of transfer so long as they are in the hands of Government, notwithstanding the fact that the amounts have *become due*.(11) The character of the fund remains unchanged so long as it remains unpaid in the hands of the Government,(12) but once the money is received by the pensioner it becomes capable of transfer.(13)

Allowances not granted by Government are not "pensions" within the meaning of this Act.

The transfer of a pension is prohibited on grounds of public policy. It is founded upon the idea of ensuring the enjoyment of the pension by the pensioners in comfort.(14) In *Lucas* v. *Harris*(15) the question was whether the pension of an Indian Army Officer was attachable in execution of a decree in view of the Army Act, 1881, under which all assignments of and charges on pensions were rendered void. Lopes, L. J., observed :

"It is beyond dispute that the object of the Legislature was to secure for officers who had served their country a provision which would keep them from want and would enable them to retain a respectable social position."

[See however 1914 Lah 345 (347) [AIR V 1] : 1914 Pun Re No. 86 (DB). (Assignment of land revenue may be a pension.)
1930 Lah 904 (905) [AIR V 17] (DB). (Do.)]

5. 1934 All 973 (974) [AIR V 21]. (Muafi Rights.)
1915 Oudh 65 (69) [AIR V 2] : 18 Oudh Cas 168 (DB). (Grant of land in consideration of former rights.)
1914 All 475 (476) [AIR V 1] : 36 All 318 (DB). (Grant of absolute estate.)
('11) 33 All 580 (582) (DB). (Muafi grant of land.)
('09) 31 All 382 (385) (DB). (Grant of land in lieu of pension.)
('04) 26 All 617 (621) (DB). (Zamindari granted as reward for services.)

6. (1859) 8 Moo Ind App 1 (41) (PC).
('80) 4 Bom 432 (436) (FB).

7. 1926 All 521 (522) [AIR V 13] (DB).
('04) 8 Cal W N 665 (666) (DB).
('87) 9 All 213 (218).
('77) 1877 Bom P J 261 (DB). (Grant as compensation for office abolished.)
[*See also* ('51) 1881 All W N 147 (147) (DB).]

8. ('12) 13 Ind Cas 194 (194) (DB) (All).

9. ('91) 18 Cal 216 (223) : 17 Ind App 181 (PC).
('46) 36 Trav L J 9 (14) (DB). (Periodical payments made by State of Travancore to Rajas of Pandalam under an obligation undertaken by treaty.)

10. 1927 Mad 604 (607) [AIR V 14] : 50 Mad 711 (DB). (Allowance granted to ex-Maharaja of Paunna under Reg. III of 1818 is a political pension.)
('98) 21 Mad 105 (108) (DB). (Allowance to the Zamorin of Calicut.)
('98) 1 Oudh Cas 170 (171). (Pension awarded by the deed of trust, dated the 23rd November 1889, on the part of Mohammad Ali Shah, King of Oudh.)
('69) 4 Mad H C R 277 (279) (DB). (Allowance granted to the descendants of the Nawab of Karnatic.)
('67) 7 Suth W R 169 (169) (DB). (Stipends by Government to Mysore family.)

10a. 1914 Lah 345 (347) [AIR V 1] : 1914 Pun Re No. 86 (DB).

11. ('70) 5 Mad H C R 371 (372), Referred Case No. 33 of 1870.

12. ('02) 26 Mad 69 (71) (DB).

13. ('77) 1877 Pun Re No. 87, p. 233 (234).

14. 1929 All 781 (787) [AIR V 16] (DB).
[*See also* ('62) ILR (1962) Andh Pra 1103 (1108) (DB). (Pension of a jagirdar cannot be taken into consideration in determining paying capacity under Hyderabad Jagir Debt Settlement Act.)]

15. (1886) 56 L J Q B 15 (20) : 18 Q B D 127 : 55 L T 658 : 35 W R (Eng) 112.

25. Clause (h).—This clause deals with three classes of cases :

(1) where the transfer is opposed to the nature of the interest affected thereby ;

(2) where the object of, or consideration for, the transfer is unlawful ; and

(3) where the transferee is legally disqualified to be a transferee.

The first class deals with property or interests which are known as *res extra commercium* — that is, things which cannot be the subject of commerce or traffic.(1) The second class is a logical result of the rule of law that a *contract* for an unlawful object or consideration is void, for, every transfer of property is preceded by a contract and if the contract is void, the transfer which is based upon such contract must also be void. The third class rests upon the impossibility of transfer, inasmuch as a transfer must necessarily pass property from one to another and it is impossible to pass property to a person to whom it cannot legally be passed.

26. Transfer opposed to the nature of interest affected thereby. — If, by the transfer, the nature of the property is injuriously affected, the transfer, in so far as it is so affected, is void. A temple, for instance, is meant to be a place of public worship. A transfer thereof resulting in its ceasing to be a public place of worship would be opposed to the nature of the property and is, therefore, prohibited. As another instance may be mentioned the transfer of the *emoluments attached to an office*. The transfer will result in the property transferred ceasing to be "emoluments" of the office which are intended to keep the office-holder from want and thus enable him to discharge his office properly. Such a transfer is, therefore, prohibited by the section(1) and would be opposed to public policy. Where, however, the right to receive a sum of money is independent of the office, there is no bar to its being alienated.(2) It has been held that the transfer of the crops on the property which constitutes the emoluments of a temple priest and which are at his absolute disposal is not opposed to public policy and does not violate the provisions of clause (h).(3)

26a. Transfer of service tenures. — Grants for service may be of three classes :

(1) Grants of lands as *emoluments attached* to an *office*.

(2) Grants to individuals and families, subject to the performance of services of a public nature by the grantees and so long as the services are performed.(1)

Section 6 — Note 25

1. 1916 Cal 269 (270) [AIR V 3] : 43 Cal 28 (DB). (Right to share offerings made to deity in Hindu temple.)

Section 6 — Note 26

1. 1958 Andh Pra 286 (288) [AIR V 45 C 80].
1943 Lah 265 (267) [AIR V 30]. (Emoluments of priestly office.)
1928 All 721 (724, 726) [AIR V 15] : 50 All 394 (DB).
('66) 6 Suth W R 129 (129) (DB). (Rents of ghatwalee tenure held for purpose of public services are not liable for former ghatwal's debts.)
[*See also* ('01) 28 Cal 483 (485) (DB). (Future rents and profits that may be due to ghatwal cannot be attached.)].

2. 1943 Lah 265 (267) [AIR V 30]. (Right to receive offerings at temple—No connection with any priestly or other duty requiring qualification of personal nature—Right can be transferred—Offerings at a mela are received not because of any service rendered but because the recipients are owners of the land on which the mela is held.)
1942 Lah 284 (286) [AIR V 29] : ILR (1943) Lah 780 (DB). (Right to receive offerings at a temple, which is independent of any obligation to render services involving qualifications of a personal nature, is transferable.)
1932 Bom 257 (259) [AIR V 19] (DB).
1936 All 131 (133) [AIR V 23] : 58 All 457 (DB).

3. 1957 Andh Pra 349 (350) [AIR V 44 C 111].

Section 6 — Note 26a

1. 1941 Mad 217 (224) [AIR V 28] (DB).
†1918 Bom 115 (115) [AIR V 5] 43 Bom 37 (DB).

(3) Grants to individuals or families subject to the performance by the grantees of services of a *personal* nature.

On the principle stated in Note 26 the transfer of the land granted in the first class of cases would clearly be opposed to the nature of the interest transferred and is, therefore, prohibited.(2)

Even in the second class of cases it has been held that the transfer of the property burdened with service is opposed to the nature of the interest transferred, and is prohibited by this clause.(3) As was observed by Schwabe, C. J., in *Anjaneylu* v. *Venugopal Rice Mills* :(4)

> "The right to enjoy the property is as long as the inamdar renders services in the performance of which the public have an interest. If the inamdar sold the property, it is obvious that he would in all probability no longer perform the services and further, it is quite opposed to the nature of his interest and his duty, namely that he should enjoy the produce of the land as salary for the public services he has to render, that he should sell it or alienate it, leaving himself without the means of subsistence and without further interest in the place or in the performance of the services."

But a transfer by way of a *lease* of the land so granted is not bad, for in such a case the grantee provides himself with what was intended he should have, namely, a subsistence out of the land. Such a transfer is, therefore, not opposed to the nature of the interest affected by the transfer.(5) It has also been held in some cases(5a) without

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2. 1928 P C 177 (178) [AIR V 15] : 55 I A 249: 7 Pat 744. (Ghatwali tenure attached to office of ghatwal.)
1924 P C 5 (13) [AIR V 11] : 3 Pat 183 : 51 Ind App 37. (Do.)
†('83) 9 Cal 187 (204, 208) : 9 Ind App 104 (PC). (Do.)
('82) 9 Cal 388 (388) (DB). (Do.)
('68) 1 Beng L R (S N) 7. (Do.)
('02) 29 Cal 227 (231) (DB). (Do.)
('18) 48 Ind Cas 335 (335) (DB) (Cal). (Do).
†1933 Pat 117 (119) [AIR V 20] (DB). (Do.)
('85) 8 Mad 249 (259) (FB). (Office of Karnam.)
1925 Pat 210 (212) [AIR V 12] : 3 Pat 915. (But ghatwali tenures may be alienable by custom.)
[*See also* 1951 S C 288 (290) [AIR V 38 C 49] : 1951 S C R 534 : 30 Pat 931. (Goverment Ghatwalis created by the ruling power in favour of a person required to render Ghatwali services to it have been uniformly held to be inalienable.)
('58) (1958) 2 Andh W R 14 (15). (Carpenter service inams are not liable to be transferred.)
('57) 1957 (1) Mad L J 164 (165). (A sale in court auction of an interest in a blacksmith service inam land is void ab initio under S. 5 of Act 3 of 1895. Such an alienation is against public policy and does not confer any rights on the purchaser.)
('56) 1956 Andh W R 314 (315). (A gift deed alienating carpenter service inam land is invalid.)
1938 Pat 431 (432) [A I R V 25] (DB). (In order to demonstrate that a tenure is not transferable, it would have to be shown that the tenure-holder occupied something in the nature of an office rather than the mere enjoyment of property.)
('12) 39 Cal 696 (701) : 39 Ind App 133 (PC). (Diwari tenure which is similar to ghatwali tenures.)]

3. † 1922 Mad 197 (198) [AIR V 9] : 45 Mad 629 (FB).
1958 Andh Pra 286 (288) [AIR V 45 C 80]. (Purohit service inam — Inam-holder creating lease of property for 50 years without reservation of annual rent—Lessor also leaving village —Transaction held was voidable and did not bind successor-in-office.)
1946 Nag 147 (147, 148) [AIR V 33 C 41] : I L R (1946) Nag 112. (Inam granted for maintenance of grantee in order to enable him to perform the services of Kazi.)
1941 Mad 217 (224) [AIR V 28] (DB). (Do.)
1939 Mad 867 (869) [AIR V 26] : ILR (1940) Mad 123 (DB). (Desabandam inam.)
1936 Mad 559 (559) [AIR V 23]. (Temple service inam.)
1925 Mad 1155 (1156) [AIR V 12] (DB). (Do.)
[*See also* ('16) 34 Ind Cas 672 (673) (Oudh). (Rent-free grant in lieu of service.)]

4. 1922 Mad 197(198) [AIR V 9]: 45 Mad 620(FB).

5. ('71) 15 Suth W R 38 (40) (SB). (Ghatwal can lease out ghatwali property for his lifetime but not inperpetuity.)
†1922 Mad 197 (199) [AIR V 9] : 45 Mad 620 (FB). (Per Schwabe, C. J.—Obiter.)
1958 Andh Pra 286 (288) [AIR V 45 C 80]).
1928 Mad 35 (37, 38) [AIR V 15] (DB). (Lease is not void but only voidable—But permanent or long lease practically amounting to alienation and effectually placing income beyond the disposal of holder of office would be void.)
1925 Mad 1155 (1156) [AIR V 12] (DB).

5a. 1915 Mad 554 (555) [AIR V 2] (DB).

reference to the principle above stated that the alienation, if made, will be good for the lifetime of the incumbent of the office, and in some other cases(5b) that an alienation will be valid by *custom*.

Where lands have been granted for the performance of services of a public nature, but the services have come to an end, there is no bar to the land being alienated.(6) So also where lands are attached to an office, but the office is put an end to, there is no bar to the alienability of the land.(7)

As to the third classes of grants above mentioned it has been held that the lands so granted are not inalienable.(8)

The question into what class a particular grant falls depends upon the facts of the particular case.(9)

See also S. 105, Note 69.

27. Transfer for unlawful object or consideration—General.—Section 23 of the Contract Act, 1872, runs as follows :

> "23. The consideration or object of an agreement is lawful, unless—
> it is forbidden by law ; or
> is of such a nature that, if permitted, it would defeat the provisions of any law ; or
> is fraudulent ; or
> involves or implies injury to the person or property of another ; or
> the Court regards it as immoral, or opposed to public policy.
> In each of these cases, the consideration or object of an agreement is said to be unlawful.
> Every agreement of which the object or consideration is unlawful is void."

Every transfer *inter vivos* is preceded by a contract to transfer and if such contract is void as being for an unlawful object or consideration within the meaning of S. 23 of the Contract Act, the transfer which rests upon such contract must also be void. (See Section 4, Note 4.) This is what is enacted in this clause.

It does not, however, necessarily follow that the transferor, in a transfer made for an unlawful object, is entitled to get back the property transferred from the transferee. Where the *unlawful object is carried out*, he cannot get back the property, not on the ground that the transfer becomes legal, but on the ground that the Court will not help a *particeps criminis*.(1) The maxim applicable in such cases is *ex dolo malo*

('09) 5 Nag L R 15 (16).
('05) 15 Mad L Jour 10 (11) (DB).
†('82) 6 Bom 596 (597) (DB).

5b. 1951 S C 288 (290) [AIR V 38 C 49] : 1951 S C R 534 : 30 Pat 931. (A zamindari Ghatwali tenure originally could be transferred with the consent of the Zamindar or if authorised by custom. Now with passage of time consent will be assumed in the absence of objection from Zamindar.)
('84) 10 Cal 677 (684) (DB). (Ghatwali in Kharagpore is transferable with the assent of the zamindar.)
†'(88) 15 Cal 471 (482) : 15 Ind App 18 (PC). (Do.)—Confirming 10 Cal 677.)
1935 Pat 306 (327) [AIR V 22] : 14 Pat 70 (DB). (Do.)

6. 1914 Bom 181 (183) [AIR V 1] : 38 Bom 272 (DB).

7. 1925 Pat 210 (212) [AIR V 12] : 3 Pat 915.
1925 Pat 346 (351, 352) [AIR V 12] : 4 Pat 272 (DB).

8. ('12) 13 Ind Cas 190 (190) (DB) (Mad). (Service inam for palanquin-bearer service—Alienation not against public policy.)

9. 1918 Bom 115 (116) [AIR V 5] : 43 Bom 37 (DB).
[*See also* 1951 S C 288 (290) [AIR V 38 C 49] : 1951 S C R 534 : 30 Pat 931. (To determine whether the tenure in question is a Government Ghatwali tenure which could not be alienated or is a Zamindary Ghatwali which could be alienated with the consent of the Zamindar or when allowed by custom it is necessary to refer to the grant by which the tenure was created.)
('91) 1891 Bom P J 234 (DB).]

Section 6 — Note 27

1. 1940 Pat 573 (576) [AIR V 27] : 19 Pat 424 (DB). (Transfer in consideration of withdrawal of pending criminal prosecution against transferor.)
1938 Lah 732 (734) [AIR V 25].
1933 Bom 209 (212) [AIR V 20] (DB).
1929 Rang 225 (225) [AIR V 16].
1923 All 453 (454) [AIR V 10].

non oritur actio—no Court will lend its aid to a man who founds his cause of action upon an illegal or immoral act. The principle is also expressed in the maxim *in pari delicto potior est conditio possidentis*(2) and in the rule that in such cases the estate should "be where it falls."(3) This rule, however, should not be extended to the class of innocent trustees and executors. Thus, where the owner of a house lets out the property to the defendant for the immoral purpose of running a brothel, the executors and trustees of the will of the owner, who were not *in pari delicto* or *particeps criminis* can sue to eject the defendant on the basis that the transfer is void.(3a)

Where the unlawful object is *not carried out* or the transferor is not as guilty as the transferee, or the effect of permitting the transferee to retain the property might be to defeat the provisions of any law, the Court will enable the transferor to get back the property even though he may thereby take advantage of his own wrong,(4) for the reason that that evil is trifling when compared with the evil of allowing the transferee to retain the property.(5) This principle is found enacted in S. 84 of the Indian Trusts Act, 1882, which runs as follows :

> "84. Where the owner of property transfers it to another for an illegal purpose and such purpose is not carried into execution, or the transferor is not as guilty as the transferee, or the effect of permitting the transferee to retain the property might be to defeat the provisions of any law, the transferee must hold the property for the benefit of the transferor."

This clause is inapplicable to cases where the object of the transfer is not unlawful but the transfer is ineffective on some other ground.(6)

28. Consideration and object.—The word "object" does not mean the same thing as "consideration." It means "purpose" or "design."(1) Thus, if *A*, while in insolvent circumstances, assigns to *B* for a consideration of Rs. 100 paid, the benefit

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† 1921 Mad 326 (327) [AIR V 8] : 44 Mad 329 (DB). (Settlement in consideration of donee cohabiting with settlor.)
1924 Mad 849 (849) [AIR V 11]. (Do.)
('05) 28 Mad 413 (419) (DB).
('98) 1898 Bom P J 292 (DB).
('95) 19 All 35 (38) (DB).:
('81) 3 Mad 215 (222) (DB).
✠(1873) 21 W R (Eng) 878 (879) : 16 Eq 275, Ayerst v. Jenkins.
(1866) 35 L J Ch 454 (456) : 1 Eq 626 : 14 L T 350 : 14 W R (Eng) 510, Smith v. White.
[*See also* ('54) 1954 All L Jour 566 (568) (DB). 1924 All 668 (668) [AIR V 11] : 46 All 622.]

2. 1932 Lah 503 (506) [AIR V 19] : 13 Lah 713 (FB).
1956 Andh Pra 225 (228) [AIR V 43 C 63] (DB).
1940 Pat 573 (576) [AIR V 27] : 19 Pat 424 (DB).
(1909) 5 Nag L R 146 (150).
(1811) 34 E R 360 (361) : 11 R R 218, Osborne v. Williams.

3. 1956 Andh Pra 225 (228) [AIR V 43 C 63] (DB).
(1918) 87 L J K B 333 (336) : (1918) 1 K B 223, Gascoigne v. Gascoigne.
(1801) 31 E R 934 (942) : 5 R R 211, Mucklestom v. Brown.

3a. 1958 Cal 713 (729) [AIR V 45 C 183] : ILR (1959) 2 Cal 684 (DB).

4. 1960 S C 213 (217) [AIR V 47 C 38] : (1960) 1 S C R 861 : 39 Pat 186. (Fraud contemplated but not perpetrated—Public policy demands that defendants should not be allowed to perpetrate new fraud.)
1956 Andh Pra 225 (227) [AIR V 43 C 63] (DB).
1923 Cal 154 (155) [AIR V 10] (DB).
1929 Bom 147 (151) [AIR V 16] : 53 Bom 321 (DB).

5. ('09) 5 Nag L R 146 (150).
1932 Lah 503 (511) [AIR V 19] : 13 Lah 713 (FB).

6. 1930 All 1 (2) [AIR V 17] : 52 All 338 (FB).
('11) 14 Oudh Cas 144 (146). (A transfer in breach of a condition is not unlawful or for illegal purpose.)
(1900) 24 Bom 622 (625) (DB).
('10) 5 Ind Cas 581 (582) (DB) (Cal).
[*See also* 1928 Oudh 35 (35) [AIR V 15]. (Decree declaring plaintiff to be entitled to "Shankalapdari" heritable, non-transferable right in land as against talukdar—Plaintiff alienating land—*Held*, the condition in decree as to non-transferability was meant for the benefit of the talukdar and not of the plaintiff himself—The alienation could not be attacked by plaintiff or his heirs—It was not a transfer for an illegal purpose.)]

Section 6 — Note 28

1. ('07) 34 Cal 289 (292) (FB).
1933 Bom 209 (212) [AIR V 20] (DB).
('06) 33 Cal 702 (710).
[*See also* (1842) 11 L J Q B 104 (106) : 2 Q B 851 : 90 R R 903, Thomas v. Thomas.]

of certain contracts in his favour, with the object of defrauding the creditors of *A*, the *consideration* is lawful, but the *object* is unlawful.(2)

Both the consideration for and the object of the transfer must be lawful in order that the transfer may be valid.(3) A gift being a transfer without consideration no question as to lawfulness or otherwise of its consideration can arise at all. Therefore in judging the validity of a gift, the only matter which has to be considered is the nature of its object when it was actually made and if that object was lawful then it must be upheld. The fact that the facts as discovered later would, if known to the donor at the time of the gift, have rendered the object unlawful is not sufficient to condemn the gift as invalid.(4)

29. Consideration partly unlawful.—Where the consideration for a transfer is partly legal and partly illegal, and the legal part cannot be separated or severed from the illegal part then the whole transfer is void.(1) But where the legal part can be severed from the illegal part, the transfer as to the legal part will be valid, but not the transfer as to the illegal part.(2) Thus, where a transfer is made both of transferable and of non-transferable occupancy lands, the whole transaction will not be void, but only so far as the non-transferable occupancy lands are concerned.(3)

Where a part of the consideration is void but not *unlawful*, and the other part good, the transfer is not bad in any part.(4)

See also section 4, Note 4.

30. Forbidden by law.—An act is forbidden by law when it is either expressly prohibited or where a penalty is imposed by law for the commission of the act.(1) A transfer prohibited by law is void.(1a) Cases under this head arise principally in connection with the Excise Acts, which prohibit agreements to assign or sub-let licences granted under the Excise laws. A sub-letting of the licence in such case is void as being forbidden by law.(2)

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2. ('07) 34 Cal 289 (292) (FB).
('12) 14 Ind Cas 519 (520) (DB) (Cal).

3. 1922 Mad 181 (182) [AIR V 9] : 45 Mad 778 (DB).

4. 1954 Trav Co 348 (351) [AIR V 41 C 118] : ILR (1953) Trav Co 1121.

Section 6 — Note 29

1. 1955 Cal 442 (445, 447) [AIR V 42 C 127) ILR (1956) 2 Cal 859. (Tenancy—Part of consideration receipt of selami prohibited by S. 7-West Bengal Premises Rent Control (Temporary Provisions) Act—Transfer is hit by S. 23, Contract Act and hence counter to S. 6 (h) of this Act—No specific performance of agreement will be granted.)
1942 Mad 720 (721) [AIR V 29].
1925 Nag 302 (304) [AIR V 12] : 22 Nag L R 136 (DB).
('08) 32 Bom 449 (454) (DB).

2. 1925 Nag 302 (304) [AIR V 12] : 22 Nag L R 136 (DB).
('09) 3 Ind Cas 104 (105) (DB) (Mad).
('07) 31 Bom 552 (557) (DB).

3. 1930 All 1 (3) [AIR V 17] : 52 All 338 (FB).
1929 All 394 (396) [AIR V 16].
1917 All 290 (291) [AIR V 4] : 39 All 539 (DB).
1916 All 346 (349) [AIR V 3] : 38 All 232 (DB).

4. 1925 All 474 (476) [AIR V 12].

Section 6 — Note 30

1. See Section 25, Note 4.
1a. See also cases cited in Note 35.
('49) 1949 Trav-Co L R 70 (72) (DB). (The office of trustee by its very nature is not alienable or transferable.)
1918 Mad 123 (126) [A I R V 5] : 41 Mad 418 (FB).
[*See also* 1952 S C 227 (228, 229) [A IR V 39] : 1952 S C R 765. (Provident funds—S. 3, Provident Funds Act has laid an absolute interdiction on assignment or attachment of the compulsory deposits—Statute cannot be circumvented by appointment of receiver.)]

2. 1929 All 210 (211) [A I R V 16] : 51 All 506 (DB).
1926 Mad 218 (221) [AIR V 13].
1922 Bom 78 (79) [AIR V 9] : 46 Bom 651 (DB).
1922 Mad 106 (106) [A I R V 9] (DB). (Madras Salt Act, S. 11.)
('04) 31 Cal 798 (804).
('95) 19 Bom 626 (630) (DB).
('89) 12 Bom 422 (424) (DB).
('89) 16 Cal 436 (441) (DB). (Bengal Excise Act, S. 11).
('88) 10 All 577 (579) (DB).
('74) 21 Suth W R 289 (290) (DB).

A prohibition of an alienation by *order of Court* is not a prohibition *by law* within the meaning of this section.(2a) A sale, therefore, in contravention of an injunction order(3) or of an attachment order(3a) is not void by virtue of this section. But a sale in contravention of an attachment would, under the Civil Procedure Code, be void as against all claims enforceable under the attachment.(4) A sale in contravention of an injunction order may also be void apart from this section, where the vendee takes the sale with knowledge of such order.(5)

An act which is *ultra vires* is not necessarily prohibited by law and therefore illegal.(6)

31. Defeat of provisions of law.—The word "law" means any rule of law in force in India. It would include not only legislative enactments, but also the rules of Hindu and Muhammadan laws, and even rules of Common law in force in India. As illustrations of transfer which would have the effect of defeating the provisions of statute law may be mentioned, leases granted in contravention of the provisions of certain Rent Acts,(1) transfers of occupancy holdings which are non-transferable under various Tenancy Acts,(2) transfers by a person expecting insolvency and transfers by an adjudicated insolvent.(3)

32. Fraudulent transfers. — Section 17 of the Indian Contract Act, 1872, which gives the meaning of the term "fraud," runs as follows :

> "17. 'Fraud' means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract :—
>
> (1) the suggestion, as a fact, of that which is not true, by one who does not believe it to be true;
>
> (2) the active concealment of a fact by one having knowledge or belief of the fact;
>
> (3) a promise made without any intention of performing it;
>
> (4) any other act fitted to deceive;
>
> (5) any such act or omission as the law specially declares to be fraudulent.
>
> *Explanation.*—Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself, equivalent to speech.
>
> *Illustrations.*
>
> *(a)* *A* sells, by auction, to *B*, a horse which *A* knows to be unsound. *A* says nothing to *B* about the horse's unsoundness. This is not fraud in *A*.
>
> *(b)* *B* is *A's* daughter and has just come of age. Here, the relation between the parties would make it *A's* duty to tell *B* if the horse is unsound.
>
> *(c)* *B* says to *A*—"If you do not deny it, I shall assume that the horse is sound." *A* says nothing. Here, *A's* silence is equivalent to speech.

2a. ('12) 15 Oudh Cas 67 (75) (DB).

3. ('03) 25 All 431 (433) (DB).
('89) 1889 Pun Re No. 144, p. 487 (491).
('87) 9 All 497 (499) (DB).

3a. ('21) 63 Ind Cas 108 (108) (DB) (Lah).

4. See S. 64 of the Civil Procedure Code.

5. ('99) 12 C P L R 109 (111).
Also see Section 40, Note 22.

6. 1930 Mad 512 (513) [AIR V 17] : 53 Mad 771 (DB).
('01) 25 Bom 52 (73) (DB).

Section 6 — Note 31

1. 1928 Cal 763 (765) [AIR V 15] (DB).
1924 Cal 57 (60) [AIR V 11] : 50 Cal 491 (DB).

2. ('85) 7 All 878 (880) (FB). (Sale of occupancy holding.)
1942 All 409 (409) [A I R V 29] : ILR (1942) All 817 (DB). (A mortgage of occupancy rights is forbidden by the Agra Tenancy Act.)
1931 All 461 (461) [AIR V 18] (DB).
('29) 116 Ind Cas 17 (18) (All).
1928 All 552 (552) [AIR V 15].
1928 All 590 (591) [AIR V 15].
1914 All 418 (419) [AIR V 1] (DB).
('85) 7 All 511 (514) (DB).

3. ('07) 34 Cal 289 (292) (FB).
('12) 14 Ind Cas 519 (520) (DB) (Cal).

(d) *A* and *B*, being traders, enter upon a contract. *A* has private information of a change in prices which would affect *B*'s willingness to proceed with the contract. *A* is not bound to inform *B*."

As to a particular class of fraudulent transfers, see S. 53. Another illustration of fraudulent fransfer would be a transfer made under circumstances stated in illustration (g) to S. 23 of the Contract Act.

33. Transfers involving injury to property of third person. — A transfer of property in consideration of giving a son in adoption might involve injury to the person and property of the adopted son inasmuch as, if it could be proved that the boy was purchased and not *given*, the adoption would be set aside, and if so, he would lose his status in both families.(1)

34. Transfers for immoral objects.—A conveyance executed in consideration of future illicit cohabitation is for an immoral consideration.(1) There is a difference of opinion as to whether *past* cohabitation can or cannot be a valid consideration for a transfer. According to the High Courts of Allahabad, Patna and Madras it is a valid consideration,(2) while according to the Bombay High Court the consideration does not become innocent by the fact of its being past.(3) But according to the High Court of Bombay, past illicit cohabitation can be a *motive* for a gift, which requires no consideration.(3a)

See also the undermentioned case.(4)

A lease of a house knowingly let to a prostitute who carries on her business there is a transfer void as being for an immoral object.(5)

See also section 25, Note 8.

35. Transfer opposed to public policy.—It is a well established rule of law that an agreement which is against the public good, or public policy, is illegal and

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('96) 20 Bom 636 (654) (DB).

Section 6 — Note 33

1. ('74) 13 Beng LR App 42 (43) (DB).

Section 6 — Note 34

1. 1947 Bom 198 (202) [A I R V 34 C 63] : I L R (1947) Bom 206 (DB).
†1925 All 437 (439) [AIR V 12] :47 All 619(DB).
(1850) 20 L J Ch 186 (187) : 3 Mac & G 94 : 87 R R 25, Benyon v. Nettlefold.
(1861) 54 E R 1012 (1019) : 30 Beav 572 (591): 31 L J Ch 185 : 5 L T (N S) 515 : 10 W R (Eng) 69 : 132 R R 424, Ford v. DePontes.

2. 1943 Mad 253 (253) [AIR V 30]. (Past cohabitation is a valid consideration — Case of promissory note.)
1940 All 385 (385) [A I R V 27] : I L R (1940) All 371 (DB).
1938 Pat 502 (503) [AIR V 25] : 17 Pat 308 (DB). (Contract to compensate a mistress for what she has lost on account of past association.)
1930 Mad 956 (960) [A I R V 17] (DB). (Per Ramesam J.)
1925 All 474 (476) [AIR V 12].
('81) 3 All 787 (788) (DB).
('77) 1 All 478 (480) (DB).

3. 1947 Bom 198 (202) [AIR V 34 C 63] : I L R (1947) Bom 206, (DB).
1933 Bom 209 (211) [AIR V 20] (DB).
1924 Bom 135 (138) [AIR V 11] (DB).
1920 Bom 142 (143) [A I R V 7] : 44 Bom 542 (DB).

3a. 1947 Bom 198 (202) [AIR V 34 C 63] : ILR (1947) Bom 206 (DB). (But where gift is made in discharge of an agreement or transfer made in consideration of past illicit cohabitation, which agreement or transfer is void then the gift also is void.)

4. ('89) 13 Bom 150 (153) (DB). (Money advanced on mortgage to dancing girls for expenses of learning singing and dancing—Consideration is not immoral.)

5† ('77) 1877 Pun Re No. 22 pages 52 (52) (SB).
1964 Andh Pra 465 (467) [AIR V 51 C 124].
('08) 32 Bom 581 (589).
('09) 31 All 58 (59) (DB). (Landlord in such case cannot recover rent in a Court of law.)
1921 Cal 486 (487) [AIR V 8] (DB). (Do.)
('98) 1898 Pun Re No. 2, p. 2 (3) (DB).
[*See also* ('76) 1876 Pun Re No. 64, p. 122 (123). (Advance of money to prostitute.)
('77) 1877 Pun Re No. 26, p. 55 (56) (DB). (A suit will not lie to recover ornaments lent by a brothel-keeper to a prostitute for purpose of display and to attract men.)
(1866) 35 L J Ex 134 (136) : L R 1 Ex 213 : 14 L T (NS) 288 : 14 W R (Eng) 614 : 143 RR

void,(1) but the expression "public policy" is a vague expression which may lead to uncertainty and error when applied to the decision of legal rights.(2) It has, therefore, been held that a Court is not at liberty to invent a new head of public policy, beyond what has been well recognised by judicial precedents.(3) In *Dhirendra Kumar* v. *Chandra Kanta Roy*,(4) Mookerjee, J., enumerated the heads of agreements which have been recognised by judicial precedents as being against public policy. They are:

(1) Agreements which injure the State in its relations to other States, *e.g.*, trading with the enemy.

(2) Agreements tending to injure the public service, *e.g.*, influencing a person in authority in the discharge of his duties(5) or the creation of an interest in him against his duty.

(3) Agreements which tend to prevent the course of justice,(6) *e.g.* stifling the prosecution for an offence of a public nature(7) but not the compounding of a compoundable offence.(8)

652, Pearce v. Brooks. (Brougham supplied on hire to prostitute.)]

Section 6 — Note 35

1. (1853) 23 L J Ch 348 (385) : 4 H L C 1 : 94 R R 1, Egerton v. Brownlow.

2. 1964 Andh Pra 465 (467) [A I R V 51 C 124].
(1853) 23 L J Ch 348 (370): 4 H L C 1 : 94 R R 1, Egerton v. Brownlow.

3. (1937) 106 L J K B 641 (651), Tendon v. Midway.
1923 Cal 154 (156) [AIR V 10] (DB).
1917 All 462 (464) [AIR V 4] : 39 All 51 (FB).

4. 1923 Cal 154 (156) [AIR V 10] (DB).
[*See also* 1917 All 462 (464) [A I R V 4] : 39 All 51 (FB).]

5. (1918) 87 L J K B 907 (909) : (1918) 2 K B 241 : 119 L T 340, Moutifiore v. Menday Motor Components Co., Ltd.
[*See also* 1940 Nag 305 (311) [AIR V 27] : I L R (1940) Nag 573 (618) (FB). (B, a Hindu, borrowing money from A and bribing certain officer therewith — To pay off A, B obtaining loan from C and executing mortgage in his favour — Mortgage loan cannot be impeached on ground of being opposed to public policy.)]

6.† 1940 Rang 73 (75) [AIR V 27]. (Contract to transfer property to another in consideration of latter's giving false evidence on behalf of former —Contract is illegal.)
('08) 32 Bom 449 (454) (DB). (Accused person transferring property to pleader indemnifying him for bail bond executed by latter.)
('97) 20 Mad 84 (86) (DB).
(1865) 3 Mad H C R 172 (176) (DB). (Promissory note given in consideration of promise withdrawing his opposition in the Insolvency Court.)

7. 1941 P C 95 (96, 98) [A I R V 28] : 68 Ind App 144 : ILR (1941) Kar (P C) 141 : ILR (1942) 1 Cal 1.
1930 P C 100 (102) [A I R V 17] : 57 Cal 1302 : 57 Ind App 117.
1938 Cal 840 (850, 851) [AIR V 25] : ILR (1939) 1 Cal 241 (DB).
1916 Cal 74 (75) [A I R V 3] : 42 Cal 286 (DB). (Money given under an agreement not to prosecute under such circumstances that there has been pressure or undue influence— Money can be ordered to be returned.)
('72) 17 Suth W R 84 (84) (DB).
1926 Cal 59 (61) [AIR V 13] : 53 Cal 51 (DB).
('13) 40 Cal 113 (118) (DB). (It is contrary to public policy to compound a non-compoundable offence.)
†1937 Lah 686 (687) [AIR V 24] (DB). (Mortgage executed to stifle criminal prosecutions—Mortgage cannot be enforced against executants nor against persons standing sureties.)
(1864) 2 Mad H C R 187 (192) (DB).
('12) 8 Nag L R 97 (105).
('05) 3 Low Bur Rul 42 (43).
(1767) 95 E R 847 (852) : 2 Wils 341, Collins v. Blantern.
(1875) 44 L J Ch 500 (502) : 10 Ch A 297 : 32 L T 628 : 23 W R (Eng) 460, Fisher & Co. v. Apollinaris Co.
(1866) 35 L J Ch 717 (726) : 1 H L C 200 : 14 L T (N S) 802 : 148 R R 396, Williams v. Bayley.
(1890) 59 L J Ch 608 (614) : 45 Ch D 351 : 63 L T 366 : 38 W R (Eng) 738, Windhill L B of Health v. Vint. (The agreement is illegal if the purpose of it or possibly if the effect of it is to prevent the law from attacking its proper object.)
(1844) 13 L J Q B 359 (365) : 6 Q B 308 : 66 R R 392, Keir v. Leeman
(1892) 61 L J Ch 138 (141) : (1892) 1 Ch 173 : 65 L T 685 : 40 W R (Eng) 273, Jones v. Merionethshire Building Society.

8 ('09) 4 Ind Cas 999 (1000) (Lah).
† ('99) 3 Cal W N 5 (5) (DB). (Contract to give land in consideration of opposite parties refraining from taking proceeding for assault.)
('66) 5 Suth W R 16 S C C Ref. (17) (DB). (Contract compounding assault.)
('82) 1882 Pun Re No. 135, p. 398 (400) (DB).

(4) Agreements which tend to abuse of legal process.(8a)
(5) Agreements which are contrary to good morals.
(6) Agreements which affect the freedom of marriage or security of marriage.(8b)
(7) Agreements in restraint of trade.

To these may be added the creation of monopolies;(9) and agreements preventing alienation in perpetuity or for an indefinite period.(9a)

Contracts in restraint of trade, or of marriage and wagering contracts have been dealt with separately under the Contract Act though not under S. 23 of that Act. Transfers based upon such contracts will not apparently fall under this clause.

In England a marriage *brokage* contract is void as being against public policy.(10) In this country, having regard to the custom thereof, such contracts have been held in some cases not necessarily opposed to public policy.(11) In other cases they have been regarded as opposed to public policy.(12)

Where a public servant is prohibited by *statute* or by rules having the force of statute from taking a transfer of property, the taking of such transfer in contravention of such rules, would be void as being forbidden by law.(13) But where the prohibition is only by *departmental rules* which have not the force of statute, the taking of a transfer by the public servant in contravention of the rules will not be void as being against public policy, though the public servant will be departmentally liable to punishment for breach of the rules.(14) The reason is that there is nothing intrinsically

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8a. *See* ('08) 35 Cal 420 (427) : 35 Ind App 48 (PC). (An assignment of property by persons claiming to be the next reversioners on the death of a female owner, for a consideration of which a small amount was paid at the time of execution of the deed, and the balance payable in proportion to the success of a suit by the assignee and assignors to recover the property, for the prosecution of which suit the assignee was to supply the funds, was held not to be a transaction contrary to public policy. Note.—The specific rules of English law against maintenance and champerty do not apply to India. But the principle, so far as it rests on grounds of public policy, is held applicable as justice, equity and good conscience—See Pollock and Mulla's Contract Act, 6th (1931) Edition, p. 174.)

8b. ('73) 11 Beng L R 129 (134) (DB). (Contract to allow persons to avoid marriage on happening of any event they may fix upon is opposed to public policy.)

(1900) 1900 Pun Re No. 15, p. 53 (56). (Agreement to dissolve marriage on happening of any event the parties chose to fix is void.)

9. See Pollock & Mulla, Commentaries on the Contract Act, S. 23.

9a. 1957 Pepsu 21 (22) (Pr 8) [AIR V 44 C 5].

10. (1905) 74 L J K B 620 (623) : (1905) 2 K B 123 : 93 L T 284 : 54 W R (Eng) 22, Hermann v. Charlesworth.

11. 1926 Pat 582 (587, 600) [AIR V 13] : 5 Pat 646 (DB.)

('12) 16 Ind Cas 1004 (1004, 1005) (All).
('05) 1 Cal L Jour 261 (267).
('94) 17 Mad 9 (11) (DB).
† ('90) 13 Mad 83 (85) (DB).
('86) 10 Cal 1054 (1056) (DB).
('76) 25 Suth W R 32 (33) (DB).
('70) 5 Beng L R 395 (396) (DB).

12. †('09) 32 Mad 185 (188) (FB). (Contract to make payment to father in consideration of his giving his daughter in marriage is opposed to public policy.)
('98) 22 Bom 658 (666) (DB). (Do.)
† ('89) 1889 Pun Re No. 128, p. 446 (448) (FB).
('11) 9 Ind Cas 652 (654) (Cal).
('92) 1892 Pun Re No. 112, p. 385 (387) (DB).
('89) 13 Bom 131*n* (137*n*).
('89) 13 Bom 126 (131).
('87) 1887 Pun Re No. 46, p. 97 (98) (FB). (Agreement to advance money to a woman in consideration that she will procure a divorce and marry the person making the advance is void even if the parties are Mahomedans.)

13. †1933 Bom 262 (265) [AIR V 20) (DB). (Taking transfer in contravention of statutory provision.)
('12) 8 Nag L R 82 (83). (Mortgage in favour of Patwari who under rules is liable to be dismissed for money-lending is opposed to public policy.)

14. 1917 All 462 (463) [A I R V 4] : 39 All 51 (FB). (An assignment of mortgage in Patwari's favour is legal).
1917 All 447 (447) [A I R V 4] : 39 All 58 (FB). (A transfer of property to a kanungo is not void on the ground of public policy.)
†1931 Bom 269 (271) [AIR V 18] (DB). (Acquisition of property by Government servant in name of another in contravention of depart-

opposed to public policy as laid down in decided cases, in a public servant taking a transfer of property, like every other person, and the Courts are not at liberty, as has been seen before, to create new heads of prohibition on the ground of public policy, other than those laid down in decided cases.

36. Person legally disqualified to be a transferee. — Section 7 deals with persons who are competent to be *transferors*. This clause provides that no transfer can be made to a person who is legally *disqualified* to be a transferee. An illustration of such persons is to be found in S. 136 which provides that no Judge, legal practitioner, or officer connected with a Court of justice shall buy or traffic in, or stipulate for, or agree to receive any share of, or interest in, any actionable claim. Another illustration is to be found in S. 52 of the Trusts Act, 1882, which provides that a trustee for sale of property or his agent is incompetent to buy such property. As a general rule no one in a fiduciary position can sell to himself. A trustee cannot buy trust property nor can an official appointed to conduct a sale for creditors be himself the purchaser.(1)

A person *incompetent to contract* is not necessarily on that ground a person disqualified to be a transferee.(2) A person who has to obtain official approval for a transfer in his favour, under Departmental Government Rules, is not a person disqualified to be transferee.(3) A Buddhist monk is not a disqualified person.(4)

37. Clause (i). — This clause is identical in terms with the second part of S. 108, cl. (j), and was inserted by the Amending Act III of 1885. The reason for this was that S. 108, cl. (j), second part applied to cases of *non-agricultural* leases only(1) and it was necessary to enact a similar provision applicable even to agricultural leases.

Under various Acts of the Legislature occupancy rights have been declared to be not transferable. An alienation of such right would in fact defeat the provisions of law and would thus be void, even under cl. (h) of this section.(2) It would also be void under this clause.(3)

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mental rules is not illegal.)

†1923 Cal 154 (156) [AIR V 10] (DB).

('97) 7 Mad L Jour 268 (269) (DB). (Do).

[But see 1927 Lah 18 (19) [AIR V 4] : 7 Lah 463 (DB). (Transfer of land to Patwari in contravention of rules is opposed to public policy.)

Section 6 — Note 36

1. ✠1923 P C 114 (117) [A I R V 10] : 50 Ind App 162 : 4 Lah 284.

2. See Section 7, Note 8.

3. 1928 Rang 136 (137) [AIR V 15] : 6 Rang 423 (DB).

4. † 1929 Rang 354 (360) [A I R V 16] : 7 Rang 677 (FB).

Section 6 — Note 37

1. See Section 117.

2. See Note 31.

3. 1948 Oudh 349 (350) [A I R V 35 C 109]. (Interest of occupancy tenant cannot be assigned by reason of S. 6 (i).)

1957 All L J 548 (549). (Mortgage of rights of occupancy by tenant — Mortgagee put in possession — Since mortgagee has no legal right to be on the land his occupation amounts to one on behalf of the tenant.)

1932 Oudh 79 (80) [AIR V 19] : 7 Luck 425 (DB).

[*See also* 1927 Cal 220 (223) [A I R V 14] (DB). (A non-permanent tenure created after the passing of the T. P. Act and before the Bengal Tenancy Act came into operation is transferable under S. 6.)]

The clause applies only where the restriction against transfer of the right of occupancy is imposed by *law*.(4) It does not apply where it is imposed by *agreement* of parties or by a *decree of Court*.(5)

38. **Muhammadan law.** — This section would not, by virtue of S. 2 (d), affect any rule of Muhammadan law. But there is no rule of Muhammadan law contrary to the rules laid down in the section and consequently these rules will apply even to cases of transfer between Muhammadans. Thus, no transfers can be made even by Muhammadans of an expectancy(1) or of emoluments attached to an office.(2) The right of a Muhammadan widow to possession of her husband's property in lieu of dower has been held in the undermentioned cases(3) to be a personal right restricted in its enjoyment to the widow and to be not transferable. It has, however, been held in the cases noted below(4) that the widow's right to the *security* is heritable "property" and that this could be transferred.

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7. Every person competent to contract and entitled to transferable property, or authorized to dispose of transferable property not his own, is competent to transfer such property either wholly or in part, and either absolutely or conditionally, in the circumstances, to the extent and in the manner, allowed and prescribed by any law for the time being in force.

Persons competent to transfer.

4. † ('74) 22 Suth W R 22 (26) (FB).
('12) 15 Oudh Cas 67 (75) (DB).
5. ('79) 2 All 411 (413, 414) (FB).
('12) 15 Oudh Cas 67 (75) (DB).
('03) 26 Mad 156 (157).

Section 6 — Note 38

1. 1918 Mad 119 (119) [A I R V 5] : 41 Mad 365 (FB).
1964 Ker 200 (203) [AIR V 51 C 59] : ILR (1964) 1 Ker 355. (1959 Mad 131 [AIR V 46], Rel. on.)
1959 Mad 131 (133, 134) [AIR V 46 C 42] (DB).
1956 Trav-Co 217 (219) [A I R V 43 C 83] : I L R (1956) Trav-Co 277 (DB).
1953 Mad 161 (163) [AIR V 40 C 50]. (Muhammadan law prohibits relinquishment of rights of future inheritance whether for consideration or not.)
1932 Sind 67 (70) [A I R V 19]. (Release of *spes successionis*.)
1921 Sind 177 (187) [A I R V 8]: 16 Sind L R 25 (DB).
1918 Mad 746 (746) [AIR V 5] (DB).
('13) 18 Ind Cas 185 (186, 187) (DB) (Mad).
('09) 2 Ind Cas 865 (872) (All).
† ('07) 31 Bom 165 (171) (DB). (Chance of heir apparent succeeding to an estate is neither transferable nor releasable.)
('06) 8 Bom 252 (257).
('87) 1887 All W N 84 (88) (DB).
[*See* ('96) 19 Mad 176 (177) (DB).]
2. † 1938 P C 71 (72) [A I R V 25] : 32 Sind L R 383. (Alienation by sajjadanashin of his share in offerings cannot bind his successors.)
3. 1960 Pat 147 (148) [A I R V 47 C 45] : 39 Pat 1 (DB). (1944 Pat 163 [A I R V 31] and 1944 Pat 174 [AIR V 31], Rel. on.; 1923 Pat 72 [AIR V 10] and 1923 Pat 33 [A I R V 10], held no longer good law in view of A I R 1925 P C 63 [A I R V 12]; 1920 Mad 666 [A I R V 7], Not foll.)
1942 Pat 210 (212) [AIR V 29] : 20 Pat 798 (DB).
1914 Oudh 369 (372) [A I R V 1] : 17 Oudh Cas 157.
('07) 29 All 640 (646) (DB).
('98) 20 All 262 (263) (DB). (Lien for unpaid dower is a personal right and does not survive to widow's heirs.)
('90) 1890 All W N 115 (116).
('83) 6 All 50 (51) (DB).
('70) 14 Suth W R 239 (241) (DB).
4. 1954 Mys 24 (26) [A I R V 41 C 10] : I L R (1953) Mys 348.
1952 Pat 123 (124) [AIR V 39] : 30 Pat 351 (DB). (Transfer of property by a widow who has been holding the property in lieu of her dower debt is valid during her life time.)
1951 Bom 22 (24) [A I R V 38 C 9] : I L R (1951) Bom 169 (DB). (Her right to retain possession of the property till the dower debt is discharged exists provided she came into possession lawfully and without force or fraud.)
1929 All 326 (327) [AIR V 16].
1927 Pat 20 (21) [A I R V 14] (DB). (Widow can transfer by way of gift her right to dower together with right to remain in possession in lieu thereof.)
1923 Pat 33 (34) [AIR V 10] : 2 Pat 84 (DB).
1923 Pat 153 (154) [AIR V 10] (DB).
1921 All 262 (264) [AIR V 8] : 43 All 127 (DB).
1914 All 461 (463) [AIR V 1].

Synopsis

1. Analogous law.
2. Scope of the section.
3. "Competent to contract."
4. "Entitled to transferable property."
5. "Authorised to dispose of ..... not his own."
6. "Either absolutely or conditionally."
7. "In the circumstances, to the extent and in the manner allowed and prescribed by any law for the time being in force."
8. Transfer in favour of person not competent to contract.

1. Analogous law. — Section 7 of the Indian Trusts Act, 1882, provides as follows :

"A trust may be created—

(a) by every person competent to contract, and,

(b) with the permission of a principal Civil Court of Original Jurisdiction, by or on behalf of a minor;

but subject in each case to the law for the time being in force as to the circumstances and extent in and to which the author of the trust may dispose of the trust property."

2. Scope of the section. — This section declares that a person is competent to transfer property if he is *competent to contract and* is either *entitled to transferable property* or is *authorised to dispose of transferable property not his own*. It does not however, deal with the question as to who can be the *transferee* of property. But S. 6(h) provides that no transfer can be made to a person *legally disqualified* to be a transferee.

3. "Competent to contract." — Section 11 of the Contract Act provides what persons are, and what persons are not, competent to contract. It runs as follows :

"Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject."

The following persons are, thus, not competent to contract and cannot, therefore, transfer property :

(1) A person who is a minor :

A person who has not attained the age of majority according to the law applicable to him.(1) Under the Indian Majority Act (IX of 1875) every person shall be deemed to have attained majority when he shall have completed the age of 18 years, except where a guardian (other than a guardian *ad litem*) has been appointed for him by a Court of justice or where the

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Section 7 — Note 3

1. 1928 P C 152 (154, 156) [AIR V 15]. (Mortgage deed executed by minor is nullity and incapable of founding a plea of estoppel.)
† ('03) 30 Cal 539 (548) : 30 Ind App 114 (PC). (Do.)
† 1937 All 610 (613, 618) [AIR V 24] : ILR (1937) All 860 (FB). (Mortgage.)
1959 Mys 188 (189) (Pr 4) [AIR V 46 C 78]. (Any sale transaction entered into by the minor is void.)
1937 Oudh 521 (522) [AIR V 24]. (Sale.)
1931 Mad 147 (148, 149) [AIR V 18]. (Lease by minor is void.)
1924 Rang 288 (288) [AIR V 11]. (Lease.)
1920 Lah 372 (373) [AIR V 7] : 1919 Pun Re No. 162 (DB). (Mortgage by minor is wholly void.)
1919 Mad 224 (225) [AIR V 6] (DB).
1916 Lah 179 (182) [AIR V 3] : 1916 Pun Re No. 60. (Sale.)
1916 Low Bur 29 (29) [AIR V 3]. (Do.)
('12) 16 Ind Cas 943 (944) (DB) (Mad). (Gift by minor.)
('09) 32 All 25 (30) (DB). (Sale — Affirming the decision of Banerji J.)
('06) 28 All 508 (514, 515) (DB). (Mortgage.)
('05) 1 Nag L R 185 (186). (A lease by minor is absolutely void. An agricultural lease does not form an exception to this rule.)
('04) 26 All 342 (343) (DB).
('91) 18 Cal 259 (263) (DB). (Transfer by a minor is voidable at the option of minor.)
('88) 1888 Pun Re No. 96, p. 260 (261). (Do.)
('88) 1888 Pun Re No. 23, p. 64 (66). (Sale).
('83) 1883 Pun Re No. 165, p. 522 (523). (Do.)
[*See also* 1938 Mad 765 (766) [AIR V 25] : ILR (1938) Mad 928 (DB)].

superintendence of his property has been assumed by any Court of Wards in which case the age of majority would be 21 years.(2)

(2) A person of unsound mind :(3)

Section 12 of the Contract Act provides as follows :

"A person is said to be of sound mind for the purpose of making a contract if, at the time when he makes it, he is capable of understanding it and of forming a rational judgment as to its effect upon his interests.

A person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind.

A person who is usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind."(3a)

(3) A person disqualified by law from contracting :

A person, for example, whose estate has been taken by any Court of Wards is a person disqualified from contracting(4) and is not a person competent to transfer property.(5) Similarly, a person who has been found to be of unsound mind and incapable of managing his affairs, by inquisition under the Lunacy Act (IV of 1912), is a person disqualified from contracting even when he is of sound mind, so long as the order subsists. The law in England is to the same effect.(5a)

The competency referred to is the *personal qualification* of the contracting party(6) and the personal capacity or incapacity of an individual to contract depends upon the law of the place where the contracting party is domiciled.(7) If by that law he is incapable of entering into a contract, a contract entered into by him is invalid even outside the limits within which the law of his domicile extends. Thus, where a disqualified proprietor is incompetent to contract because of his property having been taken over by the Court of Wards for management under the Oudh Land Revenue Act (Act XVII of 1876), he is not competent to contract even in respect of his properties outside Oudh.(8)

Where there is legal capacity to contract there can be no such thing as an equitable incapacity to contract; where, therefore, a person is legally competent to contract, the fact that the transfer is inequitable, that he is an old man and not justified to effect the transfer does not count. These facts do not constitute an incapacity to contract.(9)

A pardanashin lady is not as such incompetent to contract. The protection given to her by law cannot be transmuted into a legal disability.(10)

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2. ('85) 7 All 490 (500) (FB).

3.†1922 All 449(453) [AIR V 9] : 44 All 748(DB). 1933 Mad 624 (625) [AIR V 20] : 56 Mad 904. (Order in lunacy is binding on parties thereto under S. 41, Evidence Act.)

3a. The illustrations are omitted.

4. See the Madras Court of Wards Act, 1 of 1902, S. 34. The Central Provinces Court of Wards Act, 24 of 1899, S. 31; The Punjab Court of Wards Act, 2 of 1903, S. 15; The Bombay Court of Wards Act, 1 of 1905, S. 37; The Bengal Court of Wards Act, 9 of 1879, S. 60; The United Provinces Court of Wards Act, 4 of 1912, S. 37.

5. 1925 Oudh 545 (546) [AIR V 22] (DB). ('04) 17 C P L R 13 (15, 16). (A Government ward stands on the same footing as a minor.)

('84) 1884 Pun Re No. 18, p. 52 (56).

5a. (1920) 89 L J Ch 204 (206) : (1920) 1 Ch 284, In re Marshall. (1905) 74 LJ Ch 86 (87) : (1905) 1 Ch 160, In re Walker.

6. ('07) 3 Nag L R 171 (174, 175). 1917 Nag 215 (222) [AIR V 4] : 13 Nag Nag L R 130 (FB). (Per Stanyon A. J. C.)

7. ('95) 19 Bom 697 (699, 700) (DB). (Widow's domicile is same as her husband's.)

8. ('03) 25 All 195 (202, 203, 204)(DB). (NOTE— Act 17 of 1876 is now repealed by U. P. Act 3 of 1901.)

9. ('03) 25 All 358 (365) (DB).

10. 1928 P C 303 (305) [AIR V 15]. †('13) 36 All 81 (90, 91) : 41 Ind App 23 : 16 Oudh Cas 378 (PC).

4. "Entitled to transferable property." — A person not entitled to any transferable property, e.g., a trespasser, cannot transfer such property to another.(1) As to what properties are transferable, see S. 6 and the Notes thereon.

5. "Authorised to dispose of.....not his own." — A man has no right to deal with property which is not his own, unless he shows some right to do so either as agent, or guardian of the owner, or trustee or the like.(1) As further instances of persons authorised to deal with property not their own may be mentioned, persons holding power of attorney, an official receiver or official assignee of an insolvent's estate, an executor or administrator of a deceased person and a Court of Wards.(2) A grant, which purports to be made under the Darkhast Rules by an officer empowered by them to make it is a grant made by a person authorised in that behalf, and is valid.(3)

6. "Either absolutely or conditionally." — See Note 1 on S. 10 and Note 7 on S. 11 as to the meaning of the expressions "absolute transfer" and "conditional transfer."

7. "In the circumstances, to the extent and in the manner allowed and prescribed by any law for the time being in force." — A person entitled to property or authorised to dispose of property not his own is competent to transfer such property only *in the circumstances, to the extent and in the manner allowed and prescribed by any law for the time being in force.* Thus,

(1) A guardian of a Hindu minor, whether *de facto* or *de jure*, can dispose of the minor's property in case of necessity or where it is for the benefit of the minor.(1)

('30) 121 Ind Cas 869 (873) (Sind).
Also see S. 126, Note 10.

Section 7 — Note 4

1. 1964 Orissa 59 (62) [AIR V 51 C 25] : ILR (1963) Cut 830 (DB). (Partition between Hindu father and sons — Eldest son even though having no interest in family properties given some properties by way of maintenance of his family with no power of alienation — Alienations by him are void and inoperative.)

1941 Pat 219 (221) [AIR V 28] (DB). (It was held that a person without right to possession cannot transfer. The word 'possession' seems to be incorrectly used. The facts were that a trespasser had transferred the property to another and this was held to be not a valid transfer.)

Section 7 — Note 5

1. 1923 All 563 (564) [AIR V 10].

1923 All 581 (582) [AIR V 10] : 45 All 497 (DB). (Mother in a joint family cannot be a legal guardian of her minor sons instead of their uncle.)

2. 1918 Mad 889 (890) [AIR V 5] : 40 Mad 871 (DB).

3. ('03) 26 Mad 268 (278, 279) (DB).

Section 7 — Note 7

1. See Mulla, *Hindu Law*, 8th Edition, Pages 569 and 576.

See also the under mentioned cases:

('55) ILR (1955) T. C. 680 (687) (DB). (But this rule cannot be applied to minors governed by the Nair Act.)

1940 Pat 661 (662) [AIR V 27] (DB). (Mortgage of minor's property by guardian not for minor's benefit but for guardian's — Mortgage is void.)

1937 Pat 141 (142, 143) [AIR V 24] (DB). (There is no difference between Mitakshara and Dayabhag law in this respect.)

1935 Lah 820 (820, 821) [AIR V 22]. (A *de facto* Hindu guardian cannot dispose of minor's reversionary interest though it may be a prudent step.)

1933 Mad 352 (352) [AIR V 20].

1931 Bom 399 (401) [AIR V 18] (DB). (Permanent lease to mortgagee by guardian of Hindu minor — Mortgage if unfair and not beneficial to lessor cannot be acted upon by Court.)

1931 Mad 274 (275, 276) [AIR V 18].

1930 Lah 772 (774) [AIR V 17] : 126 I C 190.

1930 Lah 136 (137) [AIR V 17]. (Under Hindu law a mortgage effected by a *de facto* guardian is not a void but only a voidable transaction.)

1930 Nag 21 (21, 22) [AIR V 17].

1929 Cal 787 (788) [AIR V 16] : 57 Cal 39 (DB). (Gift of immovable property by guardian.)

1929 Mad 856 (858, 859) [AIR V 16].

1929 Mad 110 (114) [AIR V 16] (DB). (Powers of a *de facto* guardian are the same as those of a lawful guardian.)

(2) A *de jure* guardian of a Muhammadan minor can dispose of the minor's property for necessity,(2) but not a *de facto* guardian.(3)

1929 Nag 117 (118) [AIR V 16] (Sale of minor's property by guardian without necessity cannot be upheld.)
1928 Mad 1131 (1132) [AIR V 15] (DB). (*De facto* guardian of Hindu minor can mortgage for maintenance of minor.)
1928 Mad 226 (230) [AIR V 15] (DB). (A *de facto* guardian is under Hindu law in the same position as *de jure* guardian so far at least as acts done by him for the benefit of the minors are concerned and as regards such acts the same test is to be applied as would be applied in case of alienation by a legal guardian.)
1926 Lah 197 (198) [AIR V 13]. (Mortgage or sale by a natural managing guardian for necessity or benefit of estate is valid.)
1926 Nag 332 (333, 334) [AIR V 13].
1926 Nag 81 (83) [A I R V 13] : 22 Nag L R 5 (FB).
1925 Nag 134 (135) [AIR V 12].
1925 Lah 520 (520, 521) [AIR V 12]. (Sale by a *de facto* Hindu guardian for necessity held valid.)
1925 Lah 503 (504) [AIR V 12]. (A *de facto* guardian of a Hindu minor can create charge over minor's property for the purpose of saving the estate or for the benefit of the estate.)
1923 Bom 213 (213) [AIR V 10] (DB).
1923 Nag 230 (233) [AIR V 10].
1922 All 316 (317) [AIR V 9]. (Hindu mother alienating minor's property as his guardian — Only a portion of consideration for legal necessity — Minor can set aside the sale by paying the part of consideration which is for legal necessity.)
1919 Cal 650 (651) [A I R V 6] (DB). (*De facto* guardian.)
1919 Nag 106 (108) [AIR V 6]. (Order under S. 7, Guardians and Wards Act, implies removal of natural guardian.)
1918 Nag 18 (19) [AIR V 5]. (Hindu minor —*De facto* guardian can alienate for necessity or for benefit.)
1916 Mad 239 (240) [AIR V 3] (DB).
1914 Mad 150 (150) [AIR V 1] (DB). (Alienation by *de facto* guardian of a minor cannot bind the minor unless it is proved to be for his benefit or for family necessity.)
('08) 4 Nag L R 20 (24).
('05) 1 Nag L R 66 (67).
('90) 3 C P L R 86 (87).
('24) 75 Ind Cas 384 (386) (Pesh). (Alienation by *de facto* guardian has exactly the same legal effect as that made by *de jure* guardian.)
('07) 5 Cal L Jour 542 (547, 548) (DB).
('97) 7 Mad L Jour 191 (193) (DB). (The power of guardian to alienate his ward's property is not co-extensive with that of a trustee.)
('03) 13 Mad L Jour 223 (224) (DB).
('73) 20 Suth W R 38 (39) (DB).
('67) 10 Beng L R 368n (370n) (DB). (Where a guardian sells part of an estate, and applies the purchase-money to the expenses incurred in a suit undertaken and found, in fact, to be for the benefit the whole property, the sale is valid.)
(1865) 2 Suth W R 270 (271) (DB). (Farming lease by guardian of minor.)
('69) 2 Beng L R A C 126 (128, 129) (DB). (Alienations or abandonments by a guardian must be for the manifest interest and convenience of the infant.)

2.† 1918 P C 11 (17, 18) [AIR V 5] : 45 Cal 878: 45 Ind App 73.
1936 Mad 564 (566) [A I R N 23] : 59 Mad 942 (DB). (Father, as guardian of minor daughter, can grant lease of minor's property if it is for minor's benefit.)
1936 Cal 326 (326) [AIR V 23]. (Mahomedan law —Minor—Alienation by *de jure* guardian valid if for absolute necessity or benefit of minor.)
[But see 1923 Lah 601 (601) [AIR V 10]. (Alienation of minor's property by natural guardian is void.)]

3. 1918 P C 11 (19, 20) [AIR V 5] : 45 Cal 878 : 45 Ind App 73.
('12) 34 All 213 (221) : 15 Oudh Cas 49 : 39 Ind App 49 (PC).
('13) 6 Sind L R 268 (275) (FB).
1951 All 247 (249) [AIR V 38 C 33] : ILR (1952) All 149. (Exchange entered into by *de facto* guardian was however held not invalid.)
1946 Bom 57 (58) [AIR V 33 C 13] : ILR (1945) Bom 656 (DB). (Guardian *ad litem* in execution proceedings is in no better position than a *de facto* guardian for selling minor's immovable property.)
1931 Mad 468 (468) [AIR V 18].
1930 Sind 182 (183, 184) [AIR V 17] : 24 Sind L R 463 (DB).
('29) 120 Ind Cas 171 (172) (DB). (Lah). (Under Muhammadan law a brother is not entitled to be a guardian of the property of his minor brothers—Alienation by him cannot be enforced against minor.)
1929 Lah 810 (810, 811) [AIR V 16] : 10 Lah 385 (DB). (Do.)
†1928 Lah 250 (253) [AIR V 15] (DB).
('28) 109 Ind Cas 110 (111) (DB) (Oudh).
1927 Lah 773 (773) [AIR V 14] (DB).
1927 Nag 290 (293) [AIR V 14].
1926 Lah 170 (171) [AIR V 13] : 7 Lah 35 (DB). (Under Muhammadan Law, alienation of minor's property by his mother is void.)
1925 All 36 (36) [AIR V 12] (DB). (*De facto* guardian cannot alienate minor's property even for necessity or benefit.)
1925 Lah 509 (509, 510) [AIR V 12].
1924 Lah 564 (564) [AIR V 11].
1924 Lah 200 (203) [AIR V 11] : 4 Lah 467 (DB).
1923 All 485 (486) [AIR V 10].
1922 Cal 458 (458, 459) [AIR V 9] (DB). (*De facto* guardian under Mahammadan law cannot alienate immovables of his ward.)
†1921 Cal 572 (573) [AIR V 8] (DB).
1921 Lah 365 (366) [AIR V 8] (DB).
1921 Oudh 160 (162) [AIR V 8] (DB).

(3) A guardian of a minor (not being a guardian *ad litem*) appointed by a Court of justice, cannot alienate the property of the minor without the sanction of the Court(3a) and except under the conditions imposed by the Court.(3b)

(3a) Under the law in force in Manipur, a certificate of sale is necessary in the case of a guardian who wants to dispose of the property of the

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1920 Cal 832 (832) [AIR V 7] (DB).
1920 Cal 112 (112) [AIR V 7] (DB).
1920 Nag 279 (280) [AIR V 7] : 15 Nag L R 154.
1919 All 297 (299) [AIR V 6] : 41 All 473 (DB). (1918 P C 11 [A I R V 5], followed.)
1919 Cal 365 (366) [AIR V 6].
1919 Pat 224 (225) [AIR V 6] (DB).
1918 Lah 348 (349) [AIR V 5] : 1918 Pun Re No. 36.
1916 Mad 273 (273) [AIR V 3] (DB). (*De facto* guardian cannot alienate property for purchase of another property though beneficial.)
1914 Lah 534 (535) [AIR V 1] : 1913 Pun Re No. 30 (DB). (*De facto* guardian has no power to mortgage ward's property.)
('13) 1913 Pun Re No. 15 : 19 I.C. 235 (235, 236) (DB).
('09) 32 Mad 276 (279) (DB).
('08) 11 Oudh Cas 1 (9, 10) (DB).
('07) 30 Mad 197 (198) (DB).
('07) 1 Sind L R 221 (222, 223) (DB). (Remote guardian has no power to sell minor's property whether there be necessity or not.)
('06) 9 Oudh Cas 97 (100, 101) (DB).
('93) 1893 Pun Re No. 65, p. 292 (294) (DB).
('89) 1889 Pun Re No. 192, p. 681 (682) (DB).
[But see 1918 Lah 1 (2) [AIR V 5] : 1918 Pun Re No. 108 (DB). (The acts of mother, if to the manifest advantage or of imperative necessity, must be upheld.)
1917 Mad 71 (73) [AIR V 4] (DB). (In cases of urgent and imperative necessity, or where the transaction from its nature must necessarily be beneficial to the minor, a *de facto* guardian of a Mahomedan minor, can alienate the property of the minor.)
1915 Oudh 65 (72) [AIR V 2] : 18 Oudh Cas 168 (DB). (Mahomedan minor—*De facto* guardian —Dealings with minor's property may be binding on the minor in cases of urgent and imperative necessity.)
1914 Mad 495 (498) [AIR V 1] 37 Mad 514 (DB). (According to Mahomedan law, a *de facto* guardian of a minor can alienate the property of the minor only in cases of urgent and imperative necessity and in cases which must, in their very nature, be necessarily beneficial to the minor.)
('13) 21 Ind Cas 128 (128) (DB) (Cal). (A lease by *de facto* guardian is valid if it is for benefit of minor.)
('11) 34 Mad 527 (532) (DB). (The powers of a Mahomedan guardian in respect of immovable property are very restricted—Urgent necessity or clear benefit to the ward must be shown for alienation of immovable property.)
('07) 34 Cal 65 (68) (DB). (Alienation by *de facto* guardian if for benefit of minor must be upheld.)
('07) 34 Cal 36 (38, 41) (DB). (A *de facto* guardian, such as mother, can alienate her minor children's property for legal necessity and for their benefit.)
('96) 20 Bom 116 (121) (DB). (Alienation by guardian of Mahomedan minor valid only in case of absolute necessity.)]

3a. See Guardians and Wards Act, 1890, Ss. 29 and 30.
Also see the undermentioned cases :
1937 Bom 98 (99, 100) [AIR V 24] : I L R (1937) Bom 432 (DB).
1936 Bom 389 (394) [AIR V 23] : ILR (1937 Bom 1 (DB).
1935 All 41 (42, 43) [A I R V 22]. (Alienation by guardian in contravention of the sanction is voidable.)
1931 Cal 131 (132) [AIR V 18] : 58 Cal 128.
1927 Cal 836 (842) [AIR V 14] : 54 Cal 687 (DB).
1927 Mad 233 (235) [AIR V 14] : 50 Mad 217 (DB).
1926 Oudh 169 (175) [AIR V 13] (DB).
1925 Bom 320 (320) [AIR V 12] (DB).
1922 Cal 150 (150, 151) [A I R V 9] : 49 Cal 911 (DB).
1920 Oudh 53 (55) [AIR V 7]. (Voidable).
1917 Bom 235 (237) [AIR V 4] (DB). (A guardian under Act of 1864 cannot validly alienate the ward's property without sanction after the Act of 1890 came into force—Alienation without sanction is voidable.)
1917 Cal 235 (235) [AIR V 4] (DB).
('13) 19 Ind Cas 624 (625) (DB) (Cal). (Permission obtained by guardian from Court to mortgage particular land of minor for specified amount —Mortgage by guardian of larger quantity of land for smaller amount—Mortgage is voidable.)
('12) 13 Ind Cas 594 (594) (Cal). (Sale without permission of Court is voidable even if the sale benefited the minor and was a perfectly honest transaction.)
('12) 14 Ind Cas 515 (516) (DB) (Cal).
('11) 11 Ind Cas 764 (764) (All).
('10) 7 Ind Cas 505 (513) (DB) (Lah).
('07) 10 Oudh Cas 321 (326) (DB).
('06) 10 Cal W N 763 (764) (DB).
('99) 22 Mad 289 (290) (DB). (A mortgage of minor's property executed by a guardian without the sanction of the Court is not void but only voidable.)
('99) 23 Bom 287 (290) (DB).
('75) 2 Bom P J 312 (DB).
Also see S. 38 N 5 and S. 58 N 25.

3b. 1927 All 631 (632) [A I R V 14] : 50 All 63 (DB).

minor.(3bb)

(3b) An alienation of property of minor by a person who is not the legal or *de jure* guardian of the property of such minor is absolutely void and confers no title on the alienee.(3c)

(4) The *manager* of a joint Hindu family can validly dispose of the family property for the necessity or the benefit of the family.(4) The *father* of a joint Hindu family can dispose of ancestral property for the payment of his *antecedent* debts even if there is no necessity.(5)

(5) Prior to the enactment of Hindu Succession Act (1956) a Hindu widow or other limited heir under the Hindu law could dispose of the property inheritedh by her only for her life except where the alienation was for legal necessity.(6) One of several widows or other limited heirs could not

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3bb. 1952 Manipur 11 (1) (11) [AIR V 39].

3c. 1951 Trav-Co 118 (121) [AIR V 38 C 41] : I L R (1951) Trav- Co 150 (FB). (Existence of justifying necessity cannot validate the alienation.)

4. See Mulla, Hindu Law, 8th Edn., pp. 271 to 273.

Also see the undermentioned cases :

1931 P C 118 (120) [AIR V 18] : 58 Ind App 206 : 53 All 290.

1927 P C 80 (82) [A I R V 14] : 50 Mad 421 : 54 Ind App 136 (Alienation by a manager for religious charity is valid.)

1927 P C 121 (122, 123) [AIR V 14] : 8 Lah 597 : 54 Ind App 211. (Manager can transfer for discharging debts of family business.)

1923 P C 37 (39) [A I R V 10] : 2 Pat 285 : 50 Ind App 14.

1917 P C 61 (62) [AIR V 4] : 39 All 437 : 44 Ind App 126

1917 P C 188 (189) [AIR V 4] : 40 All 171.

1917 P C 41 (41, 42) [AIR V 9] : 39 All 500 : 44 Ind App 163.

('06) 1906 Pun L R No. 18, p. 55 (55).

Also see S. 38 Note 5.

5. See Mulla, Hindu Law, 8th Edn., p. 291.

Also see the undermentioned cases :

1936 P C 277 (279) [AIR V 23] : 63 Ind App 384 : 17 Lah 644.

1922 P C 247 (247, 249) [A I R V 9] : 49 Ind App 228 : 44 All 368.

1927 P C 37 (39) [AIR V 14] : 49 All 149 : 54 Ind App 79.

1924 P C 50 (56) [AIR V 11] : 51 Ind App 129 : 46 All 95.

1917 P C 76 (76) [AIR V 4].

1917 P C 61 (63, 65) [AIR V 4] : 39 All 437 : 44 Ind App 126.

6. See Mulla, Hindu Law, 8th Edn., pp. 176 to 178.

('80) 5 Cal 776 (790) : 7 Ind App 115 (PC).

1955 All 625 (626) [AIR V 42 C 183] (DB). (Her power of alienation is analogous to that of a manager of an estate; she can exercise the power in case of need or for the benefit of the estate.)

1955 Andhra 49 (51) [A I R V 42 C 21] : 1954-2 Mad L J (Andh) 195 : I954 Andh L T (Civil) 163. (Gift executed not for purposes sanctioned by Hindu law — Donee does not get absolute title.)

1955 Cal 312 (313) [AIR V 42 C 90] : ILR (1957) 1 Cal 22. (Permanent lease by widow—Cannot enure beyond her life-time unless lease was made for legal necessity.)

1955 Orissa 17 (19) [A I R V 42 C 6] : I L R (1954) Cut 588 (DB). (Alienation for discharging time-barred debts will not bind reversioners even though the debts themselves were incurred by the widows for legal necessity.)

1955 Pat 251 (253, 254) [A I R V 42 C 60] (DB).

1955 N U C (Pat) 4576.

Madh B L J (1954) H C R 809 (812, 813). (Alienee from widow has to prove that alienation was made for necessity—Payment of husband's debt and defraying marriage expenses are legal necessities.)

1954 Pat 455 (457) [AIR V 41 C 157] (DB).

1955 N U C (Pepsu) 3279 : I L R (1954) Patiala 653.

1954 Trav C 400 (400) [A I R V 41 C 139] : 1954 Ker L T 178. (Alienation of estate by widow for payment of husband's debt is valid and binding upon the reversioners.)

1953 Pat 374 (375) [A I R V 40 C 135] : 1953 B L J R 384 (DB). (Permanent lease or lease for a long term.)

1952 Mad 706 (710) [AIR V 39] : ILR (1952) Mad 318 : 1952-1 Mad L J 665 : 65 Mad L W 301 (DB).

1961 Simla 175 (176) [AIR V 38 C 32] (DB). (Gifts of small portion of estate by widow for religious or charitable purposes or those which are supposed to conduce to spiritual welfare of husband are binding upon reversioners).

Also see the undermentioned cases :

('67) 11 Moo Ind App 487 (514) (PC).

('88) 11 Mad 288 (290) (DB). (Alienation by widow of small piece of land for religious necessity.)

('66) 3 Mad H C R 116 (117, 118) (DB).

[*See also* 1957 Andh Pra 257 (258) [A I R V 44 C 86]. (Widow's power to gift property to daughter on the occasion of her marriage—Only a reasonable extent of property of hus-

alienate the property even for necessity without the consent of the other widows or heirs.(7) Under the law in Manipur a certificate of sale from proper authority is necessary in the case of a widow when she wants to dispose of property left by her deceased husband.(7a) Under S. 14 of the Hindu Succession Act (1956) the limited estate of a Hindu widow is now abolished and she has been conferred an absolute estate.

(6) The manager or trustee of a religious endowment can transfer the endowed property only under certain circumstances and to a certain extent such as legal necessity or the preservation of the estate.(8

band or property inherited by her from son can be gifted.)

7. See Mulla, Hindu Law, 8th Edn., p. 186.
Also see the undermentioned cases :
1928 P C 251 (253) [AIR V 15] : 55 Ind App 399.
1926 Mad 6 (10, 11) [AIR V 13] (DB).
('11) 33 All 443 (447) (DB). (Hindu co-widows — No alienation of absolute interest without the consent of the other—Life estate of one may be alienated.)
('02) 26 Mad 334 (336) (DB). (Though one of two co-widows who is not the managing member on behalf of both cannot charge the inheritance even where the transaction is for the benefit of the estate an alienation by her will bind her own interest in the property during her lifetime.)
('93) 16 Mad 1 (10) : 19 Ind App 134 (PC).
('94) 7 C P L R 153 (153). (The estate of two sisters under Mitakshara law is like that of two widows and neither of them can alienate without the consent of the other.)

7a. 1952 Manipur 11 (1) (11) [AIR V 39]. (Rule does not apply to daughters disposing of their deceased father's property.)
1952 Manipur 10 (11) [AIR V 39]. (Sale by widow without such certificate is void and inoperative.)

8. See Mulla, Hindu Law, 8th Edition pp. 480 to 482.
Also see the undermentioned cases :
1926 P C 112 (118) [AIR V 13] : 53 Ind App 253: 6 Pat 139.
1917 PC 33 (35, 37) [AIR V 4] : 40 Mad 709 : 44 Ind App 147. (Do.)
1917 P C 6 (7) [AIR V 4] : 40 Mad 402 : 44 Ind App 98.
('09) 36 Cal 1003 (1013) : 36 Ind App 148 (PC). (In absence of unavoidable necessity a mokarrari pattah or permanent lease granted by the mohunt of the endowment for the time being on the most favourable construction enures only for the life-time of the grantor.)
('77) 2 Cal 341 (351) : 4 Ind App 52 (PC). (Shebait or manager of the debutter can like a manager of an infant in Hindu law alienate a part of the debutter property for purposes of the worship of the idol and repairs of the temple.)
('75) 2 Ind App 145 (152) : 4 Beng L R 450 (PC).
('70) 13 Moo Ind App 270 (273, 275) (PC). (Cannot grant a permanent lease.)
1936 Cal 256 (258) [AIR V 23]. (Shebait gomasta of the debutter property is not competent to grant perpetual lease of the land except for imperative legal necessity.)
1934 Mad 624 (625, 627) [AIR V 21] (DB). (Apart from the question of necessity, a mahant is incompetent to create interest in mutt property to enure beyond his life.)
1933 Mad 852 (853) [AIR V 20]. (Manager of temple property can grant perpetual lease in special and unusual circumstances.)
1933 Mad 639 (643) [AIR V 20] (DB). (Power of shebait to incur debt is analogous to that of manager of infant heir.)
1933 Mad 481 (481, 482) [AIR V 20] (DB). (Permanent lease by head of mutt, valid for his life-time—Affirming AIR 1930 Mad 422.)
1930 Mad 405 (409) [AIR V 17] (DB).
1930 Cal 270 (272) [AIR V 17] (DB). (A shebait can, without legal necessity, grant a transferable and heritable lease which is permanent in so far that so long as the rent is paid regularly, tenant will continue to enjoy the land and which leaves to the idol's estate the benefit of an augmentation of rent which is not fixed and can be enhanced. Such a lease is binding on the succeeding shebait.)
1929 Cal 612 (612, 613) [AIR V 16] (DB). (Permanent lease by mahant will enure only for his lifetime.)
1929 Lah 868 (871) [AIR V 16] (DB). (Mahant cannot make a gift of religious endowment property.)
1929 Lah 816 (817) [AIR V 16] (DB). (Except for necessity no lease can be granted by the head of a religious institution so as to continue after his death.)
1925 Cal 435 (437) [AIR V 12] (DB). (A mutwalli has no power to mortgage the wakf property except for wakf necessity.)
1924 Pat 611 (612) [AIR V 11] (DB). (Mahant has right to mortgage or sell endowed property for sradh of the deceased mahant, if otherwise there are no funds available.)
1924 Pat 355 (357) [AIR V 11] (DB).
1923 Bom 296 (296) (DB). (A gift, by the manager, of perpetual allowance out of temple funds is not valid beyond the life-time of the grantor.)
1923 Mad 288 (289, 293) [A I R V 10] (DB). (Shebait or Matathipathi cannot alienate mutt properties except for unavoidable necessity.)
1922 Pat 243 (246) [AIR V 9] : 1 Pat 475 (DB).
1922 Pat 178 (180) [AIR V 9] (DB).
1922 Pat 165 (166) [AIR V 9] (DB).

S. N. DAR, ■ ■ ■ ■

(7) A coparcener of a Mitakshara joint Hindu family cannot, according to the law prevailing in some provinces, alienate his share in the property

1920 Mad 834 (835) [AIR V 7] (DB). (Perpetual Kanom by a trustee of the Malabar devaswom is not binding on devaswom though status of trustee is not analogous to that of a Hindu widow.)
1919 Mad 130 (131) [AIR V 6] (DB). (Trustee of a religious trust cannot grant a permanent lease of the trust properties.)
1918 Mad 1264 (1265) [A I R V 5] (DB). (The head of a mutt cannot alienate the whole corpus of mutt property or part of it, except for necessity.)
1916 Mad 502 (502) [A I R V 3] (DB). (A permanent lease of a religious trust property, which is neither necessary nor beneficial to the trust, is beyond the powers of the trustee.)
1920 Oudh 244 (247) [AIR V 7].
('13) 18 Ind Cas 11 (12, 13) (DB) (Oudh).
1918 Cal 804 (805) [AIR V 5] DB). (A mokarari maurasi lease of wakf property by a mutwalli is void if there is no urgent necessity for granting it.)
1918 Nag 234 (235) [AIR V 5] : 14 Nag L R 12.
1918 Oudh 345 (347) [AIR V 5] (DB).
1916 Cal 728 (728, 729) [A I R V 3] : 43 Cal 34 (DB). (The grant of a permanent lease without legal necessity is in excess of the powers of the shebait who grants the lease.)
1916 Lah 239 (241) [A I R V 3] (DB). (A mutwalli cannot create permanent encumbrances on wakf property.)
('13) 1913 Pun Re No. 18 : 19 Ind Cas 219 (220) (DB). (The powers of mahant of religious institution in matters of alienation of endowment property are analogous to those of a Hindu widow.)
('12) 16 Ind Cas 622 (623) (DB) (Mad). (The right of the trustee of a mutt to create a perpetual lease of the mutt properties is restricted only to cases in which there enters at least some element of necessity.)
('12) 13 Ind Cas 686 (687) (Cal). (The effect of a permanent lease of certain land granted by a shebait will enable the grantee to hold the land during the continuance of the grantor's interest.)
('12) 13 Ind Cas 85 (86, 87) (DB) (Cal). (An alienation of property made by a mahant is not valid if it is shown that there was no necessity for alienation.)
('11) 34 Mad 535 (539) (DB). (Permanent lease of trust property at a fixed rent by the head of a mutt is invalid, except on special grounds or circumstances of necessity.)
('10) 6 Ind Cas 7 (7) (DB) (Mad). (It is not competent to the trustee of a temple to grant a permanent lease of temple property in the absence of special circumstances to do so.)
('10) 37 Cal 179 (186, 187) (DB). (Alienation of wakf property is valid if necessity is established and permission of the Cadi is obtained.)
('09) 4 Ind Cas 1129 (1129) (DB) (Mad). (Trustee cannot grant a permanent lease at a fixed rent unless there is necessity to grant it.)
('08) 12 Cal W N 63 (64) (DB). (Permanent lease executed without legal necessity is void.)
('06) 10 Cal W N 1000 (1002) (DB). (A debutter property according to Hindu law is not absolutely inalienable; it can be alienated for legal necessity.)
('05) 28 Mad 391 (392) (DB). (Trustee of religious endowment cannot create perpetual tenure except on special grounds.)
('03) 25 All 296 (311) (DB).
('95) 19 Bom 271 (272) (DB). (Permanent under-tenures such as mirasi, putni and mokurrari grants created by managers of endowed temple lands are not void if made for a necessary purpose.)
('95) 18 Mad 359 (362) (DB).
('86) 10 Bom 34 (39) (DB). Priest cannot transfer mutt property beyond his life.)
('82) 1882 Pun Re No. 399, p. 115 (117) (DB).
('73) 20 Suth W R 471 (472) (DB). (A mohant in charge of an endowment with only a life-interest in the property cannot create an interest superior to his own, or, except under the most extraordinary pressure and for the distinct benefit of the endowment bind his successors in office.)
('73) 11 Beng L R 336*n* (336*n*) (DB). (A mortgage of debutter property by a shebait is ultra vires.)
('72) 18 Suth W R 439 (439, 440) (DB). (The shebait of a religious endowment is competent to lease the endowed lands and to appropriate the proceeds for the purpose of keeping up the worship of the idol and a mokuddum, under such a lease, is entitled to hold possession during the lifetime of the lessor or during such period as the latter continues to be the shebait of the endowed lands.)
('71) 7 Beng L R 621 (628) (DB). (Under the Hindu law, a permanent alienation by a shebait of endowed property, such as the creation of a patni, is not absolutely null and void—A permanent alienation by a shebait of endowed property under special circumstances of necessity is valid. Want of funds for repairing the temple and restoring the image of the idol is a necessity sufficient under the Hindu law to warrant such an alienation.)
('67) 7 Suth W R 446 (448) (DB). (The high priest of a religious endowment in Assam, who was only a nominee of the grantees, was held to have no right to grant leases in his own name and of his own authority.)
(1864) 1864 Suth W R (Gap) 157 (158) (DB). (A shebait is in the position of trustee for the founder and cannot create permanent encumbrances to the injury of the endowed property.)
(1863) 1 Mad H C R 298 (300) (DB). (The paid managers of the affairs of a pagoda have no power as such to encumber the pagoda property.)

without the consent of the other coparceners'(9) but according to the law prevailing in other provinces he can.(10) A *gift* or *bequest* cannot be made by such a coparcener according to the law prevailing in all the provinces(10a) except with the consent of the other coparceners.(10b)

(7a) A co-sharer in common property can sell, mortgage or lease his interest to another co-sharer or to a stranger. The fact that the common pro-

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9. See Mulla, Hindu Law, 8th Edition, page 293.

Also see the undermentioned cases:

1917 P C 128 (133) [AIR V 4] : 45 Cal 733 (PC) (Bengal).
1917 P C 61 (62) [AIR V 4] : 39 All 437 : 44 Ind App 126. (United Provinces.)
('09) 31 All 507 (509) (DB). (Do.)
('09) 1 Ind Cas 83 (84) (DB) (All). (Do).
('84) 1884 All W N 85 (85) (DB). (Do).
('94) 16 All 369 (370) (DB). (Do.)
('93) 15 All 339 (349, 350) : 20 Ind App 116 (PC). (Do.)
('83) 5 All 542 (549, 550) (DB). (Do.)
('83) 5 All 384 (385) (DB). (Do.)
('98) 20 All 325 (326) (DB). (Do.)
1920 All 111 (112) [AIR V 7]. (Do.)
('80) 5 Cal 148 (167) : 6 Ind App 88 (P C), (Bengal).
('06) 4 Cal L Jour 543 (546) (DB). (Do).
('08) 7 Cal L Jour 644 (645) (DB). (Do).
('91) 18 Cal 157 (161) : 17 Ind App 194 (PC). (Oudh).
('07) 10 Oudh Cas 289 (291) (DB). (Do.)
('12) 13 Ind Cas 547 (548) (Oudh). (Do).
('13) 18 Ind Cas 281 (282) (Oudh). (Do.)
1918 Oudh 317 (318) [A I R V 5] : 21 Oudh Cas 156. (Do.)
1920 Pat 454 (455) [AIR V 7] : 5 Pat L Jour 120 (DB). (Patna).
1935 Pat 349 (351) [AIR V 22] (DB). (Do.)
('83) 1883 Pun Re No. 153, p. 466 (471). (The Punjab.)
('93) 1893 Pun Re No. 6, p. 46 (50). (Do.)
('12) 1912 Pun Re No. 21 : 11 Ind Cas 443 (444). (Do.)
1936 All 77 (78) [AIR V 23].
1926 Oudh 470 (473) [AIR V 13]:2 Luck 226(DB).
1922 Lah 205 (207) [AIR V 9].
('08) 1908 All W N 200 (200). (United Provinces.)
('13) 21 Ind Cas 528 (529) (Cal). (Bengal.)
('11) 11 Ind Cas 892 (893) (Cal). (Do.)
('11) 33 All 654 (656 (DB).
('09) 1 Ind Cas 670 (674) (DB) (Cal.)
('74) 21 Suth W R 190 (191) (DB).
('70) 14 Suth W R 80 (81) (DB).
('80) 1880 Pun Re No. 58, p. 120 (123) (FB).
('79) 1879 Pun Re No. 21, p. 42 (45) (DB). (The Punjab.)
Also see S. 6, Note 2a.

10. See Mulla, *Hindu Law*, 8th Edn., pp. 292, 293.

Also see the undermentioned cases :

1920 Bom 341 (342) [A I R V 7] : 44 Bom 341 (DB). (Bombay.)
1919 Bom 84 (84, 85) [A I R V 6] : 43 Bom 472 (DB). (Do.)
('73) 10 Bom H C R 162 (164) (FB). (Do.)
('86) 5 Bom P J 106, p. 365 (DB). (Do.)
('73) 10 Bom H C R 139 (160) (DB). (Do.)
('69) 6 Bom H C R (A C) 247 (249) (DB). (Do.)
(1862) 1 Bom H C R 39 (40) (DB). (Do.)
1920 Mad 927 (927) [AIR V 7] (DB). (Madras.)
1919 Mad 560 (565 566) [A I R V 6] : 42 Mad 154 (DB). (Do.—A gift made by coparcener in pursuance of a promise in consideration of marriage is an alienation for consideration within the rule of Hindu law.)
('69) 5 Mad H C R 166 170) (DB). (Madras.)
(1865) 2 Mad H C R 416 (417) (DB). (Do.)
(1865) 2 Mad H C R 270 (271) (DB). (Do.)
(1863) 1 Mad H C R 471 (473, 474) (DB). (Do.)
1922 P C 353 (355) [AIR V 9] : 49 Ind App 358 50 Cal 84 : 18 Nag L R 127. (Benar.)
1934 Nag 13 (14) [A I R V 21]. (Central Provinces.)
1920 Nag 150 (150) [AIR V 7] : 16 Nag L R 131. (Do.)
1918 Nag 208 (209, 210) [AIR V 5]. (Do.)
1916 Nag 25 (26) [A I R V 3] : 12 Nag L R 161 (Do.)
('13) 9 Nag L R 74 (78). (Do.)
('93) 6 C P L R 60 (63). (Do.)
('91) 4 C P L R 139 (141). (Do.)
('90) 3 C P L R 126 (127). (Do.)
('90) 3 C P L R 64 (65).
1923 Nag 334 (335) [A I R V 10]. (A gift by an undivided coparcener is invalid.)
1916 Bom 130 (132) [A I R V 3] : 41 Bom 347 (DB). (Alienation without consideration is invalid.)
('91) 15 Bom 673 (675) (DB).
Also see S. 6, Note 2a.

10a See Mulla, Hindu Law, 8th Edn., p. 292. See also Raghavacharlar, Hindu Law, 1939 Edn., p. 267 and the following cases.

('95) 18 Mad 73 (83, 84) (DB).
('84) 7 Mad 357 (365) (FB).
('86) 9 Mad 273 (275) (DB).
('91) 14 Mad 459 (462) (DB).
('10) 7 Ind Cas 800 (800) (DB) (Mad).
1918 Mad 395 (395) [AIR V 5] (DB).
('95) 19 Bom 803 (806) (DB).
('75) 12 Bom HCR 229 (231) (DB).
('74) 11 Bom H C R 76 (81) (DB).
('99) 12 C P L R 63 (66). (Gift of his own share by an undivided coparcener is invalid.)
('66) 3 Bom H C R (A C) 66 (68) (DB) (Do.)
('80) 5 Bom 48 (62) : 7 Ind App 181 (PC). (Case of will.)

10b. 1954 Mad 307 (310) [AIR V 41 C 127] (DB). (Further no minors or a child in the womb should be existing on date of gift. But consent of maintenance holders is not necessary.)

perty has not been divided by metes and bounds and allotted in severalty to the co-sharers does not stand in the way of such conveyance. Sections 7, 8 and 44 recognise the validity of such transfers.(10c) But the lease of a plot by a co-sharer landlord in exclusive possession thereof will not bind the other co-sharer landlords whose consent to the lease has not been taken.(10d)

(8) One partner cannot create a mortgage upon partnership property without the consent of the other partners(11) except where he has, under arrangement with the others, the sole management of the business.(12)

(9) The manager of lunatic's estate cannot mortgage or sell the property of the lunatic without the order of the Court under the Lunacy (District Courts) Act (XXXV of 1858).(13) (This Act is repealed by the Lunacy Act, IV of 1912).

(10) A judgment-debtor whose property was in the possession of the Collector for the purposes of execution under Sch. III of the Code of Civil Procedure (since repealed) was incompetent to mortgage, charge, lease or otherwise alienate such property without the permission of the Collector.(14)

10c. 1957 Andh Pra 619 (621) [AIR V 44 C 205] (DB). (It is not the law that one co-sharer can only release his interest in favour of the other co-sharers.)

10d. ('51) 17 Cut L T 358 (359).
1936 Mad 967 (968) [AIR V 23] (DB).

11. ('82) 4 All 437 (459).

12. ('08) 31 Mad 206 (209) (DB).

13. ('13) 21 Ind Cas 879 (879, 880) (DB) (Mad). (Natural guardian of a lunatic appointed manager and guardian of the lunatic's estate under Act 35 of 1858 is bound by the provisions of the Act and cannot mortgage the property without the leave of the Court.)

('12) 14 Ind Cas 218 (218, 219) (DB) (Cal). (A lease for more than five years granted by the guardian of a lunatic without the authority of the Court as required by S. 14, Lunacy Act, 1858, is voidable and not void.)

('10) 6 Ind Cas 158 (159) (DB) (Cal). (Manager of estate of lunatic has power to grant without permission of Court ordinary cultivating lease though for an uncertain term.)

('06) 3 All L Jour 686 (687) (DB).

('96) 20 Bom 150 (153, 154) (DB).

('73) 10 Beng L R 364 (377) (DB). (A *de facto* manager can have no greater power than one duly appointed. Where, therefore, the mother of a lunatic, who had not been so appointed mortgaged his estate without the previous sanction of the Court, the mortgagee's suit for foreclosure was dismissed.)

('75) 15 Beng L R 350 (355) (DB). (A sale made by a guardian without the sanction of the Court required by Act 40 of 1858, S. 18, is made without power.)

14. 1918 P C 168 (169) [AIR V 5] : 14 Nag L R 181 : 45 Ind App 219 : 46 Cal 183. (36 Bom 510, Overruled.)

1941 Nag 12 (15) [AIR V 28] : I L R (1941) Nag 214.

1938 Nag 253 (253, 254) [AIR V 25] : I L R (1939) Nag 652 (DB).

1937 Nag 330 (332) [AIR V 24] : I L R (1937) Nag 111.

1937 Oudh 410 (412) [AIR V 24] : 13 Luck 531 (DB).

1937 Oudh 87 (96, 98) : 12 Luck 435 (DB).

1936 Oudh 280 (284) [AIR V 23] : 12 Luck 185 (DB). (Collector has seisin of case from the date of order of transfer.)

1935 Oudh 156 (158, 160) [AIR V 22] : 10 Luck 459 (DB).

('36) 160 Ind Cas 924 (924) (Nag).

1935 Oudh 121 (125) [AIR V 22] : 10 Luck 361 (DB).

1934 Nag 285 (288) [AIR V 21] : 31 Nag L R 129.

1933 All 908 (909) [AIR V 20] : 56 All 134 (DB).

†1933 All 468 (469, 472) [AIR V 20] (DB).

1931 All 541 (542) [AIR V 18] (DB).

1931 All 38 (40) [AIR V 18] (DB). (Prohibition in Para. II of Sch. III does not apply to decree in which the sale is ordered.)

1930 Nag 237 (238) [AIR V 17] (DB). (Part of property under Collector's management—Other part can still be mortgaged.)

1929 Nag 257 (259) [AIR V 16].

1928 Nag 128 (129) [AIR V 15]. (The incompetency of the mortgage only extends to the property of which the Collector had expressly assumed management.)

1929 Oudh 435 (436, 437) [AIR V 16] : 5 Luck 384. (Gift without permission of Collector is incompetent.)

1929 Oudh 441 (443) [AIR V 16] : 5 Luck 285 (DB). (Sale.)

1924 Oudh 302 (303) [AIR V 11] : 27 Oudh Cas 56 (DB).

1924 Nag 132 (133) [AIR V 11] : 20 Nag L R 87.

1921 Oudh 176 (180) [AIR V 8] (DB).

See also the undermentioned cases.(15)

8. Transfer in favour of person not competent to contract. — As has been seen in Note 2 this section deals only with the competency of the *transferor* to transfer property. There is nothing in this section to prevent a person not competent to contract, from being the *transferee of* property.(1) Thus, a mortgage(2) or sale(3) in favour of a minor is valid, except where the transfer involves obligations to be carried out by the minor, in which case the transfer will be invalid.(4) A transfer in favour of a lunatic is similarly valid.(5) Illness does not prevent a transfer by others in favour of a person as he is a passive party.(6)

There may be, however, cases where a person is competent to contract but is disqualified from being a transferee of property. (See Notes on S. 6, cl. (h).) In such

1920 Nag 254 (254) [AIR V 7] : 16 Nag L R 194.
1913 Nag 29 (29) [AIR V 6] : 16 Nag L R 64 (DB).
† 1917 Nag 215 (218, 219) [AIR V 4] : 13 Nag L R 130 (FB).
('07) 3 Nag L R 171 (174, 175). (Every alienation in contravention of provisions of Sch. III is not merely voidable by Collector, but is absolutely void and of no effect against any person whomsoever.)

15. 1954 Manipur 22 (23) [AIR V 41 C 10]. (Oral gift of half share in property by Hindu father governed by Mitakshara Law in favour of son-in-law—Property not proved self-acquired —*Held* the fact that donor could make the gift was not proved.)
('51) 17 Cut L T 358 (359). (One of co-sharer-landlords in exclusive possession of plot letting out same to tenant without consent of others — Tenancy not binding on non-consenting co-sharers.)
1934 Mad 605 (607) [AIR V 21] : 57 Mad 1062 (DB). (Alienation of minor's property by Christian mother is not void but voidable at the instance of minor.)
1934 Rang 365 (366) [AIR V 21]. (A *de facto* guardian of a minor cannot according to the personal law of Burmese Buddhist clothe himself with power to sell or mortgage minor's property.)
1934 Rang 349 (349) [AIR V 21] (DB). (Do.)
1934 Rang 335 (335, 337) [AIR V 21] : 12 Rang 656 (DB). (Do.)
1933 Rang 403 (404) (AIR V 20] : 12 Rang 47 (DB). (Do.)
1933 Rang 83 (84) [AIR V 20] : 11 Rang 193 (Do.)
1931 Rang 178 (178, 179) [AIR V 18]. (Do.)
1931 Mad 529 (531) [AIR V 18]. (Alienation by *de facto* guardian of property of Christian minor is void.)
1929 Pat 117 (119) [AIR V 16] : 8 Pat 549 (DB). (Alienation by disqualified proprietor, under Chota Nagpur Encumbered Estates Act, 6 of 1876, S. 12A, is void ab initio.)
1928 Rang 199 (200) [AIR V 15] : 6 Rang 329. (A transfer of minor's property by Burman Buddhist mother may be upheld if she was acting in the interests of the minor.)
1916 Low Bur 91 (93) [AIR V 3]. (Buddhist minor — Alienation by *de facto* guardian for minor's benefit is valid.)

Section 7 — Note 8

1. 1922 Nag 239 (241) [AIR V 9]. (Deed of sale in favour of minor is valid.)
1915 All 478 (479) [AIR V 2] : 38 All 62 (DB). (Do.)
† 1915 Oudh 155 (156, 157) [AIR V 2] : 18 Oudh Cas 115 (DB). (Case law discussed.)
('11) 33 All 657 (659) (DB). (A sale in favour of minor is valid.)
Also see S. 105, Note 22.

2. † 1917 Mad 630 (634, 635, 638) [AIR V 4] : 40 Mad 308 (FB). (33 Mad 312, Overruled.)
1929 All 604 (605) [AIR V 16] (DB).
1928 All 102 (102, 103) [AIR V 15] (DB).
1936 Pat 153 (156, 157) [AIR V 23] (DB).
1919 Pat 561 (563) [AIR V 6] (DB).
1918 Cal 1027 (1028) [AIR V 5] (DB).
('81) 3 All 408 (412) (DB).

3. 1930 Mad 425 (426) [AIR V 17].
1924 Lah 611 (613) [AIR V 11] : 5 Lah 317 (DB). (A sale in favour of a minor can be enforced.)
1924 Mad 544 (546) [AIR V 11]. (Sale in favour of minor at the instance of his father is valid, minor personally not being a contracting party.)
1917 Lah 109 (109, 110) [AIR V 4].
† 1916 All 366 (368, 369) [AIR V 3] : 38 All 154 (DB).
1916 Low Bur 91 (92, 93) [AIR V 3].
1915 Mad 412 (413) [AIR V 2] : 37 Mad 390 (DB). (When a minor is not himself a contracting party in a transaction of purchase but becomes the beneficial owner under the sale deed, the transaction is not void.)
('13) 18 Ind Cas 451 (451) (DB) (Cal).

4. 1918 Pat 626 (627) [AIR V 5] : 3 Pat L Jour 518 (DB). (A lease in a minor's favour imposing a liability on him to do certain thing is null and void.)

5. 1925 Oudh 37 (39) [AIR V 12] : 27 Oudh Cas 214.

6. 1963 All 194 (199) [AIR V 50 C 58].

cases the transfer in his favour would be invalid, not because he is not competent to contract, but because of the specific disqualification.

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8. Unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property, and in the legal incidents thereof.

Operation of transfer.

Such incidents include, where the property is land, the easements annexed thereto, the rents and profits thereof accruing after the transfer, and all things attached to the earth;

and, where the property is machinery attached to the earth, the moveable parts thereof;

and, where the property is a house, the easements annexed thereto, the rent thereof accruing after the transfer, and the locks, keys, bars, doors, windows, and all other things provided for permanent use therewith;

and, where the property is a debt or other actionable claim, the securities therefor (except where they are also for other debts or claims not transferred to the transferee), but not arrears of interest accrued before the transfer;

and, where the property is money or other property yielding income, the interest or income thereof accruing after the transfer takes effect.

Synopsis

1. Analogous law.
2. Scope of the section.
3. Sales in invitum.
4. "Unless a different intention is expressed or necessarily implied."
5. Maintenance grants.
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7. Grant for an indefinite period.
8. "Transfer of property."
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10. "In the property."
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12. Transfer of legal incident only — Effect o f.
13. "Easements annexed thereto."
14. Rents and profits of property.
15. "All things attached to the earth."
16. House when passes fixtures.
17. Transfer of debt—Securities when pass.
18. Interest.
19. Other legal incidents.
20. Deed—Construction.

1. **Analogous law.** — Section 60, sub-s. (1) of the English Law of Property Act, 1925, runs as follows:

"60. (1) A conveyance of freehold land to any person without words of limitation, or any equivalent expression, shall pass to the grantee the fee simple or other the whole interest which the grantor had power to convey in such land, unless a contrary intention appears in the conveyance."

Section 62 of the said Act runs as follows:

"62. (1) A conveyance of land shall be deemed to include and shall by virtue of this Act operate to convey, with the land, all buildings, erections, fixtures, commons, hedges, ditches, fences, ways, waters, watercourses, liberties, privileges, easements, rights and advantages whatsoever, appertaining or reputed to appertain to the land, or any part thereof, or, at the time of conveyance, demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to the land or any part thereof.

(2) A conveyance of land, having houses or other buildings thereon, shall be deemed to include and shall by virtue of this Act operate to convey, with the land, houses, or other

buildings, all outhouses, erections, fixtures, cellars, areas, courts, court-yards, cisterns, sewers, gutters, drains, ways, passages, lights, watercourses, liberties, privileges, easements, rights, and advantages whatsoever appertaining or reputed to appertain to the land, houses, or other buildings conveyed, or any of them, or any part thereof, or, at the time of conveyance, demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to, the land, houses, or other buildings conveyed, or any of them, or any part thereof.

* * * * *(1)

(4) This section applies only if and as far as a contrary intention is not expressed in the conveyance, and has effect subject to the terms of the conveyance and to the provisions therein contained.

(5) This section shall not be construed as giving to any person a better title to any property, right, or thing in this section mentioned than the title which the conveyance gives to him to the land or manor expressed to be conveyed, or as conveying to him any property, right or thing in this section mentioned, further or otherwise than as the same could have been conveyed to him by the conveying parties.

* * * * *"(1)

2. Scope of the section. — This section provides that unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee, *firstly*, all the interest which the transferor is then capable of passing in *the property*, and, *secondly*, all the interest which the transferor is then capable of passing in *the legal incidents* of the property.(1) The object of the section is to clarify what are the legal incidents of each particular class of property which pass along with the property when it is transferred, and not to lay down any rule as to what words are necessary to effect a transfer of any particular kind of property.(1a)

The first part is merely the legislative enactment of what was, even before the passing of the Act, the Common law of the country.(1b) The English law, both before and after the passing of the Conveyancing Act of 1881,(2) was also the same,(2a) except that it was necessary in every case that the estate given should be marked out

Section 8 — Note 1

1. Sub-sections (3) and (6) are omitted as they are not material for this commentary.

Section 8 — Note 2

1. 1959 S C 254 (257) [AIR V 46 C 35].
('65) 1965 All L Jour 637 (639). (Sir plots appertaining to and forming integral part of proprietary rights in village—Co-sharer transferring by gift his proprietary rights in village — Proprietary rights in Sir also pass to transferee.)
1964 Andh Pra 297 (298) [AIR V 51 C 78]
1944 Oudh 35 (36, 37) [AIR V 31].
1937 Cal 763 (764) [A I R V 24]: ILR (1937) 2 Cal 181 (DB). (Mortgagee in possession has right to lease mortgaged property during period of his possession under S. 76 (a) even after institution of redemption suit—Such right is not affected by S. 52—Lessee has right to cultivate lands till redemption of mortgage.)
1927 Oudh 74 (78 [AIR V 14]: 2 Luck 4 (DB). (A transfer of land without restriction carries with it every incident of ownership.)
1923 Cal 335 (337) [AIR V 10] (DB). (If apt words are not used and if reservations are not made then it does not lie in the mouth of the grantor to contend that the grant is not so extensive as on an ordinary interpretation of the words used in the grant, it would seem to be.)
('12) 17 Ind Cas 494 (496) (DB) (Cal). (A mortgage of his property by a person without reservation of any right was held to transfer both the chakdari right and the subordinate jotedari right possessed by him in the mortgaged property.)
('05) 9 Cal W N 710 (718) (DB).
('70) 14 Suth W R 379 (379) (DB).

1a. 1940 Pat 516 (536) [AIR V 27]: 19 Pat 433 (DB).

1b. ('88) 1888 Bom P J 125 (125) (DB). (Unless a different intention is expressed, a transfer of land passes with it the well also as being embedded in it.)
('84) 11 Cal 121 (131): 11 Ind App 218 (228) (PC). ("The rule of law before Transfer of Property Act was that indefinite words of gift were calculated to convey all the interest of the grantor, but that it was necessary to read the whole instrument to gather the intention.")

2. 44 and 45 Vict., C. 41.

2a. (1843) 67 E R 163 (169): 2 Here 438, Bower v. Cooper.

or *limited* by the use of such words as "and his heirs," "and the heirs of his body" "in fee" or "in tail." In the absence of such a limitation a transfer conveyed only a life estate.(3) By S. 60 of the Law of Property Act, 1925,(4) even this exception was done away with, and a conveyance will now, in England, convey the whole interest which the grantor had the power to convey in his land unless a contrary intention appears in the conveyance. The principle underlying the rule in the first part of the section is that a grantor shall not derogate from his own grant.(5)

The second part of the section is an application of the general rule of jurisprudence taken from the civil law and variously expressed in such maxims as *res accessoria sequitur rem principalem* — an accessory follows the principal thing — and *accessorium non ducit, sed sequitur, suum principale*—that which is accessory or incident does not lead, but follows the principal.(6) The same was the rule in English law, namely that all incorporeal hereditaments appurtenant to lands passed by a conveyance of land to which they were annexed without mention of the appurtenance. But a practice, nevertheless, grew up of inserting in every conveyance "general words" detailing the interests conveyed, at considerable length in many cases.(7) By S. 6 of the Conveyancing Act, 1881, which was re-enacted in S. 62 of the Law of Property Act, 1925, it was provided that in the absence of a contrary intention expressed in the conveyance, a conveyance of land

> "shall be deemed to include, and shall by virtue of this Act, operate to convey, with the land, all buildings, erections, fixtures, commons, hedges, ditches, fences, ways, waters, watercourses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land or any part thereof, or, at the time of the conveyance, demised, occupied, or enjoyed with, or reputed, or known as part or parcel of, or appurtenant to the land or any part thereof."

Sub-section (2) of that section made a similar provision for the conveyance of land having houses or other buildings thereon.

The section does not, according to the High Court of Madras, lay down any canon of construction, but is a rule relating to *the legal effect of a grant.*(8) According to Mr. Justice Mukherji of the Allahabad High Court this section lays down a rule of construction which must be applied to the case of a transfer which does not say whether any particular interest possessed by the transferor was meant by the conveyance to pass or not. The object of the section, according to him, is "to stabilize title and to remove, from the region of pure speculation, what passed in the mind of the transferor or the transferee at the date of the transfer."(9)

3. Sales in invitum. — The section does not, in terms, apply to transfers *in invitum.*(1) But the principles underlying the section are of general applicability and

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3. Williams and Eastwood, Principles of the Law of Real Property. 1933 Edn., pp. 426, 427, 443.

The rule, however, was relaxed in the cases of transfer of equitable estates — In such cases words of limitation were not necessary, but words must show an intention to give an estate in fee.

[*See* (1904) 73 L J Ch 832 (839): 2 Ch 752 (764). Re Irwin; Irwin v. Parkes.

(1921) 91 L J Ch 17 (18): (1921) 2 Ch 469 (486): 126 L T 145, In re Bostock's Settlement; Norrish v. Bostock. (The rule however was not relaxed in case of a formal limitation of equitable estate executed and perfect in itself.)]

4. 15 Geo. V, C. 20.

5. *See* ('88) (1888) Pun Re No. 60, p. 147 (149). (If the grantor intends to reserve any rights over the tenement granted, it is his duty to reserve it expressly in the grant.)

6. 1919 Mad 547 (548) [AIR V 6] (DB).

7. Williams and Eastwood, Principles of the Law of Real Property, 1933 Edn., pp. 271, 272.

8. 1919 Mad 338 (338, 339) [AIR V 6] (DB). (1917 P C 121 [AIR V 4], followed.)

9. 1929 All 465 (474) [AIR V 16] (FB).

Section 8 — Note 3

1. 1939 All 415 (417) [AIR V 26]: ILR (1939) All 607 (FB).

will apply even to sales *in invitum*.(2) First, as regards sales in execution of money decrees, it has been held by their Lordships of the Privy Council that the question as to the *extent* of the property and the interest of the judgment-debtor therein sold depends upon what the Court intended to sell and the purchaser understood he bought.(3) But in the absence of evidence as to what particular interest of the judgment-debtor in the property was intended to be sold, it is conceived that, on the principles underlying the section, *all* the interest of the judgment-debtor will pass to the purchaser. Further, the sale will also pass to the purchaser all the *legal incidents* of the property sold.(4) Thus, an execution sale of land will also pass the growing crops(5) and the trees(5a) on the land and the easements annexed thereto.(6) So also, an execution sale of entire interest in Zamindari land will also pass the house situate upon the land in the absence of words showing an intention to retain it.(6a) It has, however, been held in the undermentioned case(7) that the principle of S. 8 does not apply to court auction-sales. It is submitted that this view is not correct.

A *revenue* sale must be distinguished from sales in execution of decrees. On the failure of the owner to pay Government assessment his estate or interest in the land is forfeited to the Government and what is sold is not the interest of the defaulting owner but the *interest of the Government* subject to the payment of the Government assessment.(8) It has been held in the undermentioned case(8a) that where the sale proclamation and the receipt passed at the revenue sale held for recovery of Government dues expressly sell the right, title and interest of the defaulter it is not open to the Court in a subsequent suit to enter into an enquiry whether a different title was intended to be conveyed thereby.

1931 All 62 (64) [A I R V 18] : 52 All 985 (DB). (Section inapplicable to involuntary transfers.)

†1916 Mad 323 (325) [AIR V 3] : 39 Mad 283 (DB). (The section does not apply to transfer of rights by execution sale. See S. 2, cl. (d).)

2. 1931 All 62 (64) [AIR V 18]:52 All 985 (DB). (Thus, where property subject to charge was sold in execution of a decree, auction purchaser was held to have purchased property subject to the charge.)

[See 1933 Mad 482 (484) [AIR V 20]. (Under S. 65, C. P. C. and S. 8, T. P. Act, a purchaser in a Court sale is entitled to the property from the date of the sale and not from the date of the confirmation thereof, 40 Cal 89 (PC), followed.)]

3. ('94) 27 Mad 131 (141, 142) : 31 Ind App 1 (PC).

('90) 17 Cal 584 (589) : 17 Ind App 10 (16) (PC). (What was sold is a question of fact in each case.)

1936 Pat 349:(353) [AIR V 43 C 88] (DB).

1919 Oudh 432 (432) [AIR V 6] : 21 Oudh Cas 263. (A grove held by a proprietor from before the time he became a proprietor is not necessarily a legal incident of his proprietorship of the land.)

1928 Rang 67 (68) [A I R V 15] : 5 Rang 803. (Land already leased at the time of auction purchase — Purchaser is entitled to rent due from the lessee.)

4. 1957 Pat 706 (709) [AIR V 44 C 209] (DB). (Where at the auction sale in execution for recovery of cess, the under-tenures were purchased by the patnidar, and had passed absolutely to the patnidar and had merged in the patni tenure, the under-tenure-holder had no right left in the under-tenure, the auction sale completely divested the under-tenure-holder of his interests therein.)

5. 1934 Cal 610 (614) [AIR V 21] : 61 Cal 991 (DB). (13 Mad 15 and A I R 1919 Cal 588, Relied upon.)

1923 Pat 355 (356) [AIR V 10]. (Sale of tenure passes with it crops growing unless excepted by sale notification or custom.)

5a 1940 All 427 (428) [AIR V 27] : ILR (1940) All 599 (DB). (Grove.)

6. ('74) 22 Suth W R 522 (522) (DB).

6a. 1945 Pat 400 (402) [AIR V 32] : 24 Pat 268 (DB).

7. 1939 All 415 (417) [AIR V 26] : ILR (1939) All 607 (FB).

8 † 1927 P C 135 (137) [AIR V 14] : 54 Ind App 218 : 54 Cal 669. (Sale under Bengal Land Revenue Sales Act 11 of 1859.)

1914 P C 82 (83) [AIR V 1].

8a. 1951 Kutch 52 (53) [A I R V 38 C 34]. (Where a revenue sale for recovery of Government debt is held what passes to the auction purchaser at such sale must be determined with reference to the sale proclamation and the receipt passed at such sale, as they constitute the only documents of title.)

It has been held by their Lordships of the Privy Council that the interest of the Government will not include the building put upon the land by the defaulting proprietor, and that the maxim found in the English law, viz., *quicquid plantatur solo solo cedit*, has, at the most, only a limited application in India.(9)

4. "Unless a different intention is expressed or necessarily implied."— It is not necessary, in order to pass all the interest of the transferor, that the deed of transfer should specifically say so. All the interest of the transferor will pass *unless a different intention is expressed or necessarily implied.* It is the intention to the contrary that must be expressed or necessarily implied,(1) the maxim being *expressa nocent, non expressa non nocent*— things expressed hurt, things not expressed do not.

As will be seen in Note 20 the intention of the parties to a deed must be gathered only from the terms of the deed itself and not from extraneous circumstances unless the language of the deed is ambiguous. A reservation of rights in a transfer, therefore, cannot be inferred or necessarily implied apart from the terms of the document itself, except where the document is ambiguous, in which case the Court can consider extraneous circumstances such as, the object of the grantor, the surrounding circumstances or the subsequent acts of the parties.(2)

Some expressions used in documents in India have acquired a technical meaning and such words, in construing the documents and ascertaining the intention of the parties, must be given that meaning unless there is any contrary indication in the context. Thus, the words "from generation to generation" in a transfer import the transfer of an absolute estate.(3) A *sanadi* grant in inam, saranjam, etc., imports the

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9. 1927 P C 135 (137) [AIR V 14] : 54 Ind App 218 : 54 Cal 669. (AIR 1926 Cal 97, Affirmed— 6 Suth W R 228 distinguished on the ground of material difference in facts.)

Section 8 — Note 4

1. 1964 S C 24 (26, 27) [AIR V 51 C 3] : (1964) 2 S C R 885. (A grant should be construed to include all rights, title and interest of the grantor, unless there is a contrary provision either expressly made or implied by necessary implication.)
('65) 1965 All L Jour 637 (639).
1927 Oudh 240 (253) [AIR V 14] : 2 Luck 43. (Transfer of village - All interests of transferor, such as a grove or a house in the village, will pass unless exempted.)
1919 Low Bur 40 (42) [AIR V 6] : 9 Low Bur Rul 268 (DB).
('76) 1 Bom 91 (94) (DB). (Razinama and possession of Miras land given without express reservation of any right—Transfer complete.)
2. 1953 All 705 (706) [AIR V 40 C 343] (DB). (When an owner of a grove sells the grove by declaring that he was selling it with every right that he possessed therein, it follows that his right to the land is also conveyed to the vendee unless it is expressly reserved by him.)
1917 Cal 663 (664) [AIR V 4] (DB).
3. ('76) 1 Cal 391 (398) : 3 Ind App 92 (PC).
('87) 14 Cal 296 (307) : 14 Ind App 7 (PC). ("Naslan bad naslan".)
(1861) 9 Moo Ind App 55 (65) (PC). (Conveyance of an estate from generation to generation subject to maintenance.)
1937 All 235 (236) [AIR V 24]. (To A for life and then to heirs of his body — Estate to A is absolute.)
1935 Oudh 96 (101) [AIR V 22] (DB). ("Naslan bad naslan and batnan bad batnan".)
1926 Oudh 561 (568) [A I R V 13] : 2 Luck 335 (DB). ('Naslan bad naslan'; 'Batnan bad batnan'.)
1929 Oudh 415 (416) [AIR V 16]. ('Naslan bad naslan' and 'batnan bad batnan'—generation after generation.)
1922 Oudh 42 (43) [AIR V 9] (DB). (Naslan bad naslan.)
1921 Oudh 240 (241) [AIR V 8]. (Do.)
1918 Mad 81 (81) [AIR V 5] (DB). ("Santhathikalam puthira powthira parampariyamaya" are words of limitation.)
1916 Mad 102 (107) [AIR V 3] (DB). (The words "son to grandson," are words of limitation and not of purchase.)
1916 Pat 337 (341, 344) [AIR V 3] : 1 Pat L Jour 109 (DB). (Putra pautradi.)
('12) 14 Ind Cas 73 (76) (Lah). (The words 'putra poutradi krame' import male sex in their primary significance but in the sense of gift to a male are read as words of general inheritance and they would also include females.)
('01) 24 Mad 299 (305) (DB). (Words "sons and grandsons" in a will were held to have no other effect than the term "heir" would have in an English will.)
('89) 1889 Bom P J 30 (30). (From generation to generation—vansh parampara.)
('84) 7 Mad 387 (389) (DB). ('Putra poutra paryantam' are words of purchase and not

grant ordinarily of the land revenue and not the grant of the land itself.(4) The grant of a jaghir, saranjam or ghatwally tenure is *prima facie* a personal grant for life of the donee(5) though it may, in any particular case, be shown from the circumstances to be a heritable estate.(6) The words "*istemrari mokerrari*" in a *patta* do not *per se* convey an estate of inheritance though it may be permanent during the lifetime of the grantee.(7) So also the words "*kayam patta*" or "*kayam sasvata patta.*"(8) But the word "*mowrasi*" denotes a heritable estate(9) as also the word "*malik,*"(10) but the

of limitation and therefore confer absolute estate.)
Also see S. 105, Note 47.

4. 1923 P C 6 (7) [AIR V 10] : 47 Bom 327 : 50 Ind App 49. (In this case it was held from the circumstances of the case that the grant was of soil.)
('05) 29 Bom 480 (486) (DB). (Given in commutation of a cash payable as palanquin allowance and containing no such words as jal, trun, taru, pashan, nidhi, nikshep.)
('05) 29 Bom 415 (420) (DB). (The burden is on the inamdar to show that he is alienee of the soil.)
†('03) 5 Bom L R 983 (986) (DB). (Even where the term 'jaghir' is used if the grant is to the grantee and his heirs and there is nothing to control the meaning of those words the grantee would take an absolute estate — Case law reviewed.)
('82) 6 Bom 598 (603) (DB).
('88) 12 Bom 534 (542) (DB). (Grant of vatandari khotship in Ratnagiri District.)
†('77) 1 Bom 523 (527, 528) (DB).
('75) 1875 Bom P J 325. (Affirmed in 4 Bom 264 (PC).)
✠('69) 6 Bom H C R 191 (199, 201) (DB). (Inam or jagir grant does not include rights to forest or timber.)
('68) 4 Bom H C R A C 1 (7) (DB). (Sanadi grants in inam, saranjam, jagir, wazifa, wakf, devasthan and sevasthan are generally grants of land revenue.)
[See however 1943 Sind 100 (105) [AIR V 30] : ILR (1942) Kar 559. (The question whether the grant of a jagir is only of the revenue or is a grant of the soil itself has to be decided on the terms of the particular grant — There is no presumption either way. AIR 1923 PC 6. Followed.)
1925 Bom 12 (14) [AIR V 12] : 49 Bom 99 (DB). (There is no such presumption — It is a question to be determined from the evidence in each case whether the grant is of soil or revenue. AIR 1923 P C 6, Followed.)]
[But see 1936 Oudh 121 (124) [AIR V 23] : 11 Luck 588 (DB). (Has not the same meaning in all parts of India—In Oudh it means grant of proprietary rights in soil.)]

5. 1918 P C 203 (205) [A I R V 5] : 46 Ind App 88 : 46 Cal 683. (Grant of jagir with words 'putra poutradi' standing by itself cannot confer right of inheritance to collaterals.)
('12) 36 Bom 639 (658) : 39 Ind App 202 (PC).
('91) 15 Bom 222 (228) : 18 Ind App 22 (PC).
('71) 14 Moo Ind App 247 (256) : 11 Beng L R 71 (PC). (Ghatwally tenure.)
('35) 9 Bom 561 (567) (DB). (Sanad creating express absolute estate, the words 'as jagir' in the sanad cannot control it.)
1924 Pat 298 (299) [AIR V 11] (DB).
1922 Pat 411 (412, 413) [A I R V 9] : 1 Pat 201 (DB). (Bengal Regulation XXXVII of 1793, S. 15.)
1915 Cal 612 (612) [AIR V 2] : 42 Cal 305 (DB). (Grant of jagir with "putrapoutradikrame" creates an absolute heritable and alienable estate.)
✠('78) 3 Bom 186 (190) : 6 Ind App 54 (PC).

6 ('91) 15 Bom 222 (228) : 18 Ind App 22 (PC). (Where grant is "to a man and his heirs" and there is nothing to control the ordinary meaning of the words, the grantee takes an absolute estate.)
1914 Cal 4 (19) [AIR V 1] (FB). (Fact of descent from father to son for two or three generations is evidence of hereditary nature of the grant.)
1922 Pat 411 (412, 413) [AIR V 9] : 1 Pat 201 (DB). (Where the grant of jagir is made to a person and his heirs and there being nothing else to control the ordinary meaning of the words, the grantee takes an absolute interest.)
1915 Cal 612 (613) [AIR V 2] (DB). (A grant with the addition of the words 'putra poutradi' was held to confer an absolute estate on the grantee.)

7. ('86) 12 Cal 117 (130) : 12 Ind App 205 (PC).
(1900) 27 Cal 156 (165) : 26 Ind App 216 (PC). ('An istemarari mokurrari tenure is not necessarily a perpetual hereditary tenure.')
('03) 30 Cal 883 (892, 893) (DB).
('03) 30 Cal 20 (30, 31) (DB).
Also see S. 105, Note 47.

8. ('92) 15 Mad 199 (201, 202) (DB). (The instrument was described as fixed permanent ijara patta.)
1916 Mad 500 (500) [AIR V 3] (DB). ('Kayam patta.')

9. ('03) 30 Cal 883 (892) (DB).

10. See Note 6.
1963 S C 890 (894) [AIR V 50 C 134] : (1963) Supp 2 S C R 417. (While ordinarily an intention to give an absolute and full ownership is expressed by the words 'Malik" or "Milkiyat" by saying that somebody is to be the Malik or is to have the Milkiyat, this is not invariably so.)
1951 S C 139 (141, 142, 144) [AIR V 38 C 21] : 1950 S C R 766.
1947 All 288 (292) [AIR V 34 C 114] : ILR (1947) All 403 (DB). (If the word "malik" alone is used,

context may show that notwithstanding the word, an absolute estate was not intended. The term '*varasdar*' although simply means an heir has been construed to mean an absolute heir, having the same meaning as the word '*Malik*' unless the context indicates a different meaning.(10a)

A gift to a daughter at the time of her marriage or to a woman under coverture for her "choli bangadi" or "Haldi Kunkum" does not necessarily revert to the donor upon the donee becoming a widow. The idea conveyed by the use of these traditional expressions is that the woman going in the new family should have independent means for her personal needs.(10b)

Where trees standing on the land were mortgaged to *A* and subsequently the land was sold to *B*, no mention being made in the sale deed of the mortgage to *A*, it was held that the non-mention of the mortgage in the sale deed did not amount to a contrary implied intention.(11)

5. Maintenance grants. — A grant for maintenance is *prima facie* limited to the *life* of the grantee.(1) The fact that the object of the grant is to maintain the

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an absolute estate is intended, but, where there are other words used, the whole of the will has to be read and construed.)

1952 Nag 55 (57) [A I R V 39] : ILR (1952) Nag 60. ('Malik' imports absolute interest in the absence of any indication to contrary.)

1928 Oudh 67 (72) [AIR V 15].

10a. ('50) 3 Sau L R 155 (157) (DB). (AIR 1948 Bom 261, Rel. on.)

10b. 1952 Nag 55 (57) [AIR V 39] : ILR (1952 Nag 60.

11. ('98) 22 Bom 610 (612) (DB). (The vendor's interest in the trees, therefore, was held to have passed to the vendee.)

Section 8 — Note 5

1. 1948 P C 3 (6) : [AIR V 35 C 2] : ILR (1947) Kar (PC) 327.

('01) 25 Bom 563 (573) : 28 Ind App 198 (PC). (Such grant may be limited to the life of the grantor also.)

1954 Mad 770 (771) [A I R V 41 C 252] (DB). (Settlement of lands for maintenanee — Alienation by way of gift, sale, hypothecation etc., prohibited—Property to revert to donor in case of no issues—Held, that there was no absolute gift of corpus but it created only a life interest in the income of the property.)

1948 Oudh 9 (16) [AIR V 35 C 3] : 22 Luck 308 (DB).

1947 Pat 356 (358) [A I R V 34 C 119] (DB). (B, in possession of ancestral property, in his anxiety to provide for the maintenance of his step-mother K executing deed of gift—Certain zarpeshgi interests along with certain other lands transferred to K in lieu of her maintenance—Deed providing that neither executant nor his heirs shall have right to take possession of properties and to realise zarpeshgi —Deed held, conferred only life interest on E and not absolute interest — Last provision not inconsistent with intention to give life interest.)

1926 Oudh 561 (567) [A I R V 13] : 2 Luck 335 (DB). (The safe rule is to construe the document as a whole and not to hold it to confer absolute title merely on the ground that the words used were "as proprietor" and "for ever" and "in perpetuity.")

1925 Oudh 125 (126) [A I R V 12] : 27 Oudh Cas 350. (Maintenance grant coupled with right of alienation becomes an absolute estate.)

1924 Pat 721 (724) [AIR V 11] : 3 Pat 880 (DB). (Whether a grant is resumable on the death of the grantee or not is all a question of construction.)

1921 Oudh 209 (213) [A I R V 8] : 24 Oudh Cas 374 (DB).

1918 Cal 532 (533) [AIR V 5] (DB). (A gift to a Hindu female for her maintenance is presumed under the Hindu law to confer a life-interest only.)

1917 Nag 1 (5) [AIR V 4]. (The use of words "always" or "for ever" does not per se create an inheritable estate.)

1916 Mad 27 (28) [A I R V 3] : 39 Mad 396 (DB). (Prima facie a grant of money allowance is temporary.)

1915 Cal 735 (736 737) [A I R V 2] (DB). (Gift before T. P. Act.)

1915 Mad 357 (358) [A I R V 2] (DB). (Immovable properties given for the maintenance of a widow are prima facie resumable on the death of the grantee.)

('13) 21 Ind Cas 93 (94) (DB) (Cal). (When the grant is heritable and perpetual it does not lose that nature if it is by way of maintenance.)

('13) 18 Ind Cas 127 (127) (Oudh). (Grant in favour of a person whom grantor was under no obligation to maintain—There is no presumption that the grant was for the life of grantee.)

('06) 3 Cal L Jour 521 (524) (DB). (In the absence of express terms or custom to the contrary.)

('06) 16 Mad L Jour 352 (352) (DB). (Presumption is that they are resumable.)

('05) 1 Cal L Jour 517 (521) (DB).

grantee raises a necessary implication that the grant is only for the life of the grantee In such cases the mere use of the words "always," or "for ever" or "inam" or "*malik*" does not *per se* create a heritable estate.(2) On the other hand, if the deed clearly states that the grantee is to have an absolute interest, such interest cannot be controlled by the mere fact that the motive of the grant was maintenance.(3) In the undermentioned cases(4) where the original deed of maintenance was not forthcoming, it was held that successive enjoyment of the property transferred for several generations justified the presumption that the grant though made for maintenance was intended to be absolute. It has now been authoritatively stated by their Lordships of the Supreme Court that the mere fact, that a gift of property is made for the support and maintenance of a female relation cannot be taken to be a *prima facie* indication of the intention of the donor that the donee was to enjoy the property only during

('04) 7 Oudh Cas 90 (92, 94) (DB). (Even though the words 'in perpetuity' occur.)
('01) 23 All 194 (205) : 28 Ind App 1 (PC). (The use of the words 'proprietor' and 'for ever' will not *per se* create an inheritable estate.)
('03) 5 Bom L R 729 (734) (DB). (A grant of annuity though charged on village revenue cannot make it co-equal in duration with property itself.)
[*See also* ('82) 4 Mad 193 (197) (DB). (The point at issue in this case was whether grant was binding on the successors of grantor — *Held*, in the absence of express words to the contrary, a grant for a specific object will enure from its nature unit the object fails.)]

2. ('01) 23 All 324 (330) : 28 Ind App 65 (PC). (The words "always and for ever" are not inconsistent with limiting the interest given.)
('01) 23 All 194 (205) : 28 Ind App 1 (PC). (8 All 39 PC), Rel. on.)
1952 Punj 120 (121) [A I R V 39]. (Bequest of property in favour of wife and widowed daughter-in-law in words that "they will be malik" and "quabiz" and they will be entitled to the income of the property during their lifetime but will not have power of making any alienation and after their death whoever may be lawful heir will be entitled to all my property" — Properties to be taken equally by wife and the daughter-in-law — *Held* that the will conferred only a life estate because the testator clearly stated that the property was given as for maintenance to the wife and the daughter-in-law.)
1952 Trav-Co 105 (111) [A I R V 39] (DB). (Properties mentioned in document given to wife by way of "inam" to be enjoyed by her for lifetime without subjecting the same to any alienation — Document read as a whole, held created maintenance grant for lifetime of the donee — Word "inam" does not necessarily indicate any absolute grant — It has to be understood with reference to context and accompanying words.)
1926 Oudh 561 (567, 568) [A I R V 13] : 2 Luck 335. (The safe rule is to construe the document as a whole and not to hold it to confer an absolute title merely on the ground that the words used were 'as proprietor' and 'for ever' and 'in perpetuity.')
1927 Nag 273 (274) [AIR V 14] (DB).
1925 Oudh 125 (126) [A I R V 12] : 27 Oudh Cas 350. (In perpetuity.)
1917 Nag 1 (5) [AIR V 4].

3. ('01) 25 Bom 563 (573) : 28 Ind App 198 (PC). (Grants for maintenance although indefinite as regards duration may be shown by acts of the parties or other circumstances to be intended to operate in perpetuity.)
1952 Nag 55 (56, 57) [A I R V 39] : I L R (1952) Nag 60. (Gift for "Choli Bangadi" or "Haldi Kunkam" to woman at time for her marriage — Gift does not revert to donor upon cessation of need for "Choli-Bangadi" or "Haldi Kunkum" i.e., on the woman becoming widow.)
1958 Orissa 254 (255, 256) : [A I R V 45 C 64] : I L R (1958) Cut 234. (Merely because a document recites the purpose to be one for maintenance, this cannot be the decisive factor to constitute the document as a life grant, if the words "disposing of the property" clearly indicate that it is in respect of the absolute interest of the donor.)
1948 Oudh 9 (16) [A I R V 35 C 3] : 22 Luck 308 (DB).
1926 Oudh 561 (567) [A I R V 13] : 2 Luck 335 (DB).
1924 Pat 721 (724) [A I R V 11] : 3 Pat 880 (DB). (Maintenance grant is not absolutely inconsistent with grant to the donee and his heirs.)
1925 Oudh 125 (126) [A I R V 12] : 27 Oudh Cas 350. (Grant contained words which conveyed restricted right of alienation.)
1924 Mad 800 (800) [A I R V 11]. (Maintenance deed with words "absolute right to sell, make gifts and alienations.")
('13) 18 Ind Cas 127 (127, 128) (Oudh). (A grant for the maintenance of the grantee whom the grantor was not bound to maintain — There is no presumption that the grant is for the life of the grantee only.)

4. 1944 Oudh 65 (77) [AIR V 31] : 19 Luck 320 (DB).
('06) 4 Cal L Jour 399 (400).
('82) 4 Mad 371 (372) (DB).
[*See also* 1918 Mad 357 (358) [A I R V 5] (DB). (In this case the deed was before the Court and the grant was for life.)]

her life-time. The extent of interest which the donee is to take depends upon the intention of the donor as expressed by the language used and if the dispositive words employed in the document are clear and unambiguous and import absolute ownership the purpose of the grant would not by itself, restrict or cut down the interest. The desire to provide maintenance or residence for the donee would only show the motive which prompted the donor to make the gift but it cannot be read as a measure of the extent of the gift.(5) See also the undermentioned case(6) of the Punjab High Court in which relying on the above-mentioned Supreme Court case it was held that a deed of gift to a female member for maintenance containing no indication that it was for her life conferred on her absolute rights and the use of words "for maintenance" could not be construed as a measure of the extent of the gift.

6. Hindu law.—This section did not, before the amendment of S. 2 in 1929, affect any rule of Hindu law. So far as transfers by a Hindu to a *male* are concerned, it has never been suggested that the Hindu law is in any way different from the principles enunciated by this section. Thus if an estate is given to a man without express words of inheritance, it would, in the absence of a conflicting context, carry, by Hindu law, an estate of inheritance.(1a) As to transfers by a Hindu to his *female* relations, it was held so long ago as 1871 in *Pabitra Dasi* v. *Damodher Jana*(1) that a gift by a Hindu to his wife passed an absolute estate. "If the terms had been ambiguous" said their Lordships "we might, no doubt, have to look behind it, and consider the motives of the donor; but as there is no such ambiguity, we are bound to give effect to the deed." In *Mahomed Shumsool* v. *Shewukram*,(2) decided by their Lordships of the Privy Council in 1874, a Hindu made a bequest to his widowed daughter-in-law of his properties. In the first part of the document he stated that the widow should be his heir and *malik*. In the latter portion of the will he, however, stated that after the widow her daughters were to be 'heirs.' In construing the document their Lordships observed :

> "In construing the will of a Hindu it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property. It may be assumed that a Hindu generally desires that an estate, especially an ancestral estate, shall be retained in his family; and it may be assumed that a Hindu knows that, as a general rule, at all events, women do not take absolute estates of inheritance which they are enabled to alienate. Having reference to these considerations, together with the whole of the will, all the expressions of which must be taken together without any one being insisted upon to the exclusion of others, their Lordships are of opinion that the two Courts in India, who both substantially agree upon this point, are right in construing the intention of the testator to have been that the widow of his son should not take an absolute estate which she should have power to dispose of absolutely, but that she took an estate subject to her daughters succeeding her in that estate."

After the decision in *Mahomed Shumsool's case* the question arose as to what interest passed when a Hindu transferred property to his female relations. A number

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5 1951 S C 139 (141, 142, 144) [A I R V 38 C 21] : 1950 S C R 766. (Hindu widow relinquishing by a written deed all her right in certain properties and receiving under a tamliknama two items of property, house and shop, as 'malik' — Deed containing no express words showing that she was to enjoy the property only during her lifetime — *Held* that an absolute estate was conveyed to her by tamliknama, though the gift was expressed to be for her maintenance and residence. 1944 All 17 [AIR V 31], Reversed; 1933 P C 67 [AIR V 20], Rel. on.)

6 1967 Punj 429 (429, 430) [AIR V 54 C 121] : 1967 Cur L J 87.

Section 8 — Note 6

1a. 1954 S C 355 (359) [A I R V 41 C 86] : 1955 S C R 51.

1. ('75) 7 Beng L R 697 (704).

2 ('74) 2 Ind App 7 (14, 15) (PC). (6 Moo Ind App 1, Referred to.)

of cases proceeded on a supposed rule of Hindu law that a gift by a Hindu to a female relation did not convey an absolute estate but only a limited estate(3) in the absence of express words giving her a heritable right or power of alienation.(4) Other cases took the view that there was no presumption either way.(4a) In the year 1907, the question came up before their Lordships of the Privy Council in *Mt. Surajmani* v. *Rabi Nath Ojha*.(5) In that case a Hindu had given certain properties to his wife as '*malik*'. The High Court held that under the Hindu law, the wife had no power to alienate unless the power of alienation was conferred in express terms and that the mere use of the word *malik* was not sufficient for the purpose. Their Lordships of the Privy Council negatived this view and held that the word *malik* imported full proprietary rights unless there was something in the context to qualify it, and that the fact that the donee was a Hindu widow was not sufficient for the purpose. But notwithstanding the decision in *Surajmani's case*, conflicting views were adopted. According to one view there was a presumption that only a limited estate passed under the transfer but that the presumption would be rebutted by the circumstances under which the document came into existence.(6) A second view was that the presumption applied to transfers by a husband to his wife and not to transfers to other females.(7) A third view was that though the ordinary notions of a Hindu should be considered in construing a deed by a Hindu, there is no universal presumption that a female always takes a lesser estate

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3 ('75) 1 All 734 (744, 745) (DB). (Gift of immovable property to wife — Alienation by her can be questioned by next heir of her husband.)
('02) 12 Mad L Jour 387 (388) (DB). (Not life-estate but limited estate of a female known to Hindu law is conveyed.)

4. ('12) 17 Ind Cas 478 (480) (DB) (Cal). (Express terms used – Absolute estate passes.)
('10) 6 Ind Cas 354 (356) (DB) (Cal). (Gift to daughter - Words used were 'putra poutradi krame'—*Held*, no absolute estate passed to the daughter, looking to the intention of the grantor as gathered from perusal of the whole deed.)
('05) 27 All 364 (367) (DB). (Property permitted to be alienated in case of proper necessity — No absolute interest passed.)
('04) 27 Mad 498 (501) (DB).
('03) 30 Cal 20 (32, 33). (The words 'istemrari mokurari' meaning continuous and fixed were held insufficient to create heritable and transferable interest.)
('03) 5 Bom L R 334 (340).
('01) 23 All 309 (311) (DB). (Where words used were 'I and my representatives have ceased to have any claim to the aforesaid property' — *Held*, absolute estate passed.)
('01) 5 Cal W N 300 (303) (DB). (Power of alienation was given.)
('97) 30 Mad 356 (360, 361, 362) (DB). (Per Wallis J. — The transfer concluded with the words 'you shall enjoy the lands with the rights of gift, sale, etc.' — No absolute interest was held to pass.)
('93) 17 Bom 503 (505, 506) (DB). (Gift to a mother.)
('89) 11 All 296 (300, 301). (Gift to widow — Situation of the parties and their rights should be looked into, while construing.)
('88) 10 All 495 (497, 498) (DB).
('80) 5 Cal 684 (787) (DB).
[But see ('05) 15 Mad L Jour 492 (493) (DB). (Land given to daughter for 'pin-money' — *Held*, absolute estate passed.)]

4a. ('02) 5 Oudh Cas 345 (350) (DB).

5. ('08) 30 All 84 (89, 90) : 35 Ind App 17 (PC). (Reversing 25 All 351.)

6. 1922 Bom 179 (181) [AIR V 9] : 46 Bom 162. (Malik signifies absolute estate— But the words 'she shall during her lifetime apply and spend the same (property) in a good way' cuts down the absolute estate.)
1917 Pat 627 (630) [AIR V 4]. (The word 'malik' means literally one who holds land—The word 'gave' in a deed of gift to a woman does not imply the creation of absolute estate.)
1916 Mad 690 (690) [A I R V 3] (DB). (Where the words used in the gift deed were 'you and your heirs should enjoy the lands with all rights' Taybji J., was inclined to take the view that absolute estate passed.)
1916 Mad 536 (538) [AIR V 3] (DB). (The grant was contained in a compromise in a suit brought by a widow in assertion of an absolute title — Presumption of limited interest was rebutted.)
[*See also* 1916 Mad 646 (647) [A I R V 3] (DB). (Deed of grant inadmissible in evidence due to its non-registration – There was other evidence showing passing of life-estate — *Held* that it was unnecessary to make any presumption and only life-interest passed.)]

7. 1917 Cal 19 (22) [A I R V 4] (DB). (Gift to Hindu woman other than wife and otherwise than as a maintenance grant, must be taken to be of absolute estate. 24 Cal 646, *Rel. on.*)

than a male.(8) According to the fourth view, the document should be construed without reference to any presumption(9) and in exactly the same way as any other deed and if the wording of the deed, taken as a whole, pointed to an intention to carry or capable of carrying full ownership, then full ownership would be conveyed as if the beneficiary were a male.(10) In the undermentioned case(11) it was held that the rule stated in *Mohammad Shamsool Hooda* v. *Shewukram*(11a) should be applied only where the language of the document was *uncertain* or *ambiguous* and not where it was clear.

In this state of conflicting authorities, the question again came up before the Privy Council in two cases in the years 1921 and 1922. In *Bhaidas Shivdas* v. *Bai Gulab*(12) their Lordships observed:

"The decision in *Mt. Surajmani* v. *Rabi Nath Ojha*,(12a) showed that provision (namely the rule laid down by the High Court and referred to above) was no longer sound and that if words were used conferring absolute ownership upon the wife, the wife enjoys the rights of ownership without their being conferred by express and additional terms, unless the circumstances or context were sufficient to show that such absolute ownership was not intended."

And in *Ramchandra Rao* v. *Ramachandra Rao*(13) their Lordships observed:

"As some misapprehension appears to exist as to the effect of certain decisions of the Board, and notably one in *Mt. Surajmani* v. *Rabi Nath Ojha*,(14) their Lordships think it desirable to remove this doubt, lest error should creep into the administration of the law in India with regard to the rights of a Hindu widow.

In the case referred to, *Mt. Surajmani* v. *Rabi Nath Ojha*, when originally heard before the High Court it had been stated that under the Hindu law, in the case of a gift of immov-

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8. 1916 Pat 141 (144) [AIR V 3] : 1 Pat L Jour 16. (In absence of words of limitation, presumption in cases of gifts to Hindu women, except widows, is that it is an absolute estate.)

1915 Cal 487 (490) [A I R V 2] : 42 Cal 561 (DB). (Mother or daughter.)

9. 1920 Lah 370 (371, 372) [A I R V 7] : 1 Lah 415 (DB). (Gift to mother — Donor cannot be presumed to have intention of limiting her estate.)

1920 Mad 857 (858, 859) [AIR V 7] (DB). (Absolute estate should not be cut down because of any presumption.)

1920 Mad 274 (275) [A I R V 7] (DB). (The presumption as regards bequests in favour of a Hindu woman being only a life-estate is no longer applicable in this Presidency.)

1919 Mad 174 (177) [A I R V 6] (DB). (Gift to wife in lieu of maintenance with rights of alienation by sale — *Held*, absolute estate passed.)

10. 1919 Cal 847 (848) [AIR V 6]. (The words 'Sampurna Malik' imply absolute power of alienation.)

1918 Mad 945 (947) [AIR V 5] (DB).

1918 All 255 (256) [AIR V 5] : 40 All 575 (DB). (The word 'malik' imports an absolute estate.)

1916 Cal 775 (781) [A I R V 3] (DB). (If the testator gives an absolute estate to his widow with full powers of alienation, gift over of what might remain undisposed of by her is inoperative in law.)

1916 Mad 807 (808) [AIR V 3]. (Where a person by a deed delivered his property absolutely to his wife and provided that she was to enjoy the property from generation to generation.)

1915 Cal 414 (415) [AIR V 2] (DB). (Bequest by a Hindu to his wife and niece with the power to sell, make gift or hiba etc.—*Held* that absolute interest was transferred.)

1915 Mad 331 (333) [AIR V 2] (DB). (Gift in favour of female donee (niece of the donor) who would have no title to the property apart from the gift—Presumption held inapplicable.)

1914 Mad 428 (429) [A I R V 1] (DB). (There is no presumption of law that a gift by a father-in-law to his widowed daughter-in-law is only a gift of a life-estate. It has been held in recent cases that documents of gift to daughters and other female members of a Hindu family need not be construed with a bias in favour of the view that an absolute interest could not have been intended to be transferred.)

('11) 1911 Pun Re No. 61 (DB). (A deed of gift in favour of a Hindu female (by husband to wife) should be interpreted on its merits, allowing no importance to the circumstance that the donee is a female.)

11. 1919 Mad 557 (557, 558) [AIR V 6] : 42 Mad 283 (DB). (The word 'inam' means grant in perpetuity without restriction.)

11a. ('74) 2 Ind App 7 (14, 15) (PC).

12. 1922 P C 193 (194) [A I R V 9] : 46 Bom 153 : 49 Ind App 1.

12a. ('08) 30 All 84 : 35 Ind App 17 (PC). (Appeal from 25 All 351.)

13. 1922 P C 80 (82) [A I R V 9] : 45 Mad 320 : 49 Ind App 129.

14. ('08) 30 All 84 : 35 Ind App 17 (PC).

able property to a Hindu widow, she had no power to alienate unless such power was expressly conferred. The decision of this Board did no more than establish that that proposition was not accurate, and that it was possible by the use of words of sufficient amplitude to convey in the terms of the gift itself, the fullest rights of ownership including, of course, the power to alienate which the High Court had thought required to be added by express declaration."

After the said decisions of the Privy Council the general trend of opinion is that the question as to what passes under a transfer by Hindu to his female relations is merely a matter of interpretation of the document on its language.(15) that such documents must be interpreted in the same way as any other deed(16) without any presumption of any kind one way or the other(17) and that the notions and views of Hindus can be considered only where the language of the document is uncertain or ambiguous.(18) This view was confirmed by two later decisions of the Privy Council in *Shaligram* v. *Charanjit Lal*(19) and *Jagmohan Singh* v. *Pandit Sri Nath.*(20) In the latter case, Sir George Lowndes, in delivering the judgment of the Board observed:

"If, as in the present case, the donor does not confer upon the lady express power of alienation, such power may nevertheless be deduced from the terms of the gift if the words used are

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15. 1947 All 288 (291, 292) [AIR V 34 C 114] ILR (1947) All 403 (DB). (Testator devising all his property to his wife with rights of transfer as absolute owner - Power to adopt any boy she likes given by will — Subsequent addition of clause to will prohibiting widow from adopting boys from particular families and taking away her power of gift — Widow allowed to alienate property only in case of necessity—On construction, will held to confer a Hindu widow's estate.)

1927 All 767 (770) [AIR V 14] : 49 All 779 (DB). (Clause in deed forbidding alienation, confers only limited interest.)

16. 1953 Mad 566 (568) [A I R V 40 C 219]. (A gift or bequest in favour of a woman should be contrued in the same spirit as a gift in favour of a male.)

1938 Bom 125 (132) [A I R V 25] (DB). (Whole interest will pass in the absence of anything to the contrary in Hindu law.)

1935 Oudh 198 (202) [A I R V 22] : 10 Luck 606 (DB). ("Malik" imports full proprietary rights.)

1930 Cal 474 (476) [AIR V 17] (DB). (Where the property is given to a person whether that person is man or woman, the grant must be taken to be an absolute grant.)

1925 Mad 254 (255) [A I R V 12] (DB). (In the absence to indicate lesser interest whole will pass.)

1925 Oudh 749 (750) [AIR V 12] (Do).

1924 Lah 347 (348) [AIR V 11]. (Parties governed by custom and not by Mahomedan law— The husband in a deed purporting to be a sale-deed in favour of his wife in consideration of her dower, clearly stated that he had given proprietary possession to her and also that she had the full power of a proprietor to alienate the house sold—*Held* that the husband's intention was to confer an absolute estate upon the wife.)

17. 1965 Pat 217 (218) [AIR V 52 C 59] (DB). (There is no presumption that a woman would take only a limited interest in all kinds of properties : AIR 1951 S C 139 and AIR 1954 S C 355, Rel. on.)

('64) ILR (1964) 2 All 534 (546) (DB).

1951 Kutch 33 (35) [AIR V 38 C 22]. (A Hindu's will in favour of his wife has to be construed untrammelled by any such notion as the presumed intention to confer only widow's estate.)

1947 Mad 137 (144) [AIR V 34 C 74]: ILR (1947) Mad 272 (DB). (Gifts and wills—Rule based on 6 Moo Ind App 526 (P C) and 2 Ind App 7 (PC) has largely been departed from - Rules of construction should be adopted with changing times —There is no presumption that donee does not get absolute rights—16 Mad 201 (FB) commented on.)

1938 Bom 125 (130, 132) [AIR V 25] (DB). (Even where the purpose is maintenance the gift may still confer absolute estate.)

1936 Mad 130 (131) [AIR V 23]. (Affirmed in 1937 Mad 100 [AIR V 24].)

†1934 Mad 646 (650) [AIR V 21] (DB). (Words of sufficient amplitude giving power to widow to alienate need not be express — They can be inferred from terms of instrument.)

[*See* 1927 Nag 273 (274) [AIR V 14] (DB). (The presumption which applies in the case of a Hindu husband's gift to his widow, that only a life estate is acquired, does not necessarily proprio vigore apply in the case of a gift to the daughter.)]

18. †1937 Mad 100 (101) [AIR V 24]: ILR (1937) Mad 335 (DB). (Affirming AIR 1936 Mad 130.)

1934 Mad 646 (648) [AIR V 21]. (1929 Mad 691 [AIR V 16] Dissented from, 1930 P C 239 [AIR V 17], followed.)

†('29) 114 Ind Cas 45 (46) (DB) (All). (The words "Nafa and Nuqsan" in the deed of gift – Donor intended only the usufruct of property and not absolute estate to donee.)

19. 1930 P C 239 (242) [AIR V 17] : 57 Ind App 282 : 11 Lah 645. (The testator nominated his two widows and daughter-in-law in will as heirs—No direction as to disposition after their death—Absolute interest granted.)

20. 1930 P C 253 (254) [AIR V 17] : 57 Ind App 291.

sufficient to confer upon her absolute ownership, unless the circumstances or the context show that such absolute ownership was not intended. There is, their Lordships think, no magic in the use of any particular word or form of words; the document must be construed as a whole, and its fair import deduced in the ordinary way, and if the conclusion come to is that it confers the estate out and out with no reservation, the right of alienation will be included just as much as any of the other incidents of ownership, and just as much where the gift is to a female as where it is to a male."

The above discussion has reference to the Hindu law prevailing in all the Provinces in India except where the Hindu law as understood in the Mithila school applies. Under the Mithila school of Hindu law a *gift* by a husband to his *wife* will convey only a life interest to the wife. This limitation, however does not apply to transfers for *consideration*, which have to be construed in the same way as any other transfer.(21)

The amendment of S. 2 of the Act by omitting the word "Hindu" in the last clause thereof must now be taken to abrogate even the said rule of Mithila law.

It has been held in *Mt. Sheoraji* v. *Ram Sawari Devi*(22) by the Allahabad High Court that the principle laid down in S. 8 is "not of much practical utility when the interpretation of a transfer by a Hindu in favour of a Hindu female is in question as the words "by necessary implication" in that section do attract the operation of the general notion of a Hindu that a Hindu woman ordinarily gets an estate for life and not an absolute estate." It is submitted that this view is not correct. As has been seen in Note 4 already, the "necessary implication" must be gathered, when the document is clear and definite, *only from the terms of the document itself*. It is only in the case of ambiguity that any extraneous circumstances such as the objects or notions of the transferor can be taken into consideration.

The position has again been stated in later decisions of the Supreme Court where their Lordships have held that to convey an absolute estate to a Hindu female no express power of alienation need be given and it is enough if words are used of such amplitude as would convey full rights of ownership. It was further stated by their Lordships that the word "malik" when used in a will or other document as descriptive of position which a devisee or donee is intended to hold means an owner possessed of full proprietary rights including full rights of alienation, unless there is something in the context or in the surrounding circumstances to indicate that such full proprietary rights were not intended to be conferred.(23-24)

See also the undermentioned cases.(25)

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21. 1928 P C 112 (114) [AIR V 15] : 55 Ind App 197 : 7 Pat 500.
1925 Pat 625 (655) [AIR V 12] : 4 Pat 510 (DB). (This section does not affect the rule of Hindu Law as it is understood in Mithila that a gift by a Hindu to his wife does not carry with it the right to alienate.)

22. 1935 All 43 (45) [AIR V 22] (DB).

23.-24. 1954 S C 355 (359) [AIR V 41 C 86] : 1955 S C R 51.
1953 S C 7 (9) [AIR V 40 C 3] : 1953 S C R 232.
1951 S C 139 (141) [AIR V 38 C 21] : 1950 SCR 766.
[*See also* 1953 S C 304 (305, 306) [AIR V 40 C 71] : 1953 S C R 848. (A Hindu can confer by means of a will on his widow the same estate which she would get by inheritance. The widow in such a case takes as a demisee and not as an heir. The Court's primary duty in such cases is to ascertain from the language employed by the testator "what were his intentions," keeping in view the surrounding circumstances, his ordinary notions as a Hindu in respect of devolution of his property, his family relationships etc., in other words, to ascertain his wishes by putting itself, so to say, in his armchair. The widow cannot be held to have been given a full Hindu widow's estate under the will unless it can be said that under its terms she was given the power of alienation for necessary purposes, whether in express terms or by necessary implication.)]

25 1966 Punj 262 (265) [AIR V 53 C 57] (DB). (Bequest of his property by Hindu testator to

his wife and two brothers — There is no presumption that only life estate is conferred on wife : AIR 1954 S C 355, Rel. on.)

1965 Orissa 54 (57, 58) [AIR V 52 C 22] : I L R (1964) Cut 479. (The right to gift and sell are some of the ingredients of ownership and when these rights had been given to the wife in express terms in the will by the testator the wife must be said to have been given the right of full ownership.)

1965 Pat 217 (218) [AIR V 52 C 59] (DB). (Gift deed executed by Hindu in favour of his wife containing recital that donee will be absolute owner 'Malik' - Held on circumstances and text of document as a whole that wife obtained absolute ownership over the properties.)

1961 Andh Pra 390 (393) [AIR V 48 C 105] : ILR (1961) Andh Pra 13 (DB). (Will dividing property amongst sons and wife—Words employed clear and unambiguous importing absolute estate on wife - Will held conferred absolute estate on wife. 1959 An L T 67, Reversed.)

1958 Andh Pra 447 (448, 449) [AIR V 45 C 131] (DB). (Lands bequeathed to daughter-in-law to be enjoyed by her for her life time and to pass to her step daughter—If step daughter has no issue the same shall pass after her life time to daughters and their issues — Held absolute interest in favour of such step daughter was created.)

1958 Orissa 254 (255) [AIR V 45 C 64] : ILR (1958) Cut 234. (1951 S C 139 [AIR V 38], Foll.)

1957 Andh Pra 534 (535) [AIR V 44 C 180] (DB). (In construing gifts there is no distinction in the mode of construction between a gift to a male and a gift to a female. There is no presumption in the cases of gifts to females that the gift is only of a life estate. If the terms of the document are clear and unambiguous, the recitals therein shall be construed irrespective of the sex of the grantee. 1954 S C 355 [A I R V 31], Rel. on.)

('57) ILR (1957) Madh Pra 155 (156).

1957 Punj 146 (149) [AIR V 44 C 64] : ILR (1957) Punj 418 (DB). (Will — Property bequeathed on three widows of a predeceased son— No power of alienation - On death or contracting re-marriage by a widow the other widows to get property— Stipulation also that after the death of all the three widows daughter's sons of the predeceased son to take possession of property —Held that on construction of the will only a life interest was conferred on the three widows.)

1956 Punj 209 (209) [AIR V 43 C 80] (DB).

('55) Madh B L R 1955 (Civil) 243 (244). (Where the property is willed to the wife by stating that 'she too like me will be the full owner of the property', it clearly indicates that the intention of the testator is to give the property absolutely to his wife. The words used are of such an amplitude as would convey full rights of ownership.)

1954 All 715 (715) [AIR V 41 C 281]. (A bequest to a woman as 'Malik' imports a full proprietary right, unless there is something in the context to qualify it.)

1954 Mad 1008 (1010) [AIR V 41 C 346]. (In construing document of a Hindu, Court is competent to take into consideration what are known to be ordinary notions of a Hindu in the matter of devolution of property - This is relevant in putting right interpretation on words used, from which alone intention has to be gathered— Absolute estate granted to female by pre-nuptial settlement is cut down to life interest where successive absolute estates are given and the dominant intention of the settlor was to benefit each taker — If along with absolute grant of estate, there is restraint on alienation, the absolute estate is cut down to life interest.)

1954 Mad 136 (139) [AIR V 41 C 55] : ILR (1953) Mad 1235. (The use of the words "enjoy at her pleasure with absolute rights and powers of disposition by way of gift, sale, etc., etc." in a will made by a Hindu in favour of his wife clearly points out that the estate conferred on his wife is nothing short of an absolute and unqualified estate.)

1954 Mad 19 (37, 38) [AIR V 41 C 8] (DB). (The duty of the Court is to ascertain the intention of testator and for that purpose regard must be had not only to the language used but also to the notions and habits of thought usual in community to which testator belongs.)

1953 Mad (566) (568) [AIR V 40 C 219].

1952 Nag 327 (328, 329) [AIR V 39] : ILR (1953) Nag 170 (DB). (Conferral of full power to alienate including the power to dispose of the property in any way on a person who would according to the law of inheritance, have no such power, is a strong circumstance indicative of the intention of the testator to confer an absolute estate.)

1952 Punj 120 (121) [AIR V 39]. (Gift of land in favour of wife —Possession delivered —Material terms of gift were : "She will, like myself, now will be the owner in possession and I will have no concern with the property. She has the power to alienate by sale or mortgage but she will not be entitled to make a gift"—Held that the intention was to give full estate and not a widow's estate by means of the gift.)

1951 Kutch 20 (21) [AIR V 38 C 17]. (Will must be construed from its own language: — Testator giving all his property to his wife — Wife to dispose of, use and spend that property as she liked — Testator's brothers or agnates not to interfere with wife's rights—Wife held was made absolute and not limited owner of property.)

('50) 2 Pepsu L R 584 (589) (DB). (Will in favour of wife described as waris —Will held conferred only widow's estate.)

1948 All 81 (85) [AIR V 35 C 38] : ILR (1947) All 556 (DB). (1922 P C 63 [AIR V 9] : 37 Mad 199 (PC) and 1945 P C 30 [AIR V 32], Rel. on.)

It has been held by the Madras High Court that it is incompetent for an undivided member of a Hindu family to alienate by way of a gift his undivided share in the joint family and that such alienation is void *ab initio*.(26) (See also S. 6, Note 2a).

7. Grant for an indefinite period. - If a grant be made to a person for a *period* but the period is indefinite, it enures, generally speaking, for his lifetime and passes no interest to his heirs, unless there are words showing an intention to grant a hereditary interest.(1) This rule of construction will not apply if the term for which the grant is made is fixed or can be definitely ascertained.(2) Where *A* granted a pottah to *B* "to continue during the term of the *mokurrari* of *A*," it was held by their Lordships of the Privy Council(3) that the duration of the term was capable of being ascertained by reference to the interest which the grantor himself had in the property, that the above stated rule of construction did not therefore apply and that the interest of the grantor passed to the heirs of the grantee.

8. "Transfer of property." The expression "transfer of property" will, for the purposes of this section, include transfers of *interests* in property such as a mortgage(1) or a lease.(2) Thus, where immovable property is hypothecated, the

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1948 Bom 261 (264) [AIR V 35 C 71]. (Will — Conferring of absolute estate on wife — Tests to determine Power of alienation need not be conferred by express terms — If words used confer absolute ownership, wife enjoys all rights of ownership unless context is sufficient to show that absolute ownership was not intended —Expression "Waras" had same connotation as the word "Malik" and word "Malak" and conferred heritable and alienable estate in the absence of context indicating contrary — A I R 1922 P C 193 ; AIR 1929 P C 283, Relied on.)

1947 Mad 137 (144) [AIR V 34 C 74]: ILR (1947) Mad 272 (DB). (The rule of construction based on 6 M I A 526 (PC) and 2 I A 7 (PC), viz. that in construing a document executed by a Hindu, due weight should be given to the notions and ideas of an ordinary Hindu donor and to the ordinary method of enjoying property, has largely been departed from in construing gifts and wills made by Hindus. Whatever may have been the notions and ideas of Hindus in the early days of the last century, women are no longer considered to be incapable of holding properties of their own.)

1947 Oudh 45 (59) [AIR V 34 C 17] : 21 Luck 463 (DB). (The wills of Hindus should be read with reference to the ordinary notions of Hindus unless there is something to show that the testator intended to depart from the ordinary rule of Hindu law. 1945 P C 113 [AIR V 32] and 1921 Mad 619 [AIR V 8], Rel. on.)

1947 Pat 356 (359, 360) [AIR V 34 C 199] (DB). (Whether by the use of the word "malik" an absolute estate is created, depends on the context —Deed of partition by father in possession of joint family property — Share given to mother described as "malik" — Interest to mother held was only widow's estate. 1922 P C 63 [AIR V 9], Rel. on.)

1925 Pat 625 (670) [AIR V 12] : 4 Pat 510 (DB). (There is nothing in the Hindu Law which prohibits a woman, whether wife or widow, from acquiring an absolute estate in property including the power of alienation. If words of grant are used importing the transfer of full proprietary rights, then effect must be given to them irrespective of the sex of the grantee.)

26. 1951 Mad 318 (321) [AIR V 38 C 81].

Section 8 — Note 7

1. ✠('78) 3 Cal 210 (212) : 4 Ind App 223 (PC).
('05) 8 Oudh Cas 61 (64) (DB). (Use of 'hamesha' or word 'permanent' in a lease does not create more than a life-interest.)
†1939 Cal 423 (424) [AIR V 26] (DB). (Grant of 'sarsari jote' — Grantee permitted to build boundary wall and pacca floors and was not liable to be ejected unless he introduced bad characters — Intention to allow grantee to continue in possession for an indefinite period presumed.)
('91) 4 C P L R 90 (91).
Also see S. 105, Note 72.

2. † ('78) 3 Cal 210 (212): 4 Ind App 223 (225) (PC).
1929 Nag 23 (25) [AIR V 16].

3. ('78) 3 Cal 210 (213): 4 Ind App 223 (227) (PC).

Section 8 — Note 8

1. †('03) 30 Cal 556 (564) : 30 Ind App 71 (PC). (Followed in 8 Nag L R 123.)
1959 Ker 408 (412) (Pr 38) [AIR V 46 C 150] (DB). (Defendant executing a possessory mortgage of the Konganpara Estate in favour of the plaintiff — Mortgagee put in possession of the Konganpara Estate and also irrigation system — *Held* mortgagee was entitled to take water coming along the irrigation system for the irrigation of the mortgaged property.)
('12) 8 Nag L R 123 (125) (DB). (Mortgage of a village - No mention about 'sir' in the mortgage deed *Held*, mortgage included cultivating rights in 'sir' land—Case is overruled on another point in AIR 1935 Nag 226.)

2. ('66) 6 Suth W R 314 (314) (DB). (Right of user of a drain was held to pass to a lessee.)

fixtures attached to the property(3) and the rents and profits of the mortgaged property in the hands of a receiver appointed for the property(4) will pass to the mortgagee as his security. A contrary view, namely that this section does not apply to a mortgage, has been held in the uudermentioned case.(5) It is submitted that the view is not correct.

A court sale is not, as has been seen in Note 3, a "transfer of property" as defined in the Act. The sale certificate issued to the purchaser is not an instrument of transfer of property, but merely evidence of the title of the purchase.(6)

This section does not take in rights under a decree in respect of immovable properties, obtained by the transferor after the transfer. Thus the transferee of an equity of redemption of an item of immovable property cannot execute the decree for redemption obtained by the transferor.(7) Where however a person who owns a village, gets a decree for ejectment of a tenant and then sells his village to another, the right of the latter to execute the decree admits of no doubt.(8)

9. **"Which the transferor is then capable of passing."** — This section passes all interest which the transferor can, at the date of transfer, pass. The section will not operate to pass any future property.(1a) On a transfer of property it is only the *transferor's interest* that will pass to the transferee,(1) the general principle being that a person cannot, as a rule, transfer to another what he himself is not entitled to. A transferee, therefore, cannot have a better title than what the transferor himself has in the thing transferred,(2) and if the transferor held the property only under limitations, the transferee could not get it free from those limitations.(3) It follows that the

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3 1918 Cal 165 (166) [AIR V 5] (DB). (Case of equitable mortgage.)
1919 Cal 908 (912) [AIR V 6] : 45 Cal 653.

4 1934 Rang 321 (322) [AIR V 21]: 12 Rang 437 (DB). (Case of English mortgage.)

5. 1919 Oudh 132 (133) [AIR V 6] : 21 Oudh Cas 400 (DB).

6. † 1939 All 415 (430) [AIR V 26] : ILR (1939) All 607 (FB). (A sale certificate is to be interpreted independently of S. 8, T. P. Act.)

7. 1952 Trav-Co 254 (255) [AIR V 39] : ILR (1951) Trav-Co 743 (DB).

8. (1905) 1 Nag L R 49 (51). (If a man transfers his property he transfers all the rights attaching to such property at the time of the transfer including the right to execute decrees.)

Section 8 — Note 9

1a. 1955 S C 376 (383) [AIR V 42 C 66] : 1955 S C R 1369.

1. 1959 Madh Pra 52 (57) [AIR V 46 C 23]. (Property held by widow for life—Lands given "for ever for cultivation" — It must be held that the widow intended that the grant should operate only for her life.)

1957 Andh Pra 619 (621) [AIR V 44 C 205] (DB). (The interest of a co-sharer in common property can be sold, mortgaged or leased to another co-sharer or to a stranger.)

1957 Andh Pra 280 (281) [AIR V 44 C 93] (DB).

1952 All 650 (652) [AIR V 39] DB). (Permanent lease of proprietary right by one of co-sharer —Lease though invalid in respect of shares of other co-sharers is good in respect of share of transferring co-sharer — Lessee gets rights of transferor — Transferee put in possession — Other co-sharers cannot eject him — Lessee is entitled to remain in occupation in same manner as his transferor was.)

1927 All 689 (690) [AIR V 14] (DB). (Person having only mortgagee rights — Transfer — Presumption is that only mortgagee rights pass.)

2. † 1958 S C 832 (838) [AIR V 45 C 113]. (Document of transfer in terms confirming pre-existing rights — Pre-existing rights not shown —No interest is conveyed.)

1959 Cal 195 (199, 201) [AIR V 46 C 52] (DB). (Grant by zamindar of tenure at fixed rate — Tenure permanent, heritable and transferable —Minerals do not pass and do not form part of grant—Grantee leasing tenure, cannot lease mineral rights — Lessee does not acquire right to work mines.)

1957 Andh Pra 280 (281) [AIR V 44 C 93] (DB).
† ('09) 33 Bom 1 (22) : 35 Ind App 139 (PC).

1934 Pat 544 (545) [AIR V 21] (DB). (A tenant from a *de facto* landlord in possession has no better title than the landlord.)

3. 1957 Andh Pra 280 (281) [AIR V 44 C 93] (DB).

1915 Mad 447 (448) [AIR V 2] (DB). (A coparcener holding property under a disability to claim that his possession is adverse to other coparceners — Transferee from the coparcener

rights of third persons cannot be affected in any way by a transfer by *A* to *B*, whether or not the deed contains an exception or reservation of such rights.(4)

But whatever a transferor is capable of passing in the property transferred will pass.(5) Thus, a mortgage by a person having an absolute interest in the property mortgaged will be a mortgage of such absolute interest and not merely of any subordinate interest.(6) False recitals as to under what particular state of facts the transferor obtained his power to transfer will not affect the title of the transferee, the test under the section being what interest the transferor is capable of passing in the property and not under what title he professes to have derived the power which makes him capable of passing such interest in the property.(6a) Where a person entitled to property in more than one capacity transfers "all his estate and interests" in the property, the transferee will get all the estates and interests vested in the transferor, although not vested in the character in which he became a party to the conveyance.(7) But when a person has power to convey the absolute interest in certain property *only under particular circumstances*, but only a lesser interest in the absence of such circumstances, a transfer by him in the absence of such circumstances can convey nothing more than the lesser interest.(8) Thus, prior to the Hindu Succession Act (1956), a Hindu widow could, *for necessity*, convey the absolute interest in property inherited by her from her husband, but only a limited estate in the absence of necessity. A transfer by her, in the absence of necessity, could not convey anything more than a limited estate.(9) It has been held

takes the property subject to the same disability.)

[*See* 1924 Mad 67 (69) [AIR V 11] (DB). (A person who has acquired property under a voidable sale can give valid title to a bona fide transferee for value and without notice.)]

4. †('02) 26 Bom 198 (200) (DB). (Land used as Muhammadan burial ground, even unused, carries with it the rights of performance of certain rites by the relations of the persons buried therein — Sale of such land carries with it the obligation.)

('80) 4 Bom 643 (649) (DB). (Grant of village by Government Silence of sanad as to watan land—No inference can be drawn that there is no such land in the village.)

('77) 1 Bom 523 (528) (DB).

5. ('65) 1965 All L Jour 637 (639).

1957 Andh Pra 619 (621) : [AIR V 44 C 205] (DB). (Lease of his interest by cosharer in common property — Lessee is entitled to all rights of his lessor—He can even demand partition—But sole ground on which it will be allowed or refused is the ground of convenience.)

1940 All 457 (458) [AIR V 27] : I L R (1940) All 667 (DB).

1939 Mad 802 (803) [AIR V 26] (DB). (Specific lands conveyed without specifying the vendor's interest in those lands – Vendor had only vested remainder as regards eight annas share in those lands—Held, vested remainder of the vendor also passed to the vendee.)

1934 All 731 (732) [AIR V 21].

1916 All 251 (252) [AIR V 3[(DB). (Where land is granted which is bounded by a stream, the grantee is entitled to the bed of the stream up to the middle point.)

1917 Mad 61 (62) [AIR V 4] (DB). (Transfer of negotiable instrument will pass all the interest of the transferor in the note.)

('99) 22 All 96 (100) (DB). (Grant by Government—Lands granted described as bounded by a river or road - Half the road or river was presumed to pass to the grantee.)

(1854) 43 E R 592 (598) : 24 L J Ch 300 : 3 Eq 99 : 24 L T (O S) 178 : 3 W R (Eng.) 84 : 102 R R 225, Johnson v. Webster.

6. ('10) 8 Ind Cas 826 (827) (DB) (All). (Under ordinary rules of construction, every man's grant should be construed strongly against him.)

6a. 1920 Mad 496 (499) [AIR V 7] (DB).

7. 1915 Bom 109 (109) [AIR V 2] : 40 Bom 69. (Thus, if an executor having a one-third personal beneficiary interest in the estate purports to convey the whole of it, without qualification or limitation, he must be taken to be conveying in his character as an executor and not in that of one having a beneficial interest in a fraction of the whole estate purported to be conveyed.)

('04) 6 Bom L R 800 (816). (Property not vested in the mortgagors as absolute owners but as executors — The mortgagee was held to have a complete title, free from charge created by the will, in favour of third persons.)

†(1846) 72 E R 62 (73): 9 Ir Eq Rep 171, Drew v. Earl of Norbury.

[*See also* 1944 Mad 98 (101) [AIR V 31] (DB). (Transfer by manager of joint Hindu family.)]

8. ('03) 26 Mad 334 (336) (DB). (Alienation by co-widow will bind her own interest in the property during the lifetime.)

9. †('96) 18 All 146 (155) : 23 Ind App 1 (PC).

1957 Andh Pra 280 (281) [AIR V 44 C 93] (DB).

('74) 1874 Bom P J 125 (125) (DB).

by the Madras High Court that it is incompetent for an undivided member of a Hindu family to alienate by way of gift his undivided share and such alienation is void *ab initio*; under such transaction nothing passes to the transferee or the donee.(10)

10. "In the property." — Under this section what passes to the transferee is all the interest of the transferor *in the property*, i.e., in the property transferred and in the legal incidents thereof. In other words, the *corpus of the transfer being once ascertained*, all the interest of the transferor therein and in the legal incidents annexed thereto will pass to the transferee. An owner of land is the owner of all that is above it up to the firmament, and all that is below it up to the centre of the earth. *Cujus est solum, ejus est usque ad caelum et ad inferors*—whoever is the owner of the soil, it is his even to the firmament and to the middle of the earth.(1) As a general rule, therefore, in a transfer of land, the *corpus* of the transfer will include all that is above and below the soil. But the rule is not absolute and there are exceptions.(1a) In the case of a *lease* of land granted by A to B, whether permanently or temporarily, the *corpus* of the lease does not include "timber" standing thereon(2) or the minerals found in the sub-soil(3) in the absence of specific words

('69) 6 Bom H C R (A C) 270 (272). (Transfer by Hindu widow for no necessity passes only her life-interest.)

[*See also* 1959 Madh Pra 52 (57) [AIR V 46 C 23]. (Property held by widow for life—Lands given "for ever for cultivation"—It must be held that the widow intended that grant should operate only for her lifetime.)

1916 Pat 178 (179, 180) [AIR V 3] : 1 Pat L Jour 81 (DB). (Mortgage by a widow not for legal necessity—Plaintiff's suit to enforce the mortgage after the widow's death was dismissed as not maintainable.)]

10. 1951 Mad 318 (321) [AIR V 38 C 81]. (Rule of Hindu Law is unaffected by S. 8 — 27 Mad 162 (FB), Ref.)

Section 8 — Note 10

1. (1900) 2 Bom L R 688 (689) (DB). (Owner of a slope is entitled to obtain the removal of any encroachment on the surface of the slope.)
(1900) 2 Bom L R 114 (115) (DB).

1a. 1967 S C 1081 (1088) [AIR V 54 C 228]. (Grant of land without reservation of mineral rights in favour of grantor — Those rights pass to grantee with rights to surface).
1954 Ajmer 63 (2) (64) [A I R V 41 C 64]. (Ordinarily the roof goes along with the room, being treated as a part of it and in view of the general law that any person owning a piece of ground owns all the space over it. But where the executant of the will thought it advisable to divide the house between his sons and in allotting shares gave different floors to different sons and not portions on the ground floor with all constructions on the top of it, open roofs were not held as joint property.)
†(1900) 2 Bom L R 114 (115) (DB). (Portion of the tank belonging to A ran beneath the adjoining land of B — Held, the maxim was inapplicable and B could not use the waters.)
[*See* (1874) 43 L J Ex 57 (62) : L R 9 Ex 99 (107, 108) : 30 L T 393 : 22 W R (Eng.) 547, Spoor v. Green. (Working out coal by lessee of vendor from mine situate under the land sold, does not constitute a breach by the vendor of covenant for title.)]

2. See S. 108, clause (o), Note 4.
1923 Pat 95 (95) [A I R V 10] : 6 Pat L Jour 127 (DB). (Bamboo trees were held to be timber.)

3. See S. 108 Clause (o) Note 6.
1931 P C 302 (302) [AIR V 18] : 10 Pat 877.
1931 P C 299 (301) [AIR V 18] : 59 Cal 699 : 58 Ind App 392.
1931 P C 162 (163, 164) [AIR V 18] : 59 Cal 80 : 58 Ind App 228. (Darpatni lease.)
†1931 P C 89 (90) [AIR V 18] : 58 Cal 1187 : 58 Ind App 125.
1931 P C 186 (187) [AIR V 18] : 10 Pat 407 : 58 Ind App 29. (Jamabrit grant.)
1929 P C 182 (156) [AIR V 16] : 52 Mad 538 : 56 Ind App 223.
†1919 P C 17 (20) [AIR V 6] : 47 Cal 95 : 46 Ind App 158. (Case of grant of rent-free brahmottar land by a zamindar.)
†1917 P C 163 (165) [A I R V 4] : 45 Cal 87 : 44 Ind App 246. (Mokarari pattah in which the words 'mai hak hakuk' appeared — Use of such words did not pass the minerals.)
✠1916 P C 191 (193) [A I R V 3]: 44 Cal 585 : 44 Ind App 46. (A Talabai Brahmottar grant at fixed rent by zamindar though permanent, heritable and transferable did not pass the minerals.)
†('12) 39 Cal 696 (703) : 39 Ind App 133 (PC). (Digwari tenure.)
†('10) 37 Cal 723 (730) : 37 Ind App 136 (PC).
1959 Cal 195 (199) [A I R V 46 C 52] (DB). (Grant by Zamindar of tenure at fixed rate — Tenure permanent, heritable and transferable— Minerals do not pass and do not form part of grant — Grantee leasing tenure cannot lease mineral rights — Lessee does not acquire right to work mines.)
1943 Pat 31 (31, 32) [AIR V 30] (DB). (Unless a tenant has acquired by grant or by adverse

transferring them also.(4) The lessee, therefore, would not as part of the legal incidents of the *corpus* transferred to him, be entitled to fell or sell the timber or to open or excavate mines and utilise the minerals,(5) and this would be so even where the lease is "with all legal incidents." The expression, "with all legal incidents" cannot increase the *corpus* of the subject of transfer.

In *Rajah Bejoy Singh* v. *Surendra*,(6) a lease was granted by a zamindar to certain persons in perpetuity of "the entire zamindary including all interests therein." It was held by their Lordships of the Privy Council that the expression "including all interests therein" did not increase the corpus of the subject of the lease. Their Lordships observed:

"In *Girdhari Singh* v. *Megh Lal Pandey*,(7) it was held that the expression 'with all

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possession a right of ownership in the sub-soil, the digging of earth for bricks to be taken away from the area of the tenure and disposed of to strangers is an appropriation of the corpus of the grant which in India a tenure-holder is not entitled to make.)

1935 Pat 33 (36) [AIR V 22] : 13 Pat 517 (DB). (Sub-soil rights in land forming part of a permanently settled zamindari are presumed at all events when they are not claimed by the Crown to belong to the zamindar.)

1935 Pat 149 (151) [AIR V 22]. (But fisheries are not mineral rights and hence will pass to the lessee.)

1926 Pat 103 (109) [AIR V 13] : 4 Pat 799 (DB). (Case of ghatwali lands.)

1926 Pat 69 (73) [AIR V 13] : 1 Pat L Jour 275 (DB). (The original grant, in this case, was not forthcoming.)

1921 Pat 379 (385) [AIR V 8] : 5 Pat L Jour 563 (DB). (Patni lease — The view taken in this case that 16 Ind Cas 441 must be taken to be overruled in view of the decisions of the Privy Council is not correct. See AIR 1925 P C 42 : 4 Pat 244.)

1920 Pat 542 (545) [AIR V 7] : 5 Pat L Jour 273 (DB).

1917 Pat 477 (478) [AIR V 4] (DB). (Mokurari lease.)

1916 Cal 156 (159, 160) [AIR V 3]. (Rent-free brahmottar grant which was granted before the permanent settlement.)

1915 Cal 250 (252, 253) [AIR V 2] (DB). (Grantee of lease for maintenance for life cannot open new mines.)

1914 Cal 205 (207) [AIR V 1] : 42 Cal 346 (DB). (Where a grant was proved to be a *Mokholi Brahmottar* grant held at a fixed rent for more than 100 years, but there was no document evidencing the grant, and it was not proved that there were mines opened on the property at the date of grant, or that the grantee or his successors-in-interest had a prescriptive right to work any of the minerals under the property : *Held*, that the inference that could be drawn from these facts was that, although the *Brahmottar* was a permanent tenure the grant did not transfer the minerals to the grantee.)

('11) 38 Cal 845 (855) (DB). (Mogoli Brahmottar grant.)

[*See* 1928 P C 234 (237, 238) [AIR V 15] : 56 Cal 1 : 55 Ind App 320. (Patni lease — *Held* right to sub-soil did not pass — Question whether sub-soil used in making brick is "mineral" left open.)

1925 Bom 12 (15) [AIR V 12] : 49 Bom 99 (DB). (Case of inam grant.)]

[*See also* 1921 P C 1 (2, 3) [AIR V 8] : 44 Mad 421 : 48 Ind App 56. (A grant of village in *inam* Such grant is mere assignment of revenue, and even where it includes grant of land, what interest in the land passes must depend upon the language of the instrument and circumstances of each case.)]

[See however 1935 Cal 368 (381) [AIR V 22] : 62 Cal 346 (DB). (Title to under-ground rights is in the lakherajdar holding under an invalid grant which has not been resumed by Government, although the property is situate within the limits of the estate of the zemindar.)]

4 † 1925 P C 42 (44) [AIR V 12] : 4 Pat 244 : 52 Ind App 109. (When words '*adha*' and '*vardha*' were used in the grant, held that they indicated intention to convey all below the surface. 1921 Pat 379 [AIR V 8] Affirmed.)

1959 Cal 195 (199) [AIR V 46 C 52] (DB).

1924 Nag 96 (96) [A I R V 11]. (When a lessor executes a lease and expressly mentions that he gives the land for cultivation with the trees and shrubs standing on it reserving no rights in them for himself the ownership of the trees and shrubs passes with the land to the lessee.)

('12) 16 Ind Cas 441 (442) (DB) (Cal). (Patni-lease before Transfer of Property Act — On the facts of the case, held that the mineral rights passed.)

(1860) 11 E R 463 (468) : 8 H L C 348 : 30 L J Q B 49 : 2 L T (NS) 642, *Rowbotham* v. *Wilson*.

('10) 37 Cal 723 (727) : 37 Ind App 136 (P C). (Permanent tenure of agricultural character — Underground rights do not pass if lease does not so mention, 33 Cal 54 Reversed.)

[*See also* (1906) 33 Cal 511 (530) (DB). (A permanent lease including 'all rights of various kinds' with the exception only of the homestead includes the minerals.)]

5. See the cases cited in foot-note 3.

6 1928 P C 234 (237) [AIR V 15] : 56 Cal 1 : 55 Ind App 320.

7. 1917 P C 163 (165) [AIR V 4] : 45 Cal 87 : 44 Ind App 246.

rights,' which was amplified as meaning 'with all right, title and interest,' only gave expressly what might otherwise quite well have been implied, viz., that the corpus, being once ascertained, there will be carried with it all rights appurtenant thereto, including not only possession of the subject itself, but, it may be, of rights of passage, water or the like which enure to the subject of the lease and may even be derivable from outside properties. In that case attention was drawn to the point that the essential characteristic of a lease is that the subject is one which is occupied and enjoyed and the corpus of which does not, in the nature of things and by reason of the user, disappear."

In *Cambell* v. *Wardlaw*,(8) where a testator made a bequest to his wife of "the whole annual produce and rents of the residue of my estate," it was held that this would not pass rents of mines opened by the trustees *after* the testator's death. Where the land was leased to tenants for agricultural purposes it was held by the High Court of Madras that property in shells dug up from the land by the tenants did not pass to them.(9) On the same principles a grantee of land for her maintenance does not get any right to open up new mines on the land.(10)

11. **"Legal incidents thereof."** — An incident is that which follows the principal thing—a thing necessarily depending upon, appertaining to, or following another more worthy.(1) A thing will be deemed to be a *legal* incident of property where it is *by right* used with the property for its benefit. A consideration of the clauses of the section makes it clear that the primary consideration in determining whether a particular thing is an incident of the property or not is whether such thing is necessary or is provided for the *permanent use and beneficial enjoyment* of the property.

A legal incident annexed to a particular property is distinct from the bundle of rights constituting the ownership of the property itself. Thus, the right of an owner of property, to use it in a particular manner, cannot strictly speaking be called an incident of the property. It is part of the proprietary rights in the property.

A burden attached to property such as charges on the land, easements and covenants *to the burden of which the land is subject* cannot be said to be *incidents* of such property within the meaning of this section inasmuch as a burden cannot be said to be for the beneficial enjoyment of the property to which it is subject.

12. Transfer of legal incident only—Effect of.— The transfer of property passes with it the transferor's interest in the legal incidents thereof. But the converse of this proposition is not correct. The transfer of a legal incident of a property without more cannot operate to transfer the property itself. In other words while the transfer of the principal thing will pass the accessory thereto, the transfer of the accessory will not pass the principal. This is in accordance with the maxim *accessorium nonducit sed sequitur suum principale* - the accessory does not *lead* but follows its principal. Thus, the transfer of the rents and profits of a property to a woman *for her life* does not carry with it a gift of the entire property itself,(1) though a gift of the income of a property *without any limitation* would be a gift of the property itself.(2) Similarly. the transfer of a jungle does not carry with it the transfer of the entire land itself.(3) Where however an owner of a grove sold the grove by declaring that he

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8. (1883) 32 W R (Eng) Dig 176 (176, : 8 App Cas 641 (647).

9. ('02) 25 Mad 669 (671) (DB).

10.† ('05) 2 Cal L Jour 20 (26, 36).
†('05) 1 Cal L Jour 517 (525) (DB).

Section 8 — Note 11

1. Wharton, *Law Lexicon*, 14th Edn., 1938.

Section 8 — Note 12

1. 1936 Bom 330 (332) [AIR V 23] : ILR (1937) Bom 18 (FB).

2.† 1926 Mad 250 (251) [AIR V 13] (DB).
1921 Mad 563 (566) [AIR V 8] (DB).
Also See S. 122, Note 1.

3. 1931 Oudh 177 (229) [AIR V 18].

was selling it with every right that he possessed therein, it was held that his right to the land was also conveyed to the vendee unless it was expressly reserved by him.(3a)

So also a sale of a building without any specific reference to the land whereon it stands cannot necessarily convey the land along with it.(4)

13. "Easements annexed thereto." — A transfer of a land or a house will pass to the transferee all easements which it had enjoyed over another property.(1) The phrase "easements annexed thereto" has reference to those easements which *at and prior to the transfer were existing easements*, e. g., a right of way over a field belonging to a different owner by which a house could be approached. It would not have reference to an easement which first came into existence as a consequence of the transfer.(2) Thus, an easement of necessity(3) or quasi easements of the nature dealt with in S. 13 of the Indian Easements Act which spring up on a severance of tenements resulting from a transfer are not easements "annexed" to the property transferred within the meaning of this section. Such easements are created and pass to the transferee by virtue of S. 13 of the Easements Act or of the principles underlying it, and not as "incidents" of the property transferred.(4)

Generally any sale of a building without any specific reference to the land whereon it stands cannot necessarily convey the land along with it, because what is provided in this section as to easement cannot apply to the land on which the buildings stand for there is no easement in law which gives any exclusive and unrestricted

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3a. 1953 All 705 (706) [AIR V 40 C 343] (DB).

4. 1958 Pat 133 (142) [AIR V 45 C 55] (DB). (If the grant is exclusive and unrestricted it beyond all questions passes ownership of the land.)

Section 8 — Note 13

1. 1959 Pat 463 (471) [A I R V 46 C 132] : 38 Pat 443 (DB).

1927 Lah 351 (351, 352) [AIR V 14]. (When a house or any other immoveable property is sold, all rights and privileges concomitant to it and previously enjoyed by the vendor go with it, specially where there is no provision to the contrary in the deed of sale and it is of no use to the seller to reserve them.)

('10) 1910 Mad W N 625 (625) (DB). (When the right to irrigation in respect of some lands is an apparent and continuous easement, the acquirer of the lands is entitled to the continuance of the easement.)

1934 All 447 (448) [AIR V 21].

('08) 35 Cal 889 (894). (Easement of light and air—Transfer in this case was by court-sale.)

('85) 1885 Bom P J 20 (21) (DB).

('74) 22 Suth W R 522 (522) (DB). (This is so even where the transfer is by compulsory sale effected by the Court.)

('71) 15 Suth W R 526 (526) (DB). (Right of way from the house to the public way.)

('66) 6 Suth W R 314 (314) (DB).

[*See also* (1909) 2 Ind Cas 637 (638) (All). (In the case of implied easements that is easements which are used from time to time only, such easements do not pass unless the owner by appropriate language shows an intention that they should pass.)]

2. 1947 Pat 122 (124) [AIR V 34 C 46]. (AIR 1937 Nag 179, Foll.)

1937 Nag 179 (180) [AIR V 24] : ILR (1937) Nag 204.

✠ ('93) 15 All 270 (290) (DB). (Right of way over transferor's land, arising as an incident of transfer.)

3. 1937 Nag 179 (180) [A I R V 24] : ILR (1937) Nag 204.

('93) 15 All 270 (290) (DB).

4 1947 Pat 122 (124) [AIR V 34 C 46]. (Partition between members of family — Common passage left for use of co-sharers — Right to share in passage not legal incident of shares and did not pass as such to successive vendees from co-sharers.)

1930 Pat 7 (11) [AIR V 17] (DB). (Easement of necessity defined and distinguished.)

1924 Lah 724 (725) [AIR V 11]. (Right to use staircase.)

✠1915 Mad 795 (796) [A I R V 2] : 38 Mad 141 (DB). (Passage to the latrine.)

1924 Mad 812 (813) [AIR V 11).

('12) 17 Ind Cas 966 (967) (Cal). (Right of way.)

('88) 1888 Pun Re No. 60.

† ('82) 8 Cal 956 (958, 959) (DB).

('78) 2 Mad 46 (53) (DB). (A continuous, apparent easement passes by implication of law and no express language to pass it is necessary.)

('71) 8 Bom H C R 181 (185). (Easement of light and air.)

(1892) 61 L J Ch 44 (46) : (1892) 1 Ch 47 (53) : 65 L T 552, Phillips v. Low.

(1881) 50 L J Ch 731 (733) : 18 Ch D 616 (623) : 45 L T 383 : 29 W R (Eng) 929, Barkshire v. Grubb.

use of land.(5)

14. Rents and profits of property.—A transfer of land will, in the absence of an intention to the contrary, expressed or necessarily implied, also pass to the transferee the transferor's interest in the rents and profits of the land.(1) A transfer of a house will, similarly, pass to the transferee the transferor's interest in the rent thereof. But in the either case, only the rents and profits or the rent, as the case may be, accruing *after the date of the transfer and not before* that will pass to the transferee.(2) The reason is that the rents and profits prior to the transfer are not subsidiary to the enjoyment of the property transferred.(3) But a right to the rents of property accrued before the date of the transfer may itself be transferred. In such a case, this section has no application.(4)

A right to *mesne profits* prior to the date of transfer cannot be transferred at all by virtue of S. 6 (e).(5)

A transfer of rents and profits alone cannot be presumed to carry with it the right to open mines and remove minerals which are a portion of the soil.(6)

In the undermentioned case(7) it was held that where mortgaged property

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5. 1958 Pat 133 (142) [AIR V 45 C 55] (DB).

Section 8 Note 14

1. ('03) 30 Cal 556 (564) : 30 Ind App 71 (PC).

2. ('62) I L R (1962) Madh Pra 210 (216, 217) (DB).

1951 Mad 601 (603 and 604) [AIR V 38 C 169.)

1951 Nag 299 (301) : [AIR V 38 C 88]. (Arrears of rent do not pass on to new proprietor along with the patti; the tenants' liability remains and the ex-proprietor has a legal right to recover rental arrears from them.)

1929 Bom 51 (53) [AIR V 16] (DB). (Plaintiff 1 the vendee with plaintiff 2 the vendor as a formal party, brought a suit against the defendant for rent and profits accruing due after the date of plaintiff 1's purchase—Plaintiff 1's claim was decreed — After due amendment of the plaint plaintiff 2's claim for rent due before the date of sale by him to plaintiff 1 was also decreed.)

1920 Mad 386 (387) [A I R V 7] (DB). (Transfer of a claim for past profits is invalid. 38 Mad 308, Rel. on.)

1917 Nag 61 (61, 62) [A I R V 4]. (Co-sharer assigning his village share and profits already due before assignment — In a suit by assignee for the profits already due held, the assignment of profits was a transfer of mere right to sue and the suit was not maintainable.)

('01) 14 C P L R 84 (85). (Suit for village profits by a mortgagee who had obtained a conditional decree for foreclosure — S. 8 and not S. 36 of Transfer of Property Act held applicable.)

(1903) 72 L J K B 294 (295) : (1903) 1 K B 683 (687, 688) : 88 L T 426 : 51 W R (Eng.) 479, Shillito v. Biggart. (Mortgagee of ship, upon taking possession of ship is entitled to all freight which the ship is then in the course of earning but not to freight previously earned and due and payable but not paid at the time of his taking possession.)

[*See also* (1851) 42 E R 293 (294) : 15 Jur 641 3 Mac & G 344 : 87 R R 115, Salmon v. Dean.]

Also see S. 36, Note 4.

3 ('62) ILR (1962) Madh Pra 210 (216) (DB).

1951 Mad 601 (603) [A I R V 38 C 169]. (Such arrears of rents are a debt or actionable claim, and, if they are to be transferred, must be assigned separately.)

✻1927 Mad 817 (818) [A I R V 14]. (In other words, it cannot be said that to make sale operative and effective, the right to collect past profits must also be conveyed to the vendee.)

4. 1925 Pat 310 (312) [A I R V 12] : 4 Pat 43. (Transfer of arrears of mokarari rent.)

1923 Mad 177 (178) [AIR V 10]. (1920 Mad 386 [AIR V 7], distinguished on the ground that in that case there was no question about the actual transfer of the right to recover rent.)

5. 1927 Mad 817 (818) [AIR V 14]. (1920 Mad 386 [AIR V 7], Approved; obiter dicta to the contrary expressed by Seshagiri Iyer J., in 1921 Mad 56 [AIR V 8], Not approved.)

1926 Cal 428 (430) [AIR V 13] (DB). (Land together with past profits was transferred.)

1924 Pat 551 (553) [AIR V 11] : 3 Pat 575 (DB). (Claim to mesne profits was also specifically assigned along with the property.)

1916 Mad 473 (473) [AIR V 3] : 38 Mad 308 (DB). (AIR 1916 Mad 595, Relied on.)

[*See also* 1917 Nag 61 (61, 62) [AIR V 4]. (Transfer of share in village and profits accrued before the transfer — *Held*, transfer invalid under S. 6 (e), T. P. Act.)]

6. ('06) 33 Cal 203 (217) : 32 Ind App 185 (PC). (Case of kharposh grant which was presumed to be for the life of grantee.)

7. † 1934 Rang 321 (322) [AIR V 21] : 12 Rang 437 (DB). (Receiver appointed pending a suit for redemption of an English mortgage.)

[*See also* 1926 Cal 204 (209) [AIR V 13] (DB). (Rents and profits after mortgage by deposit pass to mortgagee.)]

came into the hands of a Receiver appointed by the Court the rents and profits of the property in the hands of the Receiver formed part of the security by virtue of the provisions of this section.

15. "All things attached to the earth." — As seen in Note 2 the section provides that unless a different intention is expressed or necessarily implied a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the legal incidents of the property. Second paragraph of the section then provides that where the property transferred is land such legal incidents include, *inter alia*, all things attached to the earth.(1a) As to the meaning of the expression "things attached to the earth," see Notes 6 to 10 on S. 3.

Standing timber, growing crops and grass are not included in the definition of "immovable property," but being things attached to the earth, will pass on a transfer of property on which they stand, as the legal incidents of such property.(1) So also trees(2) and buildings(3) standing on the land will pass to the transferee of the land.

Section 8 — Note 15

1a. 1959 S C 254 (257) [AIR V 46 C 35].

1. 1942 Peah 88 (88) [AIR V 29]. (Possession of land delivered to pre-emptor under pre-emption decree—Vendee is not entitled to value of standing crops as they pass with land.)

1934 Cal 610 (614) [AIR V 21] : 61 Cal 991 (DB). (This is so in the absence of an express provision to the contrary.)

1932 Pat 344 (345) [AIR V 19]. (Where a person took possession of land in execution of a decree it was held in spite of the new definition of 'movable property' inserted in Civil Procedure Code, that bamboos growing on that land also passed to the auction-purchaser.)

1923 Nag 327 (329) [AIR V 10]. (Decree for pre-emption—On paying the pre-emption money, the plaintiff was held to have become the owner of the land with crops standing on it.)

1923 Pat 355 (356) [AIR V 10]. (Execution sale of land; crops go with the land.)

('01) 15 C P L R 141 (142). (Mortgagee entering into possession of the land occupied by mortgagor is entitled to the emblements.)

('79) 4 Cal 814 (815) (DB). (Execution sale — Certificate not mentioning crops — Crops were held to have passed to the auction-purchaser along with the land.)

('90) 13 Mad 15 (16). (Do.)

2. ('67) 11 Moo Ind App 295 (313): 10 Suth WR P C 132 (PC).

('03) 13 Mad L Jour 3 (6) (SB). (Mortgagee of land is also entitled to the security of trees thereon.)

1939 All 291 (294) [AIR V 26] : ILR (1939) All 518 (FB). (Sale of sir land—Title to the grove standing on the land will pass to the transferee, but prima facie, right to the produce of the trees will be with the ex-proprietor.)

1950 Pat 284 (288) [AIR V 37 C 70] (DB). (On settlement of land, the right of landlord, in trees also passes.)

1940 All 427 (428) [AIR V 27] : ILR (1940) All 599 (DB). (Case of execution sale.)

1927 Oudh 240 (253) [AIR V 14] : 2 Luck 43. (Interest in grove.)

1921 Sind 109 (111) [AIR V 8] : 16 Sind L R 87.

1918 Nag 206 (206) [AIR V 5]. (To the pre-emptor.)

('11) 11 Ind Cas 192 (192) (All).

('98) 22 Bom 610 (611) (DB). (The fact that the trees standing on the land had previous to the sale of land been mortgaged will not lead to an implied inference that they were not intended to be included in the sale.)

('75) 24 Suth W R 330 (331). (Transfer was by lease in this case.)

('70) 2 N W P H C R 251 (252) (DB). (Trees not cut or severed.)

[*See also* 1932 All 653 (655) [AIR V 19]. (Sale of proprietary rights—Title to grove standing on sir land passes to transferee.)]

3. 1959 Ker 294 (296) [AIR V 46 C 97] (DB). (Mortgage of land—Building imbedded in land also passes.)

1927 Oudh 240 (253) [AIR V 14] : 2 Luck 43. (Tranfers of village—Al linterests of transferor, such as a grove or a house in village, will pass unless exempted.)

1916 All 249 (251) [AIR V 3] (DB). (Where defendants conveyed to the plaintiff the whole of their proprietary rights in a certain village and in the same deed of sale they expressly specified the buildings with the land on which they stood without expressly reserving a right of residence or of user in any of the buildings the defendants had no right to occupy the buildings or to treat them as appurtenances to their holding.)

1945 Pat 400 (402) [AIR V 32] : 24 Pat 268 (DB). (Execution of sale of entire interest in zemindari land will pass house situate upon the land in the absence of words showing an intention to retain it.)

1933 Rang 24 (25) [AIR V 20].

1925 All 449 (453) [AIR V 12] : 47 All 470 (DB). (Following 4 All 381.)

[*See also* 1941 Oudh 395 (398) [AIR V 28]. (Auction sale of zamindari patti in a village —Houses owned by zamindar in abadi also pass with it.)]

16. House when passes fixtures.—The English law of fixtures with all its technicalities should not be applied to this country as being based on equitable considerations.(1) No doubt, fixtures attached to land will pass on a transfer of land under this section but that is subject to any different intention which is express or necessarily implied in the document.(1aa) Whether a particular fixture passes on a transfer of the house to which it is attached would depend upon the applicability of this section to the facts of the case.(1aaa) The *fourth* paragraph of the section provides that when the property is a house, only things provided for *permanent use therewith will pass as an incident.* Thus, the doors fixed to a house will pass with the house.(1a) Machinery brought into the house for the purpose of carrying on business is not a thing provided for the permanent use of the house, and will not therefore pass under that clause.(2)

In *Narayana Sa* v. *Balaguruswamy Nadar*,(3) the Madras High Court observed as follows :

> "In cases where business is carried on in the premises and the sale is only of the premises and not of the business as a going concern or the premises together with the fixtures or machinery, *prima facie* all that the purchaser is entitled to are the buildings. . . . . In cases of houses the primary considerations in determining whether the items claimed are fixtures under S. 8 of the Transfer of Property Act, should be whether the articles are provided for the permanent use of the house, and whether they can be said to be articles which are necessary or which are provided for the more beneficial enjoyment of the property and I do not think that under that term machinery brought into the house for the purpose of carrying on business can be included. One important test in these cases is with what intention were the articles put into the house ? Were they put in for more beneficial enjoyment of the house or with the object of improving the value of the house by making it more artistic or were they put in with a collateral purpose ?"

The words "other things provided" do not include a right of access by a staircase when the ownership of the staircase itself is not claimed and the right of way is

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[See however ('57) ILR (1957) Madh Pra 450 (456). (Proprietary interest in building is in no sense an appurtenance to zamindari share or interest in the mahal and even in the absence of any express exclusion would not pass to the transferee.)

1955 All 292 (296) [AIR V 42 C 86] : ILR (1955) 1 All 718 (FB). (But the presumption in a case of a residential house is that it is not necessarily appurtenant to the zamindari and unless it can be established from evidence that it was intended to be transferred along with the rest of the zamindari, the house must be deemed to have remained the property of the erstwhile zamindar.)]

Section 8 — Note 16

1. 1928 Oudh 67 (87) [AIR V 15].

† 1924 Mad 187 (188) [AIR V 11]. (Along with distillery buildings, vats, pipes and stills do not pass as fixture to the vendee.)

('12) 15 Ind Cas 619 (620) (DB) (Cal). (English law of fixtures may be stated thus : if trees are planted or seeds sown in the land of another, the owner of the soil becomes owner also of the tree, the plant, the seed as soon as it has taken root. But this has never been the law of this country.)

† ('10) 37 Cal 815 (821) (DB).

1aa. 1959 S C 254 (257) [AIR V 46 C 35].

1aaa. 1959 S C 254 (257) [AIR V 46 C 35]. (On a construction of the documents held the intention was to sell the fixtures as movables.)
[*See* ('57) 70 Mad L W 205 (206). (Mortgage of a cinema building and not of running cinema house — Ceiling boards and ceiling fans and exhaust fans would not form an integral part of building, though they may be required to run a cinema in building — Mortgagee-purchaser of building will not be entitled to them.)]

1a. ('90) 13 Mad 518 (520) (DB). (11 Cal 164 in which it was held that doors form part of an immovable property Relied on.)
[*See also* ('91) 14 Mad 467 (469) (DB). (The doors of a house are not attachable as moveable property. 13 Mad 518, Rel. on.)]

2. 1924 Mad 187 (188) [AIR V 11].
1925 Rang 250 (251, 252) [AIR V 12] (DB).

3. 1924 Mad 187 (188) [A I R V 11]. (The general rule is that what is annexed to the land becomes part of the land, but what constitutes an annexation must depend on circumstances, as indicating the intention, viz., degree of annexation and the object of the annexation.)

not an easement of necessity.(4)

17. Transfer of debt — Securities when pass. — The *fifth* paragraph of the section provides that where the property transferred is a debt or actionable claim, the securities therefor will also pass to the transferee as legal incidents of the property transferred.(1a) Thus, where *moveable* property is hypothecated to *A* as security for the repayment of a debt due to *A* on a promissory note, and *A* transfers the promissory note to *B*, *B* will be entitled to the security also and can enforce the payment of his debt by sale of the moveable property.(1)

The same principle will apply even where the debt which is transferred is secured by a mortgage of *immovable* property, provided that the transfer of the security itself is not required to be made by a registered instrument. Thus, a sale of a mortgage debt, in execution of a decree attached under the provisions of O. 21, R. 46 of the Civil Procedure Code will pass the security to the purchaser.(2) Suppose now, *A* in whose favour a simple mortgage of immovable property has been executed, transfers the debt due to him, to *B* by an unregistered instrument. Two questions arise ; *first*, whether the security will pass to *B*, and, *second*, whether, if the security cannot pass without a registered instrument, whether the debt itself can be separated from the security and pass to the transferee. As to the *first* question : Before the year 1900, the words "actionable claim" included a mortgage debt and could be transferred under the provisions of S. 130 of the Act without a registered instrument. It was held in the undermentioned case(2a) that on the transfer of the debt by an unregistered instrument the security will also pass. Section 3 of the Act was, however, amended in the year 1900 by excluding a mortgage debt from "actionable claim" with the result that the question arose whether the security would pass on the transfer of debt in the absence of a registered instrument.

It was held by the High Court of Madras in *Dwarka Doss* v. *Dhanakoti Ammal*,(3)

4.† 1937 Nag 179 (180) [AIR V 24] : ILR (1937) Nag 204. (The words "all other things provided for permanent use therewith" are ejusdem generis with the previous words "locks and keys, etc," and apply only to things within the building transferred.)

[*See also* 1924 Lah 724 (725) [AIR V 11]. (Relying on 1888 Pun Re No. 50 it was held that when the user of a staircase was necessary for reasonable enjoyment of property transferred the grant of access by the staircase was implied — It was further held that words of the deed of transfer showed that the right was transferred.)]

Section 8 — Note 17

1a. ('61) 1961 Ker L T 996 (997). (Rent which has accrued due constitutes a debt; therefore where such a debt is transferred the transferee gets a charge on the tenant's holdings as provided in S. 41 of the Malabar Tenancy Act.)

[*See also* (1907) 30 Mad 235 (237, 238) (DB). (The word "debt" cannot be taken to be used in its widest sense but is confined to debts that fall within the general category of actionable claims.]

1. 1929 Bom 471 (473) [A I R V 16] : 53 Bom 819.

2. 1921 Mad 137 (138) [A I R V 8] : 44 Mad 196 (DB). (Gift of mortgage—Same rule applies.)

1919 Oudh 132 (133) [A I R V 6] : 21 Oudh Cas 400 (DB). (A deed of simple mortgage is a debt not secured by a negotiable instrument and cannot be treated as immovable property for the purposes of attachment under O. 21, R. 46, C. P. C.)

1915 Mad 209 (210) [AIR V 2] : 37 Mad 51 (DB). (Simple mortgage debt.)

† ('02) 26 Bom 305 (310) (DB). (The security will pass without attaching the mortgage property under O. 21, R. 54, C. P. C.)

† ('93) 15 All 134 (135, 136) (DB).

See also the Authors' Commentaries on the Code of Civil Procedure, 7th (1963) Edn., O. 21, R. 46, Note 4.

2a. ('95) 18 Mad 454 (455, 456) (DB).

[But see ('01) 24 Mad 449 (463, 464) (DB). (The right of simple mortgagee in the mortgage property is an intangible thing like a charge on immovable property within the meaning of S. 54, T. P. Act, and hence cannot be transferred except by registered instrument. Per Bhashyam Ayyangar J.)]

3. 1914 Mad 353 (353, 354) [A I R V 1]. (Following 18 Mad 454 and not approving remarks at p. 463 in 24 Mad 449 — *Held*, registration is

that a transfer of a mortgage was a transfer of a mortgage debt with its attendant securities and not a sale of immovable property requiring registration, and that even if S. 54 of the Transfer of Property Act should be held to apply, the provisions of this section which are special provisions, would prevail over S. 54 which is a general provision, on the principle enunciated by the maxim *generalia specialibus non derogant*—general provisions do not derogate from special provisions. The same view was restated in *Cunniah* v. *Gopal*(4) with a further remark that the security passed to the transferee by a *statutory transfer* under this section without further act of the parties. The view has, however, not been followed in subsequent cases of the same Court. In *Elumalai Chetty* v. *Balakrishna Mudaliar*,(5) it was held, dissenting from *Cunniah* v. *Gopal*,(6) that the endorsee of a promissory note, the amount of which had been secured by a mortgage by deposit of title deeds, could not claim to enforce the mortgage in the absence of a registered instrument conveying the mortgage right. The basis of the decision was that a mortgage debt was not an actionable claim and that therefore S. 8 "did not apply to mortgage debts." It is somewhat difficult to understand why the fifth paragraph which speaks of *debts* and actionable claims should not apply if a mortgage debt is not an "actionable claim," since it is still a "debt." In *Ranganatha Iyengar* v. *Rajagopala Iyengar*,(7) Madhavan Nair J., observed:

> "Section 8, Transfer of Property Act, no doubt says that where a debt is transferred the security therefor is also transferred as a legal incident of the transfer, but it does not prescribe the manner or method of the assignment of the security and cannot override the provisions of the Registration Act in cases where under that Act an assignment to be valid requires registration."

In *Sakiuddin* v. *Sonaullah*,(8) the High Court of Calcutta has held that notwithstanding S. 8 of this Act, a transfer of a mortgage debt must be by a registered instrument. Their Lordships observed:

> "It can hardly be supposed that debts secured by mortgages of immovable property were excluded from the definition of actionable claims in order that they might pass by word of mouth without any writing."

On the *second* question there was a conflict of opinion. It had been held in some cases(9) that where a debt was secured by a mortgage of immovable property the debt was inseparable from the security. A contrary view, viz., that although the transfer was inoperative as regards the land mortgaged as security for the debt, yet it was not inoperative as an assignment of the debt itself, was however expressed in the undermentioned case.(9a) In *Imperial Bank of India* v. *Bengal National Bank Ltd.*,(10) *A* had borrowed from *B*, a bank, a sum of money for which he had given to *B* a security of immovable property. *B* transferred the debt due by *A* to *C*. It was admitted by the parties that the *security* did not pass in the absence of a registered document. The High Court held that even the *debt* did not pass, inasmuch as the debt could not be separated from the security. This decision was reversed by their Lordships of the Privy

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not required under Transfer of Property Act for transfer of mortgage by mortgagee — Held further, that transfer of mortgage by deposit of title deeds did not require registration even under Registration Act.)

Also see S. 54, Note 6.

4. 1919 Mad 547 (548, 549) [A I R V 6] (DB). (Assignment of pronote secured by title deeds takes with it the equitable mortgage.)

5. 1922 Mad 341 (345, 347) [AIR V 9]: 44 Mad 965 (DB). (AIR 1921 Mad 137, Not approved.)

6. 1919 Mad 547 (548) [AIR V 6] (DB).

7. 1933 Mad 181 (184) [AIR V 20]. (Transfer of unpaid vendor's lien was held to require registration.)

8. 1918 Cal 411 (413) [AIR V 5] (DB).

9. 1919 Oudh 132 (133) [A I R V 6]: 21 Oudh Cas 400 (DB).
('02) 26 Bom 305 (310) (DB).

9a. ('02) 25 Mad 396 (398) (DB).

10. 1931 Cal 223 (230) [A I R V 18]: 58 Cal 136 (DB).

Council on appeal in *Imperial Bank of India* v. *Bengal National Bank Ltd.*,(11) and their Lordships observed :

> "The debts may be secured either on immovable property or on merchandise; they may be wholly secured or partly secured; the security may have been given when the debt was created or later; but in any case, the debts exist as moveable property; and do not, if secured, become identified with the security or transformed into land in the one case or merchandise in the other. The separation between debt and security is well established; the creditor is entitled to take a judgment for the debt without having recourse to his security. There would therefore appear to be no reason in principle why a creditor should not be able to charge his moveable assets, the debts due to him, even if he be unsuccessful *by reason of statutory* restrictions in transferring the security."

But their Lordships also held in that case that the remedy of the transferee in such cases would be to sue the debtor *in the name of the transferor* and the latter would be bound to permit it. The effect, according to their Lordships, of the amendment of 1900 was merely to restrict the statutory rights on transfer such as the right to sue in the *transferee's* name to such transfers as are transfers of actionable claims as defined.

The view expressed in *Imperial Bank of India* v. *Bengal National Bank Ltd.*,(11a) was affirmed by their Lordships again in *Fanny Skinner* v. *The Bank of Upper India Ltd.*(11b) In that case the whole of the assets of a bank *X* were purported to be transferred to *Y* by an unregistered instrument. One of the items of assets was a debt secured by a mortgage executed by *A* in favour of the bank *X*. After the said transfer *X* sued *A* on the mortgage. It was contended by *A* that *X* having transferred the debt to *Y* and the transfer of the security being ineffective by reason of want of registration of the instrument, *X* could not enforce the security alone. Their Lordships overruled the contention in the following words :

> "Applying that case (i. e., *Imperial Bank of India* v. *Bengal National Bank Ltd.*,(11c)) which need not be gone into in more detail, to the present, the result is this, as it appears to their Lordships: The transfer of this mortgage debt was effective as between the transferor and the transferees. But any proceedings to recover the debt brought against the mortgagor must be, not in the name of the transferee, but in that of the transferor. Accordingly, what was here done by the Bank of Upper India (*X*) in suing in its own name to recover this mortgage debt was rightly done."

See also the undermentioned case.(11d)

Debt secured by a charge.

The creation of a charge, as distinguished from a mortgage, does not *convey* any interest in immovable property and is not a "transfer of property." It merely secures payment out of certain property without there being any transfer of an interest.(12) The question arises whether a debt secured by a charge can be transferred without a registered instrument, so as to pass the charge also to the transferee. In *Sambasiva* v.

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11. 1931 P C 245 (247, 248) [A I R V 18] : 59 Cal 377 : 58 Ind App 323.
[*See also* ('55) 1955 Andh W R 635 (637) : A I R 1955 N U C 5840. (A mortgage debt as distinguished from mortgage security can be transferred without a registered instrument. A I R 1931 P C 245 and A I R 1935 P C 108, Rel. on.)
1935 All 837 (838) [AIR V 22]. (AIR 1931 P C 245, Followed.)]

11a. 1931 P C 245 (248) [A I R V 18] : 59 Cal 377 : 58 Ind App 323.

11b. 1935 P C 108 (113) [A I R V 22] : 57 All 314 : 62 Ind App 115.

11c. 1931 P C 245 (248) [A I R V 18] : 59 Cal 377 : 58 Ind App 323.

11d. 1949 Mad 52 (52, 53) [A I R V 36 C 22] (Assignment of security and assignment of debt apart from security — Latter does not require registration — Rule holds good as regards usufructuary mortgage containing covenant to pay.)

12. See Note 4 on S. 5.

Venkatarama(13) it was held that since a charge is not a transfer of any interest in immovable property a transfer of a debt without a registered instrument will pass the charge also under the provisions of S. 8. The transfer of the debt in that case was by a certificate of sale in court auction and such certificate is not required, under the Registration Act to be registered. In *Ranganatha* v. *Rajagopala*,(14) it was held by Mr. Justice Madhavan Nair that a charge is "an interest in immovable property" for the purposes of S. 17 of the Registration Act and if the debt is transferred by a *written instrument*, it will not pass the charge, unless document is registered.(14a) The decision was affirmed on appeal on the same grounds.(15) It may be observed that the Registration Act does not require any transfer to be in writing at all, but merely provides that *if a transaction is reduced to writing* it must in certain circumstances be registered. In cases in which the transfer of debt is not made in writing, or in cases where though made in writing the writing is not required to be registered under the Registration Act, (*e.g.*, sale certificate), the charge will pass to the transferee as a legal incident of the debt.

Debt ripened into decree.

Where a money decree was obtained in respect of a secured debt, and was then transferred, it was held in the undermentioned case(16) that the securities did not pass with the decree and the purchaser could not claim to enforce the security. But where the registered deed of transfer, though referred to the decree debt alone, clearly showed the intention of the transferor that the security for the debt should also be transferred to the transferee at the same time, it was held that the security passed along with the decree debt.(16a)

Endorsement of promissory note—Debt if passes.

An indorsee of a promissory note is limited to his remedy on the *note* unless the endorsement is so worded as to transfer the debt as well and the stamp law is complied with. Thus, the indorsee of a promissory note executed by the manager of a Joint Hindu family cannot make the non-executant coparceners liable on the note under the Hindu law in the absence of words transferring the debt itself.(17) The transfer of the promissory note by an endorsement in the ordinary way is not the transfer of a *debt* and S. 8 has no application to such cases.(18)

Transfer of debt pending litigation — Decree whether passes.

It has been held by Das J. of the Supreme Court in the undermentioned case,(19)

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13. 1926 Mad 903 (904) [AIR V 13]. (Vendor's right to unpaid purchase money, purchased at court-auction — Vendor's lien for the unpaid purchase-money also passed to the auction-purchaser.)

14. 1933 Mad 181 (183, 184) [AIR V 20]. (AIR 1926 Mad 903 distinguished on the ground that assignment of unpaid vendor's lien was by virtue of sale certificate which is expressly excluded from registration.)

14a. *The same view has been held in the undermentioned cases also:*
1934 Mad 713 (714) [AIR V 21) (DB).
1931 Cal 223 (227, 228) [AIR V 18] : 58 Cal 136 (DB). (Reversed by the Privy Council on another point in 1951 P C 245 [AIR V 18].)

15. 1934 Mad 615 (615, 616) [AIR V 21] (DB).

16. ('77) 1 All 446 (447) (DB).
[See however ('73) 19 Suth W R 255 (259) (DB). (It is not clear whether a mere decree was passed in this case.)]

16a. 1964 Andh Pra 297 (298) [AIR V 51 C 78]. (Transfer of preliminary decree on simple mortgage—Transfer-deed clearly giving right to transferee to recover decree amount and interest from mortgage property—Transfer was of entire rights arising under mortgage and not only mortgage decree—Transferee has right to security also—AIR 1950 Pat 211, Rel. on.)
1950 Pat 211 (212) [AIR V 37 C 51] (DB).]

17. 1938 Mad 377 (379) [AIR V 25] : I L R (1938) Mad 568 (FB). (1917 Mad 61 [AIR V 4], Overruled; 1935 Mad 240 [AIR V 22], Relied on.)

18. 1939 Mad 846 (847) [AIR V 22] (DB). (Endorsement in this case was held to have passed merely property in the promissory note.)

19. 1955 S C 376 (383, 400) [AIR V 42 C 66] : 1955 S C R 1369.

that the transfer of book-debts during the pendency of the suit on them does not pass the decree to be passed thereon; but a contrary view is taken by Bhagawati J. in the same case.

18. Interest. — Interest is always accessory to the principal.(1) The last two clauses of the section provide that interest accrued on a debt, actionable claim or other money transferred, *before* the transfer is not included in the expression "legal incidents" of the property transferred. But it has been held in the undermentioned cases(2) that such interest will pass to the transferee, not as a legal incident but as *part of debt* or *actionable claim* itself. In the case noted below(3) it was held by the High Court of Calcutta that on a transfer of arrears of rent, the interest on such arrears from before the date of transfer would pass to the transferee *as a legal incident* of the rent transferred. It is submitted that this view is against the terms of the section which clearly states that the arrears of interest accrued before the date of transfer are not included in the term "legal incident."

19. Other legal incidents. — The following are further illustrations of legal incidents or otherwise of property—

(1) Village account books and other papers relating to the management of the village are accessories to the estate in so far as they are necessary to the effectual and proper enjoyment of the village, and consequently are legal incidents of the village.(1)

(2) Where the principal *patti* is transferred the interest of the transferor in the *shamilat-patti* will also pass as appurtenant to the principal patti.(2)

(3) A transfer by a zamindar of a zamindari will pass also the zamindar's interest in the abadi.(3) But a contrary view is taken in the undermentioned case.(3a)

(4) The settlement of land carries with it the right of fishery in water standing on the land.(4) It has been held by their Lordships of the Privy Council that in general fishing rights in a river follow the river and subsidiary fishing rights in waters associated with a river fishery vary with the changes in the river.(4a)

(5) Title deeds of the property transferred are legal incidents of such property.(5)

Section 8 — Note 18

1. ('03) 27 Bom 330 (333) (DB). (Interest under Act XXXII of 1839 was hence disallowed, on time-barred items of the debt.)
(1836) 132 E R 275 (276) : 2 Bing N C 713, Holis v. Palmer.

2. 1919 Oudh 132 (133) [AIR V 6] : 21 Oudh Cas 400 (DB). (Assignment of mortgage debt.)
1915 Low Bur 136 (136) [AIR V 2]. (Such interest passes as a matter of course in the absence of words to show a contrary intention.)

3. ('10) 7 Ind Cas 582 (583) (DB) (Cal). (This decision may however be supported on another ground, viz., that the document of transfer clearly conveyed the rights "not only to the rents in arrears but also to the interest on such arrears.")

Section 8 — Note 19

1. ('87) 11 Bom 485 (487) (DB). (Decree giving possession of a village—The decree-holder is generally entitled to the village account books.)

2. 1927 All 717 (719) [AIR V 14] : 49 All 606 (DB). (Principal patti sold at court auction—Observation obiter.)

3. 1926 Oudh 358 (359) [AIR V 13].

3a. ('57) I L R (1957) Madh Pra 450 (456).

4. 1935 Pat 149 (152) [AIR V 22]. (Fisheries unlike minerals are not under-ground rights.)
1930 Pat 382 (383) [AIR V 17] : 9 Pat 401 (DB). (The right of fishery passes to the lessee unless expressly reserved by the lessor.)
1922 Pat 9 (11) [AIR V 9] (DB). (Right reserved by landlord is really a regrant by tenant.)

4a. 1946 P C 92 (93) [AIR V 33 C 32] : I L R (1946) 2 Cal 1 : 73 Ind App 109 : I L R (1946) Kar (P C) 100.

5. (1897) 66 L J Ch 627 (628) : (1897) 2 Ch 144 (148) : 76 L T 646 : 45 W R (Eng) 627, In re

See also the undermentioned cases.(6)

20. Deed — Construction. — It is a cardinal rule of construction of deeds and documents, in general, that the intention of the parties should be gathered from the *language* used by the parties in such deeds and documents,(1) and that where the

Williams & Duchess of Newcastle's Contract.
(1827) 130 E R 708 (709) : 4 Bing 106, Prillips v. Robinson.
(1832) 110 E R 63 (65) : 2 B & Ad 170 : 1 L J (N S) K B 122, Harrington v. Price.

6. ('83) 5 All 324 (330) (FB). (Where the vendor sold his zamindari rights, the full estate of the vendor carrying with it the right of pre-emption vested in the vendee.)
('65) 1965 All L Jour 637 (639). (At any rate, Sir right possessed by a proprietor was certainly a legal incident of his proprietary right and it must be held that on a transfer of proprietary rights in the village it passed to the transferee by force of S. 8 provided the transferor was competent to transfer it.)
1964 Mad 519 (523) [AIR V 51 C 176] : I L R (1964) 1 Mad 832 (DB). (Transfer of share effected after declaration of dividend—It cannot convey title to transferee to receive payment of dividend already declared.)
1963 Pat 160 (163, 164) [AIR V 50 C 48] (DB). (Lessee's right to be indemnified under the indemnity bond is not merely a personal right to sue but is a legal incident of the lease-hold property.)
('62) I L R (1962) Madh Pra 210 (216, 217). (Right to recover damages for trespass on land is not a legal incident of land as it is not necessary for its permanent use and beneficial enjoyment.)
1952 Cal 673 (676) [AIR V 39] : I L R (1952) 1 Cal 373 (DB). (Upon sale of business, the right to the entire good-will and to use the trade-marks whether specially .mentioned or not passes to the purchaser. But where the terms of the sale place a limitation on the ambit of the purchase, inasmuch as the sale is expressed to be confined to a sale of assets and liabilities as per list, and the trade mark was not one of the items of the assets listed, it cannot be held that the trade mark was also sold.)
1952 Nag 398 (400) [AIR V 39] : I L R (1951) Nag 895 (DB). (The khudkasht land is a part of the mahal on which the land revenue is assessed and is not something apart from it. So when the mahal is sold for arrears of land revenue the khudkasht land which forms part of it goes with the mahal in the absence of any express reservation.)
1944 Oudh 35 (36, 37) [AIR V 31]. (Stipulation that land revenue of land X should be paid by owner of land Y is not interest in or legal incident of property X.)
('39) 41 Punj L R 579 (580). (Sale of house-chabutra used by Mohalladars – No means of ingress or egress from the house to the chabutra shown in the plan—No title to chabutra proved. Chabutra cannot be taken to have been sold as an appurtenant to the house.)
1923 Nag 130 (132) [AIR V 10]. (All khudkhasht land goes with the village, if the decree has not specified particular khudkasht fields. But where the decree specifies the khudkasht fields by their numbers, it is not open to decree-holder to claim one that is not so specified, especially where the decree does not refer in a general way to lands held in khudkasht right, while it does to tenancy and proprietary rights.)
1919 Low Bur 40 (42) [AIR V 6] : 9 Low Bur Rul 268 (DB). (A covenant for renewal being a covenant running with the land, where a grantee of land for a term of years tranfers his interest the right of renewal goes with the land unless there is an express or implied intention in the document of transfer to the contrary.)
1937 Nag 205 (208) [AIR V 24] : I L R (1937) Nag 367. (In the absence of specific reservation, there is a presumption that khudkast land would pass along with the village share.)
1931 All 587 (588) [AIR V 18] : 53 All 764 (DB). (Franchise of a ferry not necessarily appurtenant to land.)
1929 All 371 (372) [AIR V 16]. (Transfer of a house in mohalla—Transferor's right to joint share in sehdaries and gateway also passes.)
1927 Nag 177 (180) [AIR V 14]. (Transfer of a share in village passes house and kotha in the village as appurtenant of the share.)
1922 Oudh 289 (291) [AIR V 9] : 25 Oudh Cas 319 (DB). (The right of pre-emption is an incident to the ownership of one land and a burden on the ownership of another land.)

Section 8 — Note 20

1. 1965 S C 1288 (1290) [AIR V 52 C 208].
1963 S C 890 (893, 894) [AIR V 50 C 134] : (1963) Supp 2 S C R 417. (1958 M P 246 [AIR V 45], Reversed on another point.)
1957 S C 797 (800) [AIR V 44 C 118] : 1957 S C R 1122. (Religious endowment—Whether dedication is complete is question of fact, to be determined in the light of material terms used —In such cases it is always a matter of ascertaining the true intention of the parties — Such intention is to be gathered on a fair and reasonable construction of the document considered as a whole.)
1954 S C 345 (346) [AIR V 41 C 83] : 1955 S C R 174.
1951 S C 139 (141) [AIR V 38 C 21] : 1950 S C R 766.
1936 P C 281 (282) [AIR V 23] : 63 Ind App 436. (Intention should be gathered from words of the document.)
1927 PC 272 (274) [AIR V 14]. (Owing to imperfection of language a further inquiry should be made as to the circumstances with reference to which the words were used).

1923 P C 47 (49) [AIR V 10] : 50 Ind App 25 : 47 Bom 335.
1920 PC 103 (106) [AIR V 7].
1949 FC 106 (109) [AIR V 36 C 18] : 1949 F C R 36 : ILR (1950) 1 Cal 209.
('82) 4 Mad 179 (190) (FB). (Per Innes, J.)
1967 Mad 227 (228) [AIR V 54 C 68] : ILR (1966) 2 Mad 590 (DB).
1967 Mad 175 (177) [AIR V 54 C 49] : ILR (1964) 2 Mad 832 (DB).
('66) ILR (1966) Andh Pra 69 (80) (DB).
1965 Mad 193 (195) [AIR V 52 C 68] : I L R (1965) 1 Mad 41 (DB). (No distinction in construction between partition deed and other documents inter vivos or by way of testamentary disposition.)
1964 Cal 470 (472) [AIR V 51 C 90] (DB).
1964 Guj 249 (252) [AIR V 51 C 41].
1964 Orissa 141 (144) [AIR V 51 C 56] : ILR (1963) Cut 935.
('64) ILR (1964) 1 Punj 186 (223, 224). (1954 S C 345 [AIR V 41], Rel. on.)
1962 Pat 28 (30) [AIR V 49 C 10] [DB). (Where an interest is created in favour of a party under a compromise, the nature of the interest depends upon the intention of the parties to be gathered from the terms of the compromise.)
1961 Assam 173 (175) [AIR V 48 C 49] : I L R (1961) 13 Assam 351.
('62) (1962) 1 Lab L J 534 (544) : ILR (1961) 2 Punj 421 (DB).
1960 Orissa 165 (167) [AIR V 47 C 54] : I L R (1960) Cut 307 (DB). (On the question of the construction of the agreement the opinion given by the plaintiff's lawyer will not be a guide especially for ascertaining an intention of the parties.)
('60) ILR (1960) Cut 227 (228). (Deed of gift — Whether it was in favour of donee as adopted son or in his personal capacity — Document must be read as a whole — Main feature to be borne in mind is the motive for making gift.)
1960 Punj 51 (54) [AIR V 47 C 22]. (The first rule in interpreting a contract is, that the language used by the parties should be examined in order to find a clue as to their intention.)
('59) 1959 Andh L T 67 (75). (Reversed on another point in 1961 Andh Pra 390 [AIR V 48].)
1959 J & K 103 (104, 105) [AIR V 46 C 41].
1959 Andh Pra 151 (160) [AIR V 46 C 52] (FB).
1959 Pat 69 (71) [AIR V 46 C 17] (DB).
1958 Andh Pra 447 (448, 449) [AIR V 45 C 131] (DB).
('58) 1958 Cal L Jour 252 (259, 260) (DB).
('58) 1958 Ker L T 597 (601) (DB). (Document drawn in the name of several persons—Intention that all should execute it—Deed inoperative till all have done so—Intention is a question of fact.)
1958 Mad 334 (336) [AIR V 45 C 110] : ILR (1958) Mad 477 (DB). (An inference can be drawn that the settlor intended to and did create a joint tenancy but that inference must be based primarily on the terms of the deed of settlement.)
1958 Orissa 254 (255) [AIR V 45 C 64] : I L R (1958) Cut 234.
1957 Bom 94 (98) [AIR V 44 C 35] : ILR (1956) Bom 827.
('56) 1956 B L J R 314 (316).
('55) 1955 All W R (HC) 459 (461) : AIR 1955 NUC (All) 1704 (DB).
1955 Bom 419 (428) [AIR V 42 C 112].
('55) Madh B L R 1955 (Civil) 243 (244) : AIR 1955 NUC (Madh B) 5359. (Will.)
1954 Bom 370 (374) [AIR V 41 C 107] : I L R (1954) Bom 615 (DB).
('54) 56 Bom L R 910 (915) : AIR 1955 NUC 22. (Will—Constitution.)
1954 Mad 1008 (1010) [AIR V 41 C 346].
1954 Orissa 23 (24) [AIR V 41 C 7] : ILR (1953) Cut 531 (DB).
1953 Mad 977 (980) [AIR V 40 C 387]. (Terms of compromise decree clear and unambiguous—It is not open to Courts to read into them words which are not there.)
1953 Mad 566 (568) [AIR V 40 C 219].
1952 Pat 86 (88) [AIR V 39] (DB). (Sale deed — What was intended to be conveyed and what was conveyed must be determined from the words used in the deed itself.)
1952 Trav-Co 277 (281) [AIR V 39] : ILR 1951 Trav-Co 840 (DB).
1951 Kutch 33 (35) [AIR V 38 C 22]. (Will).
('49) ILR (1949) All 368 (374) (DB).
('49) 1949 Ker L Tim 103 (111, 112) (DB).
1948 All 81 (85) [AIR V 35 C 38] : ILR (1947) All 556 (DB). (Construction of will.)
1947 All 288 (292) [AIR V 34 C 114] : I L R (1947) All 403 (DB).
1947 Bom 49 (51) : [AIR V 34 C 14] : ILR (1946) Bom 984. (The question whether a certain document is a gift or a will depends not merely upon the form of the document, but upon the intention gathered from the words used in the document itself.)
1946 Cal 441 (443) [AIR V 33 C 98] (DB). (Legal effect of instruments depends primarily upon intention of parties—Intention must be gathered from language employed and not from external circumstances or conduct of parties unless there is ambiguity.)
1944 Nag 94 (96) [AIR V 31] : ILR (1944) Nag 141. (Language of document clear and unambiguous—No extrinsic evidence is admissible to prove intention of parties.)
1944 Oudh 65 (70) [AIR V 31] : 91 Luck 320 (DB).
1942 Mad 139 (142) [AIR V 29] : ILR (1942) Mad 33 (DB).
1942 Nag 115 (116) [AIR V 29] : ILR (1942) Nag 592 (DB).
1941 Oudh 479 (481) [A I R V 28] : 16 Luck 789 (DB).
1941 Oudh 369 (371) [A I R V 28] (DB). (Such intention should be effecuated so far and as nearly as may be consistent with the law to which the executant was subject.)
1940 Cal 417 (420) [A I R V 27] : I L R (1940) 2 Cal 189 (DB).
1938 Pat 585 (588) [AIR V 25] : 17 Pat 737 (DB).

words are clear and unambiguous, effect should be given to them according to their natural sense and plain meaning,(2) uninfluenced by extraneous considera-

1937 Mad 40 (42) [AIR V 24] : I L R (1937) Mad 479 (DB). (Document plain and unambiguous —Intention of parties should be gathered from language of document itself.)
('36) 165 Ind Cas 941 (942) (DB) (Cal).
1936 Lah 508 (509) [AIR V 23].
1936 Pat 450 (451) [AIR V 23] : 15 Pat 680 (DB). (Intention not to be gathered by speculating — In case of construing a lease with provision of re-entry, intention to be gathered from several clauses in lease deed.)
1935 Cal 659 (661) [AIR V 22] (DB). (Intention is to be gathered from the documents as they stand.)
1935 Lah 884 (886) [AIR V 22] (DB).
1935 Oudh 213 (214) [A I R V 22] : 10 Luck 481 (DB). (Every document should be construed on its own terms without reference to other cases.)
1933 Bom 87 (88) [A I R V 20] (DB). (Construe the document as a whole.)
1929 Lah 143 (144) [AIR V 16]. (No speculation as to supposed intention of the author.)
1926 Oudh 186 (187) [AIR V 13] : 1 Luck 83 : 29 Oudh Cas 108 (DB). (The primary object of all interpretation is to determine what intention is conveyed by the deed.)
1925 Oudh 11 (14) [A I R V 12]. (Precedents in the construction of documents are useless unless they lay down general principle of interpretation.)
1925 Pat 625 (638) [AIR V 12] : 4 Pat 510 (DB). (Application of doctrines, although they must be given due weight must not be allowed to overrule the clear indications of intention to be gathered from fhe words of the document.)
†1923 All 586 (588), [AIR V 10]: 45 All 581 (DB). (Document is to be construed according to the intention of the parties as evidenced by its terms.)
('07) 9 Bom L R 514 (522).
('58) 1958-2 W L R 186 (192). (Will — Absolute estate or life interest — Particular attention to be paid to the terms of the instrument which is being construed avoiding too close comparisons with words used in wills in other cases. In this case will read as a whole held to cut down brother's interest from an absolute to a life interest.)
[*See also* 1933 P C 78 (81) [A I R V 20]. (Document should not be read contrary to actual wording.)]

2. 1965 S C 1288 (1290) [AIR V 52 C 208].
1963 S C 890 (893, 894) [AIR V 50 C 134] : (1963) Supp 2 S C R 417. (AIR 1958 M. P. 246 Reversed on another point.)
1957 S C 286 (292) [AIR V 34 C 41] : ILR (1947) Punj 819 : 1956 S C R 889. (Government grant — Intention obvious — Fair and liberal interpretation must be given to the grant to take effect.)
1954 SC 345(346) [AIR V 41 C 83]:1955 SCR 174.
1948 P C 3 (6) [AIR V 35 C 2] : I L R (1947) Kar (PC) 327. (The words of a written instrument must be construed according to their natural meaning and no amount of acting by parties can alter or qualify words which are plain and unambiguous.)
1929 P C 149 (151) [AIR V 16] : 56 Ind App 213 4 Luck 305.
1914 P C 92 (95) [A I R V 1] : 42 Cal 56 : 41 Ind App 189. (Meaning of the deed is to be decided by the language used and should not be allowed to be affected by speculations.)
†('75) 2 Ind App 256 (260) : 24 Suth W R P C 168 (PC).
1949 F C 106 (109) [AIR V 36 C 18] : 1949 F C R 36 : ILR (1950) 1 Cal 209.
1950 Orissa 67 (71) [A I R V 37 C 12] : 51 Cri L Jour 683 : ILR (1949) 1 Cut 1 (SB).
†('85) 7 All 258 (268, 270) (FB). (The words 'intikal' 'hakkiyat' and 'rahn' occurring in Wazib-ul-arz construed.)
1967 Cal 119 (123, 125) [AIR V 54 C 28] (DB).
('66) ILR (1966) Andh Pra 69 (80) (DB).
1965 Mad 193 (196) [AIR V 52 C 68] : ILR (1965) 1 Mad 41 (DB).
('64) I L R (1964) Cut 229 (234, 235). (If the words used in a document are unambiguous the doctrine of intention cannot materially affect the construction of it.)
('64) I L R (1964) 1 Punj 186 (223, 224). (1954 S C 345 [AIR V 41], *R-l. on.*)
1958 Andh Pra 447 (448, 449) [A I R V 45 C 131] (DB).
1958 Madh Pra 319 (320) [AIR V 45 C 121].
('56) 1956 B L J R 314 (316).
1954 Assam 45 (48) [AIR V 41 C 10] : ILR (1953) 5 Assam 94.
1954 Bom 370 (374) : [A I R V 41 C 107] : I L R (1954) Bom 615 (DB).
1954 Bhopal 17 (19) [AIR V 41 C 6].
1954 Cal 179 (182, 183) [A I R V 41 C 67]. (The grammatical or the natural and usual meaning is the meaning which has to be put upon the Bought and Sold Notes.)
1952 Trav Co 277 (281) [AIR V 39] : I L R (1951) Trav Co 840 (DB).
1951 Pat 556 (561) [A I R V 38 C 157] : 30 Pat 406 (DB),
1951 Pat 254 (259) [AIR V 38 C 52] : 30 Pat 613 (DB). (Per Jha C. J. — In construing a written instrument the plain meaning of the express words are to be rigidly adhered to irrespective of the question of the intention of the parties.)
('49) ILR (1949) All 368 (376) (DB).
✠('49) I L R (1949) 1 Cal 498 (505). (The word 'children' is a plain and simple word, which in ordinary parlance does not include grand children, unless there is something in operative part to abridge or enlarge the meaning.)
1949 Mad 690 (691) [A I R V 36 C 307] (DB). (Clear and unambiguous dispositive words are not to be controlled or qualified by any general expression of intention.)
1946 Pat 93 (96) [A I R V 33 C 32] : 24 Pat 566 (DB). (Every word used must receive due weight

tions.(3) The Court's function is to say what the *parties have said* they meant and not to determine what they intended apart from the language of the instrument, and, having done so, to bend the language in favour of the assumption so made.(4) The Court must

according to its plain common meaning.)
1938 Lah 270 (271) [AIR V 25] (DB).
('24) 75 Ind Cas 402 (403) (Cal). (This is so even where the words may have been used for the purpose of ascertaining and specifying stamp duty payable on the deed.)
†1916 Cal 775 (781) [AIR V 3] (DB). (The words are to be read in their grammatical and ordinary sense unless the context shows otherwise.)
('77) 1 Bom 513 (520) (DB). (Words must be read in their ordinary and grammatical sense unless such a construction would lead to some absurdity or inconvenience, or would be plainly repugnant to the intention of parties to be collected from other parts of the deed.)
('89) 1889 Pun Re No. 194, p. 687 (688) (DB). (Explanatory clause to be interpreted with reference to actual terms.)
(1877) 46 L J Ch 857 (859): 6 Ch D 264 (270): 37 L T 253: 25 W R (Eng) 885, Taylor v. St. Helen's Corporation. (Technical terms should be given their technical meaning.)

3. 1965 S C 1288 (1290) [AIR V 52 C 208]. (Plain language cannot be changed by relying upon surrounding circumstances.)
1954 S C 345 (346, 347) [AIR V 41 C 83]: 1955 S C R 174.
('66) ILR (1966) Andh Pra 69 (80) (DB). (When the words are plain and clear, no words can be supplied to cut down their effect and amplitude.)
('64) ILR (1964) 1 Punj 186 (223, 224). (1954 S C 345 [AIR V 41] Rel. on.)
('62) 1962-1 Lab L J 534 (544): ILR (1961) 2 Punj 421 (DB). (To interpret document it is neither necessary nor even proper to record evidence.)
1959 Andh Pra 612 (613, 615) [AIR V 46 C 174] ILR (1959) Andh Pra 929 (DB). (If the meaning of the words is clear and unequivocal and the intention of the parties is easily deducible therefrom, it is not permissible to lead parole evidence to show that the document was not really what it purported to be.)
('58) 1958 Cal L Jour 252 (260) (DB). (Where the intention of the parties has been reduced in writing it is not generally permissible to use extrinsic evidence, whether oral or contained in writing, such as instructions, drafts, or conditions of sale or preliminary agreements unless the provisions of S. 92, Evidence Act, are satisfied.)
('57) 1957 M P L Jour 196 (197, 198).
('56) 1956 B L J R 314 (316).
1954 Ajmer 63 (2) (64) [AIR V 41 C 64]. (Questions of convenience cannot be taken into consideration when interpreting a document.)
1954 Assam 45 (48) [AIR V 41 C 10]: ILR (1953) 5 Assam 94.
1952 Pat 146 (148) [AIR V 39] (DB). (Where the recitals in a document of title are clear and unambiguous it is not open to the parties to refer to the recitals in any other document or to any other evidence to construe the recitals.)
1952 Pat 86 (88) [AIR V 39] (DB). (Sale deed—Words plain and unambiguous — What was intended to be conveyed and what was conveyed must be determined from deed itself—No extraneous consideration can be admissible to construe words.)
1952 Vindh-Pra 25 (28) [AIR V 39].
('49) 1949 Ker L Tim 103 (112) (DB).
1946 Cal 441 (443) [AIR V 33 C 98] (DB).
1946 Pat 447 (455) [AIR V 33 C 153] (DB). (Ancient grant.)
1943 Nag 81 (82) [AIR V 30]: ILR (1943) Nag 10. (Surrounding circumstances not to be considered.)
1938 Nag 185 (186) [AIR V 25]. (Gift by a Hindu woman to her grand-daughter—Terms of the gift should be considered — Held further, that rules of construction for a will by a male in favour of female do not necessarily apply in such a case.)
†1937 Bom 472 (474) [AIR V 24]: ILR (1937) Bom 724 (DB). (Words which are not there should not be read into a document, if the document as it stands can be given a rational meaning.)
1936 Mad 388 (390) [AIR V 23].
1934 Mad 16 (18) [AIR V 21] (DB). (Motive has no place in construing a document.)
1933 Cal 381 (385) [AIR V 20]: 60 Cal 167. (Intention of parties not to be gathered by reference to the particular religious beliefs or ethical doctrine of the persons using them.)
1922 Cal 461 (463) [AIR V 9] (DB). (Except in case of ambiguity, extrinsic evidence is not admissible.)
1919 Mad 338 (338) (AIR V 6] (DB). (Lease containing permanent rate coupled with words of inheritance—absolute estate conveyed.)

4. 1954 S C 345 (346) [AIR V 41 C 83]: 1955 S C R 174.
1917 P C 23 (24) [AIR V 4]. (In construing the terms of a deed, the question is not what the parties may have intended, but what is the meaning of the words which they used.)
(1857) 6 Moo Ind App 526 (553): 4 Suth W R P C 114 (PC). (Court of construction must found its conclusion upon just reasoning and not upon mere speculative doubts.)
(1839-41) 2 Moo Ind App 311 (329): 5 Suth W R P C 129 (PC). (You are to gather what he means from what he has said in his instrument not from what he suggests.)
('64) ILR (1964) 1 Punj 186 (223, 224). (In construing a document, the real question is not what the parties intended or meant but what is the legal effect of the words which they used. 1954 S C 345 [AIR V 41] Rel. on.)
('59) 63 Cal W N 590 (593) (DB).
1959 J & K 103 (104, 105) [AIR V 46 C 41]. (Where the mortgage and the lease back form parts of one and the same transaction effect

not travel outside the words used to found or confirm speculations as to the parties to the documents having in fact intended something other than what they have said.(5)

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must be given to each according to its provisions and the Court cannot by reading the two together spell out a transaction totally different in character and incidents.)
1958 Andh-Pra 447 (448, 449) [AIR V 45 C 131] (DB).
('58) 1958 Cal L Jour 252 (259) (DB).
1956 Cal 164 (167) [AIR V 43 C 53] (DB). (A deed must be presumed to intend what it says and its provisions must be so construed, whenever possible, as to give effect to that intention and so must the directions contained in the deed be held to be workable and intended to be worked, if such a construction is open on the words used.)
('56) 1956 B L J R 314 (316).
1955 Bom 419 (428) [AIR V 42 C 112].
1951 Pat 254 (259) [AIR V 38 C 52] : 30 Pat 613 (DB). (Per L. K. Jha, C. J. The question is not what the parties to a deed intended to do by entering into that deed, but what is the meaning of the words used in that deed.)
1946 Mad 419 (421) [AIR V 33 C 214] (DB). (If words of a clause in a will are clear and unambiguous, there can be no question of research into the possible intention of the testator in order to add to those words — Reversed on construction of will in 1951 S C 103 [AIR V 38].)
1938 Lah 270 (271) [AIR V 25] (DB).
1936 Mad 388 (389, 390) [AIR V 23]. (Court will not be justified in giving an interpretation to the language other than ordinary legal meaning.)
('28) 112 Ind Cas 243 (245) (DB) (Mad). (In construing a deed, the question is not what the parties may have intended, but what is the meaning of the words which they used.)
1916 Oudh 339 (341) [AIR V 3]: 19 Oudh Cas 75 (DB).
1914 Cal 777 (777) [AIR V 1] (DB). (The question in construing a deed always is, what is the meaning of what the parties have said and not what the parties meant to say.)
† ('13) 18 Ind Cas 545 (546, 547) (DB) (Cal). (In construing a document the Court should determine the intention of the parties as expressed in the deed itself — It cannot give effect to the unexpressed intention.)
† ('12) 14 Ind Cas 56 (59) (DB) (Cal). (Unexpressed intention cannot be given effect to.)
('08) 7 Cal L Jour 291 (295) (DB).
(1888) 13 App Cas 294 (301) : 59 L T 9 : 58 L J P C 13, Leader v. Duffey. (In case of inaccuracy and inconsistency the meaning can be ascertained from the document taken as a whole.)
[*See also* 1949 F C 64 (68) [A I R V 36 C 11]: 1948 F C R 239 : I L R (1950) 1 Cal 17. (Per Mahajan J. (Contra) : — It is the duty of the Court to find out the meaning of a will, however obscure, and though it is probable that the testator himself may have no particular meaning, still that is no reason why the Court should not find a particular meaning.)
1954 Bom 370 (374) [A I R V 41 C 107] : I L R (1954) Bom 615 (DB). (Words used fn documents unambiguous and lead only to inference that relationship of landlord and tenant is intended to be created — Doctrine of intention cannot materially affect construction of document.)
1954 Bom 257 (258) [A I R V 41 C 75] : ILR (1954) Bom 448 (DB).
1924 Cal 1047 (1049) [A I R V 11] : 51 Cal 972 (DB). Document unambiguous—Intention of the parties should not be considered.)]

5. 1959 S C 1362 (1368) [A I R V 46 C 193] : (1960) 1 S C R 493.
1951 S C 103 (106) [AIR V 38 C 13] : 1950 S C R 949. (Intention has to be gathered primarily from the language used in the document which is to be read as a whole without indulging in any conjucture or speculation as to what the testator would have done if he had been better informed or better advised—AIR 1946 Mad 419, Reversed on construction of will.)
1943 P C 115 (119) [AIR V 30] : ILR (1943) Kar (PC) 123. (It is wrong to start with an inspired assumption that it is unlikely that one party could or would have assented to a particular provision, and then to hold that because so unlikely a provision is not contained in the document in clear and express terms, it cannot have been intended to apply.)
1950 Orissa 67 (71) [A I R V 37 C 12] : 51 Cri L Jour 683 : ILR (1949) 1 Cut 1 (SB). (In construing a deed such as an agreement any inference as to the intention of the parties thereto cannot be allowed to outweigh the import of the express terms of the agreement.)
1967 Mad 227 (228) [A I R V 54 C 68] : 61 ITR 474 : ILR (1966) 2 Mad 590 (DB).
1957 Pat 278 (284) [AIR V 44 C 90] : 36 Pat 471 (DB). (Facts set out fully in document and admitted—Party's opinion about legal effect of those facts is of no consequence in construing it.)
1952 All 1011 (1019) [A I R V 39] (DB). (Per Desai J. : — The Court is bound to take the deed as it stands and cannot add to its terms or substitute in its place another deed.)
1952 Trav-Co 277 (281) [AIR V 39] : ILR (1951) Trav-Co 840 (DB).
1950 Raj 56 (57) [AIR V 37 C 22]. (Held language of document was clear and created relationship of landlord and tenant.)
('49) ILR (1949) All 368 (374) (DB).
1916 Mad 242 (246) [A I R V 3] (DB). (However clear the intention of the parties may be, they are bound by the words used by them.)
†1915 Mad 1079 (1080) [AIR V 2] (DB). (Where the language used accurately applies to existing

Where, however, the language of the document *is not itself precise or is ambiguous or of doubtful import*, recourse may be had to extraneous considerations(6) such as the surrounding circumstances,(7) the known opinions of the grantor, the existing state

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facts, evidence to show that it is not applicable to those facts is inadmissible.)

6. 1950 S C 15 (21) [AIR V 37 C 5] : 1950 S C R 30 : ILR (1951) 1 Cal 511. (Per Mahajan J. — Doubt regarding true meaning—Extrinsic evidence for determination of effect of instrument is admissible.)

('55) 1955 B L J R 93 (96) (DB). (Parties are entitled to take assistance of facts outside the recitals in the instrument, if the language used in the document is unmeaning in reference to existing facts.)

1952 Pat 146 (148) [AIR V 39] (DB). (In case of ambiguity in sale certificate, it is permissible to look to other evidence to find out what was really intended to be sold.)

1952 Vindh Pra 25 (28) [AIR V 39]. (The circumstances attending the creation of the document may be looked into in case there is ambiguity, and it is capable to two interpretations.)

1946 Cal 441 (443) [AIR V 33 C 98] (DB).

1946 Mad 419 (421) [A I R V 33 C 214] (DB). (Other considerations may well be taken into account if the words of a clause of a will are reasonably capable of two meanings and the question is which of those two meanings should be adopted—Reversed on construction of will, in 1951 S C 103 [AIR V 38].)

1946 Pat 447 (455) [AIR V 33 C 153] (DB). (Ancient grant — Terms ambiguous—Extrinsic evidence is admissible to construe terms.)

1937 Bom 472 (474) [A I R V 24] : I L R (1937) Bom 724 (DB). (The Court is entitled to read words into a document if such a course is necessary to reconcile conflicting clauses.)

1934 Cal 571 (576) [A I R V 21] (DB). (Ancient document — Contemporaneous usage may be looked into.)

1929 Oudh 204 (210) [AIR V 16] (DB). (You may resort to contemporaneous usage to ascertain the meaning of an ancient deed.)

1919 Mad 338 (338) [A I R V 6] (DB). (Grant ambiguous—In considering the extent of interest granted, the nature of the estate possessed by the grantor may be considered.)

7. 1954 S C 345 (346) [AIR V 41 C 83] : 1955 S C R 174.
1951 S C 139 (141) [AIR V 38 C 21] : 1950 S C R 1766.

1963 S C 890 (893, 894) [AIR V 50 C 134] : (1963) Supp 2 S C R 417. (To ascertain intention of parties court has to consider circumstances under which particular words were used 1958 M P 246 [AIR V 45] Reversed on another point.)

1927 P C 272 (274) [AIR V 14].

1920 P C 103 (106) [AIR V 7]. (Document plain and unambiguous — Surrounding circumstances cannot be considered.)

('74) 13 Beng LR 312 (319) : 1 Ind App 157 (PC).

(1856) 6 Moo Ind App 251 (263) : 10 Moo P C 124 (PC).

1964 Orissa 141 (144) [AIR V 51 C 56] : I L R (1963) Cut 935.

('64) ILR (1964) 1 Punj 186 (223, 224).

1962 Pat 28 (30) [AIR V 49 C 10] (DB).

1961 Assam 173 (175) [A I R V 48 C 49] : I L R (1961) 13 Assam 351.

(1962) 1 Lab L Jour 534 (544) : ILR (1961) 2 2 Punj 421 (DB).

1959 Andh Pra 612 (613) [AIR V 46 C 174] : ILR (1959) Andh Pra 929 (DB).

1959 Madh Pra 151 (160) [AIR V 46] (FB).

1959 Madh Pra 52 (57) [AIR V 46 C 23].

1959 Pat 69 (71) [AIR V 46 C 17] (DB).

1957 Andh Pra 534 (535) [AIR V 44 C 180] (DB).

('57) 1957 M·P L Jour 196 (198).

('56) 1956 B L J R 314 (316).

1955 Bom 419 (428) [AIR V 42 C 112].

1954 Mad 1008 (1010) [AIR V 41 C 346]. (Meaning of words may be affected by surrounding circumstances ; position of settlor or donor, his family relationship etc.—Among such surrounding circumstances, court is competent to take into consideration, in case of a gift by a Hindu, the ordinary known notions of a Hindu with respect to devolution of property.)

1954 Orissa 23 (24) [AIR V 54 C 7] : ILR (1953) Cut 531 (DB).

('53) ILR (1953) Madh B 18 (24). (In the matter of interpretation in case of doubt courts' attention is to be given more to the attending circumstances than to the terms of the deed as a whole.)

1953 Mad 977 (980) [AIR V 40 C 387].

1953 Mad 566 (568) [AIR V 40 C 219].

1952 Nag 220 (224) [AIR V 39] : ILR (1949) Nag 581 (DB). (In case of ambiguity courts to be guided by terms of document and surrounding circumstances — This is so, even when terms, which have now acquired technical significance, are employed.)

('50) 54 Cal W N (2 DR) 53 (60) (DB).

('50) 3 Sau L R 155 (156) (DB). (Will drafted by layman and not using precise language—Dominant intention of testator is to be judged from will read as a whole along with surrounding circumstances.)

('49) ILR (1949) 2 Cal 67 (70). (Court should ordinarily ascertain intention of testator from words used — It can, however, take into consideration surrounding circumstances but only to ascertain real intention from the words used and by reason of circumstances give a more extended or restricted meaning to a word than its exact literal meaning permits provided the context justifies it.)

1947 Bom 98 (102) [AIR V 34 C 33]. (Ambiguities patent in contract — Court should give grammatical and ordinary meaning to the words and the surrounding circumstances present in the minds of the contracting parties, unless this results in absurdity or repugnancy.)

1947 Oudh 17 (19) [AIR V 34 C 9] : 21 Luck 539 (DB).
1943 Nag 81 (82) [AIR V 30] : ILR (1943) Nag 10. (Surrounding circumstances can be considered to show in what manner the language of the document is related to existing facts.)
1942 Nag 115 (116) [AIR V 29] ILR (1942) Nag 592 (DB).
1941 Oudh 507 (508) [A I R V 28]. (Deed not ambiguous and capable of legal construction — Contemporaneous circumstances and subsequent conduct of parties are inadmissible.)
1930 All 837 (839) [AIR V 17] : 52 All 748 (DB). (Importation of extraneous matter is forbidden unless surrounding circumstances are required to show in what manner the language of the document is related to existing facts.)
1925 Pat 625 (638) [AIR V 12] : 4 Pat 510 (DB).
[*See also* 1947 Nag 17 (24) [A I R V 34 C 3] : ILR (1946) Nag 824 (FB). (Nearly every contract, of necessity, leaves matters which are to be implied. Such contracts must, therefore, be construed with reference to the surrounding circumstances and the parties who made them.)]

In the following cases it was held that surrounding circumstances should be considered in construing the document. It must be assumed in these cases that there was ambiguity in the language of the documents themselves:—

1960 S C 301 (304) [AIR V 47 C 53] : (1960) 2 S C R 117. (The question whether by the incorporation of a condition a transaction ostensibly of sale may be regarded as a mortgage is one of intention of the parties to be gathered from the language of the deed in the light of the surrounding circumstances.)
1951 S C 103 (108) [AIR V 38 C 13] : 1950 S C R 949.
1927 P C 275 (278) [AIR V 14]. (Surrounding circumstances, the position of the parties to agreement, its subject-matter, and the apparent purpose and object thereof, and in particular of the provisions to be construed may be considered.)
('78) 3 Bom 186 (189) : 6 Ind App 54 (PC). (Construction of an ancient sanad.)
1949 F C 64 (68) [AIR V 36 C 11] : 1948 F C R 239 : I L R (1950) 1 Cal 17. (In construing Hindu will, Court should ascertain intention of testator — Intention means, intention which the will itself, by express words or by implication, declares — Language of entire document has to be considered — Meaning to be attached to actual words used may certainly be affected by surrounding circumstances and the Court has to bear in mind other matters than mere words used — Court must consider surrounding circumstances, the position of testator, his family relationship, the probability that he would use words in a particular sense and many other things which are summed up as that "the Court is entitled to put itself in the testator's arm-chair.")
1967 Cal 119 (123) [AIR V 54 C 28] (DB).
1965 Assam 90 (91) [AIR V 52 C 33] : ILR (1963) 15 Assam 496. (Intention of the parties must be gathred from the terms of the document itself and the surrounding circumstances.)
1965 Pat 217 (218) [AIR V 52 C 59] (DB). (The language and tenor of the document, the context and surrounding circumstances in which that document came to be executed are to be taken into account for making out the real intention of the donor.)
1958 Orissa 254 (255) [AIR V 45 C 64] : I L R (1958) Cut 234. (If words are unambiguous the surrounding circumstances are to be considered only for the purpose of finding out the intended meaning of the words which have actually been employed.)
('56) 1956-2 All E R 362 (365, 370), Levermore v. Jovey. (Construction of lease deed — It is permissible for Court and indeed it is obligatory on it, to pay regard to surrounding circumstances, with reference to which lease was entered into and in particular to look at the nature of the subject-matter of the letting.)
1954 Mad 19 (37, 38) [AIR V 41 C 8] (DB). (Court has to ascertain intention of testator from the language used and the notions and habits of the community to which he belongs.)
1953 All 766 (767) [A I R V 40 C 381] : I L R (1952) 1 All 60 (DB). (It is true that in so doing they are entitled and bound to bear in mind other matters than merely the words used. They must consider the surrounding circumstances, the position of the testator, his family relationships, the probability that he would use words in a particular sense, and many other things which are often summed up in the somewhat picturesque figure. Among such surrounding circumstances which the Court is bound to consider none would be more important than race and religious opinions, and the Court is bound to regard as presumably (and in many cases certainly) present to the mind of the testator influences and aims arising therefrom. But all this is solely as an aid to arriving at a right construction of the will, and to ascertain the meaning of its language when used by that particular testator in that document. So soon as the construction is settled, the duty of the Court is to carry out the intention as expressed, and none other.)
1949 All 718 (726) [AIR V 36 C 266] (DB). (Will Intention of testator to be gathered primarily from words used —Meaning to be attached to the words may be affected by surrounding circumstances.)
1949 Cal 278 (281) [AIR V 36 C 85]. (Reversed on another point in 1951 S C 293 [AIR V 38] — It is the duty of a Judge to construe a document in accordance with the language used and with due regard to the surrounding circumstances.)
1947 Bom 98 (99) [AIR V 34 C 33]. (Evidence of surrounding circumstances— Court can take surrounding circumstances, such as the existence of World War 2, which must have been present in the minds of parties when they entered into the contract, into consideration while constru-

of law, the contemporaneous usage or the like.(8)

Subject to these broad principles, the following general rules of construction may be borne in mind in construing documents :

(1) A document must be construed as a whole(9) and a construction should

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ing contract—But party cannot adduce evidence to prove that when he wrote one thing he meant quite a different thing.)

1947 Oudh 45 (57) [AIR V 34 C 17] : 21 Luck 463 (DB). (Court should ascertain the dominant intention of the testator from the words used in the document and give effect to it to the extent and in the form which the law allows. The Court is entitled and bound to bear in mind the surrounding circumstances, the testator's manners, his outlook based on his family relationships, the probability that he would use words in a particular sense and many other things which are summed up in the expression "the Court is entitled to put itself into the testator's armchair.")

1942 Mad 139 (142) [AIR V 29] : I L R (1942) Mad 33 (DB). (Surrounding circumstances are not to be ignored.)

1941 Oudh 369 (372) [AIR V 28] (DB). (Deed unambiguous—Conduct of parties not relevant.)

†1938 Nag 93(94) [AIR V 25]: ILR (1938) Nag 50.

1937 Oudh 295 (297) [AIR V 24]. (Words 'bila intiqual' interpreted.)

†1936 Nag 168 (169) [AIR V 23] : I L R (1936) Nag 60. (Ambiguous deed — Intention may be gathered from subsequent conduct and acts of parties.)

†1928 Mad 349 (350) [A I R V 15] (DB). (The name by which the instrument is called by the maker should be borne in mind though not conclusive.)

('26) 94 Ind Cas 967 (968) (D B) (Cal). (Where the issue was whether a certain deed was a testamentary disposition or a transfer inter vivos, the old age of the executant and danger of imminent death were taken into consideration.)

1922 Cal 300 (301) [AIR V 9] (DB). (Conduct of the parties may be considered.)

†1918 Cal 609 (612) [AIR V 5] (DB). (Position of the parties and their affairs considered.)

1917 All 248 (249) [AIR V 4]. (In cases of documents more than 30 years old, cogent evidence can be adduced to deduce the intention of the parties.)

1917 Mad 415 (417) [AIR V 4] (DB). (Surrounding circumstances may be looked at to see what the parties must have meant, but it is not permissible to listen to the parties' words, negotiatory letters or similar matters to see what they said they meant.)

1916 Cal 760 (761) [AIR V 3] (DB). (Every fact, the knowledge of which may conduce to the right application of the words used, may be considered.)

1916 Mad 242 (244) [A I R V 3] (DB).

1916 Mad 500 (500) [AIR V 3] (DB).

('12) 16 Ind Cas 184 (186) (DB) (Mad). (Usage is part of the circumstances.)

('12) 16 Ind Cas 571 (573) (DB) (Mad). (Object of the demise considered.)

('12) 17 Ind Cas 497 (498) (DB) (Mad). (Sale deed by managing member of a joint Hindu family — Surrounding circumstances may be looked at in order to see whether the personal interest of the executant or the family interest was conveyed.)

('07) 3 Nag L R 97 (99). (The law of the country under which the deed was drawn up may be considered as a surrounding circumstance.)

8. 1966 Him Pra 54 (56) [AIR V 53 C 17]. (For clearing ambiguities in ancient documents, resort may be had to any contemporaneous usage.)

1954 Mad 1008 (1010) [AIR V 41 C 346]. (Position of settlor or donor, his family relationships, the probability that he would use words in particular sense, notions of a Hindu (where settlor is a Hindu) in the matter of devolution of property are to be considered—Court should put itself in the maker's arm-chair.)

1952 Pat 409 (413) [A I R V 39] (DB). (Where there is ambiguity in the language of an instrument evidence may be given of usage to show what was the meaning attached to the instrument soon after its execution by those interested in interpreting it. It is not necessary that the actings should be of parties or their agents ; it is sufficient that the actings are of persons purporting to act under the document.)

1946 Pat 447 (455) [A I R V 33 C 153] (DB). (Ancient deed or grant whose words are not clear or are ambiguous — Documentary or oral evidence of contemporaneous usage throwing light upon subject of grant or its ambit is admissible.)

(1842) 8 E R 450 (463) : 9 Cl & Fin 355, Shore v. Wilson.

9. 1963 S C 890 (893, 894) [A I R V 50 C 134] : (1963) Supp 2 S C R 417. (1958 Madh Pra 246 [AIR V 45], Reversed on another point.)

1959 S C 639 (642) [A I R V 46 C 88] : (1959) Supp (2) S C R 180.

1957 S C 797 (800) [A I R V 44 C 118] : 1957 S C R 1122. (Deed of dedication — Whether dedication is complete is question of fact to be gathered from material terms used—It is matter of ascertaining true intention of parties —Such intention must be gathered on fair and reasonable construction of document considered as whole.)

1953 S C 7 (9) [AIR V 40 C 3] : 1953 S C R 232.

1951 S C 103 (106) [AIR V 38 C 13] : 1950 S C R 949.

1950 P C 105 (107) [AIR V 37 C 37].

1948 P C 39 (41, 42) [A I R V 35 C 12] : I L R (1947) Kar (PC) 382.

1933 P C 49 (51) [AIR V 20].

†1930 P C 253 (254) [AIR V 17] : 57 Ind App 291. (There is no magic in the use of any particular word or form of words — The document must be construed as a whole and its fair import deduced in the ordinary way.)
1929 P C 149 (151) [AIR V 16] : 56 Ind App 213: 4 Luck 305.
1929 P C 115 (119) [AIR V 16] : 56 Ind App 146: 52 Mad 453. (Where each point in the document is inconclusive, the deed is to be construed from the effect of the whole.)
('85) 11 Cal 121 (131) : 11 Ind App 218 (PC). (Gift deed, whether carrying absolute or limited gift, construed.)
('76) 2 Cal 341 (350) : 4 Ind App 52 (PC). (Statements in documents if relied on as admission by the parties to it must be taken as a whole.)
1949 F C 106 (109) [A I R V 36 C 18] : 1949 F C R 36 : I L R (1950) 1 Cal 209.
1967 All 590 (591) [AIR V 54 C 176] (DB).
1967 Cal 119 (123) [AIR V 54 C 28] (DB).
1967 Cal 99 (104) [AIR V 54 C 23] (DB).
1967 Guj 161 (165) [AIR V 54 C 31] (DB). (Question whether interest granted under a settlement or will is a vested or contingent interest. It is really one of intention to be gathered from a comprehensive view of all the terms of the document—Held A I R 1923 Bom 96 not good law after A I R 1967 S C 255.)
1967 Mad 175 (177) [A I R V 54 C 49] : I L R (1964) 2 Mad 832 (DB).
1965 Guj 9 (13) [AIR V 52 C 3] (DB).
1965 Mad 193 (196) [A I R V 52 C 68] : I L R (1965) 1 Mad 41 (DB).
1965 Orissa 54 (57) [AIR V 52 C 22] : ILR (1964) Cut 479.
('64) I L R (1964) 2 All 534 (539) (DB).
1964 Cal 470 (472) [AIR V 51 C 90] (DB).
('64) I L R (1964) Cut 229 (235).
('63) 1963 Cur L J 556 (558). (Reversed on another point in 1965 Punj 110 [AIR V 52].)
1964 Raj 184 (190) [AIR V 51 C 48] : ILR (1964) 14 Raj 107 (DB). (Construction of the portions of the document treating them as separate entities is not the proper mode of construction.)
1960 Ker 183 (186) [AIR V 47 C 84] : ILR (1959) Ker 1040.
1960 Mad 328 (331) [AIR V 47 C 110]. (In construing a hire-purchase agreement the substance of the agreement must be considered as a whole.)
('60) I L R (1960) Mys 96 (113) (DB).
('60) I L R (1960) Cut 227 (228).
('59) 1959 Andh L T 67 (75). (Reversed on another point in 1961 Andh Pra 390 [A I R V 48].)
1959 Madh Pra 151 (161) [AIR V 46 C 52] (FB).
1959 Raj 15 (16) [AIR V 46 C 3].
('58) 1958 Cal L Jour 252 (259, 260) (DB).
1958 Ker 265 (267) [AIR V 45 C 94] (DB).
('58) 1958 Ker L T 516 (519) (DB).
1958 Orissa 254 (256) [A I R V 45 C 64] : I L R (1958) Cut 234. (A single sentence from here and there cannot be taken out of the context in order to determine the nature of the transaction unless some words are absolutely decisive one way or the other.)
1957 Ker 119 (121) [AIR V 44 C 69] (DB).
('57) I L R (1957) Ker 822 (825) (DB). (1953 S C 7 [A I R V 40], Foll.)
1957 Pat 24 (26) [AIR V 44 C 8]. (Usufructuary mortgage and lease of property back to mortgagor—Transaction embodied in two documents —Court must look upon transaction as a whole after tearing off the veil attempted to be thrown round the real intent of the parties.)
('56) 1956-1 Mad L Jour 98 (110) (DB).
('56) I L R (1956) Cut 59 (64) (DB).
1956 Pat 345 (347) [A I R V 43 C 87] (DB). (Document itself stating that it was not revokable and described as a deed of gift in recitals contained therein—Mere reservation of life interest or provision for maintenance did not necessarily indicate that deed was will—Construed as a whole document held to be a deed of gift in its true nature and effect.)
('56) 1956 B L J R 314 (316).
1955 Bom 175 (176) [A I R V 42 C 46] : I L R (1954) Bom 1256. (Held that the document must be read as a whole and that reading thus the parties intended to create a lease and not a license.)
('55) 1955 Lab A C 184 (191) (Cal).
('55) 1955 Raj L W 472 (474) : A I R 1955 N U C 4046. (It is not proper to split up a statement in a document and to pick up a portion favourable to a party and ignore the rest.)
('54) I L R (1954) 6 Assam 63 (65) : A I R 1955 N U C 4220.
1954 All 195 (196) [AIR V 41 C 108].
1954 Bom 370 (374) [A I R V 41 C 107] : I L R (1954) Bom 615 (DB).
1954 Bom 257 (259) [A I R V 41 C 75] : I L R (1954) Bom 448 (DB). (1926 Bom 374 [A I R V 13], Dissented from.)
('54) 56 Bom L R 910 (915).
1954 Mad 1008 (1010) [AIR V 41 C 346].
('54) I L R (1954) Mys 209 (210) : A I R 1955 N U C 949.
1954 Pat 586 (590) [A I R V 41 C 190] (DB). (Construction of a document cannot depend on one isolated word taken from its context.)
1953 Mad 977 (980) [AIR V 40 C 387).
1953 Mad 566 (568) [AIR V 40 C 219].
1952 Nag 220 (227, 228) [AIR V 39] : ILR (1949) Nag 581 (DB). (Quaere.)
1952 Trav-Co 518 (521) [AIR V 39] (DB).
1952 Trav-Co 277 (281) [AIR V 39] : ILR (1951) Trav-Co 840 (DB).
('50) 1950-2 Mad L Jour 239 (243) (DB).
1950 Pat 218 (220) [AIR V 37 C 54] : 29 Pat 209 (DB). (Will.)
('50) 2 Pepsu L R 584 (587) (DB). (Will—Intention of testator should be gathered from the whole will and not from a word used here and a word used there.)
('49) I L R (1949) All 368 (374) (DB).
1949 Cal 278 (284) [A I R V 36 C 85]. (Reversed on another point in A I R 1951 S C 293.)
1949 Pat 427 (430) [A I R V 36 C 124] : 27 Pat 218 (DB).

be adopted which is reasonable(10) and which will give effect to all parts of the document(11) without rejecting any of

1949 East Punj 277 (278) [AIR V 36 C 64] (DB). (Will.)

1948 Oudh 54 (60) [AIR V 35 C 25] : 22 Luck 93 (DB). (It would be an entirely incorrect mode of construction to take a few sentences or clauses and to consider them removed from the context.)

1947 All 288 (290) [A I R V 34 C 114] : I L R (1947) All 403 (DB).

1947 Lah 117 (130, 131) [AIR V 34 C 25] : I L R (1946) Lah 300 (DB).

1947 Oudh 45 (58) [A I R V 34 C 17] : 21 Luck 463 (DB).

1947 Oudh 17 (19) [AIR V 34 C 9] : 21 Luck 539 (DB).

1946 Oudh 20 (23) [AIR V 33 C 10].

1946 Pat 93 (96) [A I R V 33 C 32] : 24 Pat 566 (DB).

1943 All 337 (339) [AIR V 30] : I L R (1943) All 802 (FB).

1941 Nag 1 (2) [AIR V 28] : ILR (1942) Nag 126.

1935 All 662 (663) [AIR V :22]. (In case of ambiguity of the document due to inconsistency, evidence under Section 97, Evidence Act should be adduced.)

1937 All 273 (274) [AIR V 24] (DB).

1936 Bom 330 (332) [AIR V 23] : ILR (1937) Bom 18 (FB). (Per Wadia J., in the judgment appealed from.)

1936 Pat 275 (276, 277) [AIR V 23] (DB). (The use of a particular term or expression to describe it should not be taken to be conclusive.)

1936 Pat 450 (451) [AIR V 23] : 15 Pat 680 (DB).

1935 All 632 (634) [AIR V 22].

1935 All 616 (618) [AIR V 22] (DB).

1935 All 43 (45) [AIR V 22] (DB). (It is not permissible to insist on one portion of the deed to the exclusion of others.)

1935 Cal 659 (661) [AIR V 22] (DB). (Form of instrument is a very delusive guide to its construction.)

†1935 Nag 35 (40) [AIR V 22] : 31 Nag L R 188 : (To pick out some passages torn from their context and try to interpret the document as a whole in the light of those extracts would be a forced construction and would defeat the operation of the deed as a whole.)

†1934 All 93 (94) [AIR V 21] (DB).

1934 Mad 16 (21) [AIR V 21] (DB).

1934 Oudh 337 (342) [AIR V 21] (DB).

1934 Pat 134 (139) [AIR V 21] : 13 Pat 200 (DB). (No part should be taken as meaningless or redundant.)

('34) 147 Ind Cas 397 (398) (DB) (Oudh). (The words 'ba istisnai' and 'mustansna Shuda' used in the deed should not be left out of consideration.)

†1933 Bom 87 (88) [AIR V 20] (DB).

1933 Mad 194 (195) [AIR V 20]. (The word 'shrotriem' in a gift deed construed.)

1932 Sind 217 (219) [AIR V 19] : 26 Sind L R 373 (DB). (Sense of the parties on a particular point may be collected by bringing every part of document into action.)

1931 Mad 404 (413) [AIR V 18] : 54 Mad 269 (DB).

†1931 Nag 25 (27) [AIR V 18]. (Each provision of the document must receive attention.)

1929 Lah 45 (46) [AIR V 16] : 9 Lah 567 (DB). (Too much stress should not be laid on a word here or a word there but intention should be gathered from the document as a whole.)

1924 Lah 196 (197) [AIR V 11]. (No part of document is to be left out as redundant.)

1922 Pat 362 (363) [AIR V 9] : 1 Pat 295 (DB). (No part of the document should be ignored as redundant or contradictory.)

1918 Cal 609 (612) [AIR V 5] (DB).

1918 Lah 317 (317) [AIR V 5] (DB). (Intention of the parties should not be gathered from isolated sentences.)

1918 Oudh 432 (433) [AIR V 5] (DB). (It is not desirable to impute repugnancy to the terms of a document where a consistent intention can be found from the study of the document as a whole.)

1917 Lah 216 (217) [AIR V 4] (DB).

('09) 12 Oudh Cas 84 (88).

('89) 1889 Pun Re No. 194.

('71) 16 Suth W R 300 (301) (DB). (One must look at the whole instrument and in construing it, one must not be too critical, but infer the intention from the whole tenor of the instrument.)

('58) 1958-2 W L R 186 (192).

[*See* 1930 Lah 1004 (1008) [AIR V 17] : 12 Lah 172 (DB). (In this case the document was construed as a whole.)]

10. 1957 S C 797 (800) [AIR V 44 C 118] : 1957 S C R 1122.

† ('85) 11 Cal 237 (243, 244) : 12 Ind App 1 (PC).

1967 All 590 (591) [AIR V 54 C 176] : 65 ITR 168 (DB).

1949 Pat 427 (430) [AIR V 36 C 124] : 27 Pat 218 (DB).

1947 Nag 53 (55) [AIR V 34 C 13] : ILR (1946) Nag 640. (When an instrument is susceptible of two meanings, one of which is reasonable and probable and the other which leads to absurdity and frustration, the latter must be avoided.)

1947 Oudh 45 (58) [AIR V 34 C 17] : 21 Luck 463 (DB).

1946 Pat 93 (96) [AIR V 33 C 32] : 24 Pat 566 (DB).

('08) 8 Cal L Jour 525 (529) (DB). (That construction should be adopted which is just to both parties rather thon unjust to one of them.)

11. 1963 S C 890 (893, 894) [AIR V 50 C 134] : 1963 Supp (2) S C R 417. (1958 M P 246 [AIR V 45] Reversed on another point.)

them.(12) In other words a harmonious construction of the document should be preferred to one which causes repugnancy between the various parts.(13)

1936 P C 281 (282) [AIR V 23] : 63 Ind App 436. (If possible.)

† 1928 P C 35 (37) [AIR V 15]. (Every part of the document may be brought into action in order to collect from the whole one uniform and consistent sense.)

('85) 11 Cal 237 (243) : 12 Ind App 1 (PC).

1960 Ker 183 (186) [AIR V 47 C 84] : ILR (1959) Ker 1040. (All the parts of a deed are to be construed with reference to each other.)

('58) 1958 Cal L Jour 252 (259, 260) (DB).

1958 Ker 265 (267) [AIR V 45 C 94] (DB).

1957 Ker 119 (121) [AIR V 44 C 69] (DB). (All parts are to be construed with reference to each other.)

1954 Mad 1008 (1010) [AIR V 41 C 346]. (Unless they are clearly independent and absolutely irreconcilable when the latter part must prevail.)

('51) ILR (1951) 2 Cal 81 (85): AIR 1955 NUC (Cal) 848. (A deed is to be interpreted with reference to all the different items contained therein and the decision cannot be based upon one single word without reference to the other clauses.)

1951 Pat 206 (207) [AIR V 38 C 39] : 30 Pat 86 (DB). (It is a primary rule of construction of a will that the intention of the testator must be gathered ex visceribus testamenti. All the parts and provisions of a will are to be construed in relation to each other, so as to form one consistent whole and operate together.)

1950 Pat 218 (220) [AIR V 37 C 54] : 29 Pat 209 (DB). (Will.)

1949 All 718 (726) [AIR V 36 C 266] (DB).

('49) ILR (1949) All 368 (374) (DB).

1949 Pat 427 (430) [AIR V 36 C 124] : 27 Pat 218 (DB).

('48) 1948 Bur L R (H C) 148 (151, 152) (DB). (No tautology or superfluity should be imputed.)

1947 Oudh 45 (58) [AIR V 34 C 17] : 21 Luck 463 (DB).

1946 Oudh 20 (23) [AIR V 33 C 10].

1942 Nag 115 (116) [AIR V 29] : ILR (1942) Nag 592 (DB).

1932 Sind 217 (219) [AIR V 19] : 26 Sind L R 377 (DB).

12. 1959 S C 620 (625) [AIR V 46 C 85]: (1959) Supp (2) S C R 107. (As in the construction of other documents, so in the construction of an agreement to lease, regard must be had to all the relevant and material terms; and an attempt must be made to reconcile the relevant terms if possible and not to treat any of them as idle surplusage.)

1953 S C 7 (9) [AIR V 40 C 3] : 1953 S C R 232. (Nothing should be ignored as redundant or contradictory.)

1936 P C 281 (282) [AIR V 23] : 63 Ind App 436.

1916 Mad 242 (247) [A I R V 3] (SB). (A Court will not readily adopt a construction that reduces one important clause of an agreement to a nullity.)

1965 Orissa 54 (57) [AIR V 52 C 22] : ILR (1964) Cut 479. (None of them to be ignored as redundant or contradicting.)

('60) ILR (1960) Mys 96 (113) (DB).

('57) ILR (1957) Ker 822 (825) (DB). (AIR 1953 S C 7, Foll.)

1952 Trav Co 518 (521) [AIR V 37] (DB). (Effect cannot be given to a part giving the go-by to another part.)

1951 Kutch 33 (35) [AIR V 38 C 22]. (Will—No word can be disregarded as surplusage unless it clearly makes the construction absurd.)

1949 All 718 (726) [AIR V 36 C 266] (DB). (Importance has to be attached to all parts of the will, and the Court ought to adopt that construction of the words assuming them to be susceptible of two meanings which will give some effect to them rather than that which will give none.)

('49) ILR (1949) All 368 (374) (DB). (Will—All clauses have to be looked into and none ignored as contradictory or redundant.)

1949 Cal 278 (281, 282) [AIR V 36 C 85]. (Every word should, if possible, be given a meaning and no word should ordinarily be treated as surplusage. [Reversed on another point in AIR 1951 S C 293].)

1947 Oudh 45 (58) [A I R V 34 C 17] : 21 Luck 463 (DB). (A I R 1936 P C 281, Rel. on.)

† 1941 Mad 367 (371) [A I R V 28] : ILR (1941) Mad 720 (FB). (If there is repugnancy between the parts, rejection is allowed in order to carry into effect more effectively the intention of the parties gatherable from the parts retained.)

1931 Mad 404 (413) [A I R V 18] : 54 Mad 269 (DB). (Rejection would frustrate some part of the intention of the executant.)

[*See* 1958 Ker 265 (267) [AIR V 45 C 94] (DB). (Rejecting only such provisions as are really inconsistent with the intentions of the parties as gatherable on a reading of the whole document.)]

13. 1963 S C 890 (893, 894) [AIR V 50 C 134] : (1963) Supp (2) S C R 417. (AIR 1958 M P 246, Reversed on another point.)

1949 F C 106 (110) [A I R V 36 C 18] : 1949 F C R 36 : ILR (1950) 1 Cal 209.

('64) ILR (1964) 2 All 534 (539) (DB).

1960 Ker 183 (186) [AIR V 47 C 84] : ILR (1959) Ker 1040. (Every attempt should be made to reconcile, if possible, two contradictory provisions.)

('58) 1958 Ker L T 516 (519) (DB).

1957 Ker 119 (121) [AIR V 44 C 69] (DB). (Before provision (in gift or will) is rejected on the ground of repugnancy to the main provision every attempt must be made to reconcile, if

(1a) The fact that a clause in a deed is not binding on the ground that it is unauthorised cannot *ipso facto* render the whole deed void, unless it forms such an integral part of the transaction as to render it impossible to sever the good from the bad.(13a) Where, therefore, the terms of a settlement are not separable and out of the basic terms one is found to be illegal, the settlement must be set aside as a whole. To set them aside partially will be to spell out a new agreement which would not be the agreement of the parties.(13b)

(2) Where a clause in a document destroys the effect of a prior clause in the document and the clauses cannot be reconciled with each other, the subsequent clause should be rejected on the ground of repugnancy and the prior clause given effect to.(14) But if the subsequent clause *qualifies*

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possible, the two provisions.)

('54) 56 Bom L R 910 (915) : A I R 1955 N U C (Bom) 22. (Two constructions possible — Court would prefer the one which does not leave any hiatus.)

1954 Mad 1008 (1010) [AIR V 41 C 346].

1951 Pat 206 (207) [A I R V 38 C 39] : 30 Pat 86 (DB). (Will should be read as whole—All provisions to be considered—Contradictory clauses should if possible, be reconciled.)

('50) (1950) 2 Mad L Jour 239 (243) (DB).

('49) ILR (1949) All 368 (374) (DB). (The Courts should in construing a will give to each part a meaning reconciling, where possible, one part with the other.)

('49) ILR (1949) 1 Cal 498 (506). (Court to adopt construction which will give best effect to donor's intention and reject that construction which will totally defeat the same.)

1941 Nag 1 (2) [AIR V 28] : ILR (1942) Nag 126.

1931 Mad 404 (413) [A I R V 18] : 54 Mad 269 (DB). (Each part of the document must be presumed to have been drafted to subserve a consistent purpose and course of action.)

†1931 Nag 60 (62) [A I R V 18] : 27 Nag L R 24. (Without violence to the meaning of the words the best construction is to make one part expound the other.)

1922 Pat 122 (145) [AIR V 9]. (Each part of the document should be made to expound the other so as to make all the parts agree.)

1921 Oudh 209 (213) [A I R V 8] : 24 Oudh Cas 374 (DB).

('96) 18 All 388 (394) (DB). (In interpreting a document, a clause which is inconsistent with the remaining provisions of the document must be rejected.)

(1885) 28 Ch D 523 (525) : 54 L J Ch 644 (646) 52 L T 554 : 33 W R (Eng) 386, Re Bedson's Trusts. (Instrument not to be construed in such a way that one part would contradict the other part.)

[*See also* 1959 Ker L R 148 (150). (All clauses of deed indicating only a division for convenient enjoyment leaving tarwad joint—Clause for mutation in name of each individual of property given to his enjoyment held was not sure indication that deed was a partition deed.)

1946 Pat 93 (96) [AIR V 33 C 32] : 24 Pat 566 (DB). (Seemingly inconsistent terms in the instrument of agreement should be interpreted to bear a reasonable meaning of the transaction as a whole consistent with common sense and ordinary conduct of human affairs.)]

13a. 1956 S C 446 (459) [A I R V 43 C 78] : 1956 S C R 325 : 35 Pat 573. (Proviso in lease void being unauthorised — Effect of declaring proviso void leaving rest of deed whole and intact — Lease without proviso is perfectly valid.)

1947 Lah 117 (134) [AIR V 34 C 25] : ILR (1946) Lah 300 (DB). (Deed containing invalid clause —Clause can be excised if whole instrument is not affected by excision—Overriding intention of document to be kept in mind in interpreting same.)

13b. 1952 Cal 763 (767) [A I R V 39] : ILR (1954) 2 Cal 41.

14. 1963 S C 890 (893, 894) [AIR V 50 C 134] : (1963) Supp 2 S C R 417. (Hindu joint family—Award embodying partition among members—Conflict between earlier and later directions—Village given "kul haq haquq samet milkiyat" to co-sharer R—Direction followed by mention of purposes (meeting expenses of worship and maintenance of public temple) for which village was being given—Village held dedicated absolutely to temple and R was given possession of it as manager and trustee — AIR 1958 Madh Pra 246, Reversed.)

1953 S C 7 (10) [AIR V 40 C 3] : 1953 S C R 232. (Intention to grant absolute estate — Attempt to reduce powers of owner by imposing restraint on alienation would be repelled on ground of repugnancy.)

1950 P C 105 (107) [AIR V 37 C 37].

†1921 P C 209 (211) [AIR V 8].

1965 Punj 110 (111) [AIR V 52 C 34] (DB). (Gift deed — Conflicting recitals — Absolute gift in earlier part — Absolute title restricted in later part of deed — Earlier disposition of absolute title will prevail and later direction is to be disregarded : 1963 Cur L J (Punj) 556, Reversed.)

('64) ILR (1964) 2 All 534 (543) (DB).

1960 Ker 183 (186) [AIR V 47 C 84] : ILR (1959) Ker 1040. (Absolute estate given by prior clause

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the prior clause, then the two are to be read together and effect should be given to the intention of the parties as disclosed by the deed as a whole.(15)

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in will—Restriction on powers of transfer in subsequent clause has to be ignored as repugnant to the interest already created.)
('59) 1959 Andh L T 67 (75). (Reversed on another point in AIR 1961 Andh Pra 390.)
1958 Andh Pra 447 (448, 449) [AIR V 45 C 131] (DB).
('58) 1958 Ker L T 516 (519, 520) (DB).
('57) ILR (1957) Ker 822 (825) (DB). (1953 S C 7 [AIR V 40], Foll.)
1956 Pat 457 (465) [AIR V 43 C 112] (DB). (Governing portion of will designating estates created by it as Hindu widow's estate – Mention of "life-estate" in subsequent portion is of no consequence and does not destroy the effect of the expression "widow's estate", used in describing the estate intended to be conveyed.)
('54) ILR (1954) Mys 212 (216): AIR 1955 N U C 705. (Gift—Vested remainder after creation of life estate—Gift of corpus—Condition derogant to absolute gift is repugnant and will be rejected.)
('54) ILR (1954) Trav-Co 355 (365, 368) : AIR 1955 N U C 1249 (DB).
1953 Mad 566 (569) [AIR V 40 C 219].
1953 Sau 180 (187) [AIR V 40 C 89] (DB). (Gift of immovable property under Muhammadan Law – Donee gets title to it—Condition against alienation being repugnant to gift is void.)
1949 All 464 (466) [AIR V 36 C 174] (DB).
1949 Mad 690 (692) [AIR V 36 C 307] (DB). (First clause granting absolute estate to donee —Next clause reciting that on failure of issues of donee, property should revert to donor and her male heirs—Later clause should be read rather as an attempt to restrict powers of absolute owner than as intention to grant life-estate —Such restriction being repugnant to an absolute estate is void—AIR 1949 Mad 122, Affirmed.)
1949 East Punj 277 (280) [AIR V 36 C 64] (DB). (Bequest to M as sole owner and possessor of testator's entire property with power to enjoy it in every way —M takes as absolute owner with power of disposal —Existence of provision as to devolution of property after M's death does not change nature of estate taken by M.)
1947 Oudh 17 (19) [AIR V 34 C 9] : 21 Luck 539 (DB). (If the different portions of the document are not capable of being reconciled the later provisions should be preferred to the earlier ones.)
1946 Cal 288 (296) [AIR V 33 C 64] : ILR (1946) 2 Cal 134. (If by a deed a grantor first conveys in clear and unambiguous words a certain estate and then adds a proviso which derogates therefrom. the proviso must be rejected as repugnant.)
1938 Cal 225 (227, 228) [AIR V 25]. (Precise description of land to be conveyed in body — Misdescription in rider which was meant only as confining recitals in body will not prevail over it.)
1936 Oudh 270 (274) [AIR V 23] : 12 Luck 109 (DB). (This rule is converse of the rule which obtains in construing wills.)
1933 Cal 535 (537) [AIR V 20] : 60 Cal 701. (Sufficient description of property — Further incomplete description should be disregarded.)
1921 Cal 750 (752) [AIR V 8] (DB). (The Court should not resort to this rule until all other means of reconciling apparent inconsistencies are exhausted.)
('12) 5 Sind L R 192 (206) (DB).
[*See also* 1960 Ker 226 (227) [AIR V 47 C 106]. (Settlement deeds—Father conveying property absolutely in favour of his sons A and B— Expression of intention that A should not convey any property during minority of B — Held that expression was nothing more than a pious wish expressed by a well-intentioned father that the properties must be preserved for benefit of both—This could not put restriction on disposing power of A.)
('55) 1955 B L J R 93 (95) : AIR 1955 N U C 3239 (DB). (It is open to the Court while construing a document to give preference to an earlier recital over the later one, if it finds that the earlier recital is the most important one to convey the actual intention of the parties at the time of the execution of the deed.)]
[See however 1954 Mad 1008 (1010) [AIR V 41 C 346]. (The tendency of modern decisions is to read different clauses in an instrument referentially to each other — Where they are clearly independent and absolutely irreconcilable, the latter part prevails.)]

15. 1953 S C 7 (10) [AIR V 40 C 3]: 1953 S C R 232. (Restrictions primary things which testator desires and consistent with whole tenor of will—It is material circumstance to be relied upon for displacing presumption of absolute ownership implied in use of word "malik".)
†1921 P C 209 (211) [AIR V 8].
('59) 1959 Andh L T 67 (75). (Reversed on another point in AIR 1961 Andh Pra 390.)
1957 Ker 119 (121) [AIR V 44 C 69] (DB). (Held that it was a case where the dispositive words creating in the first instance an estate of inheritance were displaced in effect by the subsequent restrictive clauses,)
('57) ILR (1957) Ker 822 (825) (DB). (AIR 1953 S C 7, Foll.)
1954 Mad 1008 (1010) [AIR V 41 C 346]. (Absolute estate granted to female by pre-nuptial settlement is cut down to life interest where successive absolute estates are given and the dominant intention of the settlor was to benefit each taker—If along with absolute grant of estate, there is restraint on alienation, the absolute estate is cut down to life interest.)
1952 Mad 166 (167) [AIR V 39]. (Document conferring life estate on X — Clause restricting the

(2a) Where an agreement begins with a preamble, such preamble must be prayed in aid whenever the text of the document presents any difficulty of construction.(15a)

(3) Where the *operative* part of an instrument and the recitals thereof are conflicting, the rule is that if the recitals are clear and the operative part ambiguous, the recitals govern the construction; if the recitals are ambiguous and the operative part clear, the latter must prevail; if both the recitals and the operative part are clear but if they are inconsistent with each other, the operative part must be preferred.(16)

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alienation held not in derogation of an absolute grant but a condition of the grant itself.)

1949 All 464 (466) [AIR V 36 C 174] (DB). (Gift by Hindu donor to his wife—Deed reciting that under it the donee to become absolute owner—Donee prohibited from transferring property in any manner or form—Gift held created only limited estate and not absolute estate in favour of donee—Donee could not will away property.)

('97) 24 Cal 834 (846, 849) : 24 Ind App 76 (PC). (Clear dispositive words are not to be controlled by any general expression of the intention.)

1924 Pat 200 (202) [AIR V 11] (DB). (If first description is not sufficient, later description will restrict the operation of the first part.)

[*See also* 1957 Cal 150 (150, 151) [AIR V 44 C 47] (DB). (Held, that though the expressions "putra poutradicramay" and "warishancromay" used frequently in the will indicate a bequest in favour of heirs in general, the said clause at the end of the will not only limited the earlier disposition but clearly brought out the intention of the testator to give a limited bequest to donee and his children, should he have any children, and the children's children and so on.)

1952 Mad 784 (785) [AIR V 39]. (But if the testator appointed a person as sole trustee without words of limitation and there is no indication in the document to the contrary, the said grant conveys an estate of inheritance. But in a case where the will contains other directions which are inconsistent with such intention, the Court should give effect to his real intention.)

1949 Mad 122 (123, 124) [AIR V 36 C 52]. (Gift deed executed by donor in favour of her daughter V — Defeasance clause viz,, that on failure of issue, property should revert to donor — Defeasance clause never came into operation since V left issues behind—Deed, held, conferred absolute estate on V—Presence of such defeasance clause would not limit absolute nature of estate.)

1947 All 288 (290, 291) [AIR V 34 C 114] : ILR (1947) All 403 (DB). (The will must be read as whole and the later provisions must be given preference if they are inconsistent with the earlier ones.)

1947 Lah 199 (205) [AIR V 34 C 39] (DB). (Will providing that testator's widow would be malik of his property and if any sons be born to his son during her lifetime, they would after her death be owners of property—Held, estate conferred on widow was limited estate.)]

15a. 1950 Orissa 67 (72) [AIR V 37 C 12] : 51 Cri L Jour 683 : ILR (1949) 1 Cut 1 (SB).

(1966) 8 Law Rep 791 (794, 795) (DB). (Operative portion in document not inconsistent with the preamble—Document is to be construed in accordance with its declared object in the preamble—But if coperative portion is in conflict with the title or preamble it prevails.)

16. 1957 S C 286 (292) [AIR V 44 C 41]: 1956 SCR 889: ILR (1957) Punj 819. (Government grant—Operative part plainly expressed may take effect notwithstanding qualifications in recitals.)

1948 P C 168 (173) [A I R V 35 C 45] : Pak L R (1949) Lah 1. (The operative part of a deed cannot be controlled by recitals when the operative words are clear.)

('79) 2 Mad 239 (257) : 7 Ind App 83 (PC). (Intention clear from operative part—The intention cannot be defeated or controlled because it may go beyond what is expressed in the recital.)

1967 Cal 119 (123, 124): [A I R V 54 C 28] (DB). (The operative part, if plainly expressed, will take effect notwithstanding qualifications in the recitals.)

('55) ILR (1955) 2 Cal 109 (151)(DB). (Construction of release or relinquishment deed - General words in operative part are controlled by the recitals.)

('54) 1954 B L J R 284 (285) : A I R 1955 N U C 1591 (DB). (Where the operative part of a sale deed stated that a cadastral survey plot (corresponding to four municipal survey plots) was sold and this description was followed by an enumeration of only three of the four municipal survey plots it was held that the principle of *falsa demonstratio* applied.)

1954 Raj 54 (56) [AIR V 41 C 26] : ILR (1952) 2 Raj 322 (DB).

1949 Cal 174 (177) [AIR V 36 C 42] (DB). (Operative part clear—It prevails over any contrary intention suggested by recitals—Settlement deed among other terms providing that purchasers were to pay all debts and liabilities of settlor as per statement attached—Held on construction of deed that non-scheduled creditors of settlor were not entitled to recover their debts from purchasers under deed or from estate of the settlor in their hands.)

('49) ILR (1949) 1 Cal 498 (506). (If the operative part is clear and unambiguous, but there is a conflict between it and the intention expressed in the recitals, then the conflict can-

(4) Where there are two conflicting descriptions of the subject-matter of a grant, or two conflicting parts of the same description, that which is the more certain and stable and the least likely to have been inserted inadvertently should prevail if it sufficiently identifies the subject-matter.(17) In *Eastwood* v. *Ashton*(18) Lord Parker of Waddington observed as follows :

"Where there are several descriptions which, when evidence of surrounding facts is admitted, are not consistent one with the other, I do not think that there is any general rule by which the Court can decide which description ought to prevail. But *ceteris paribus* it would seem that the more detailed and precise the description the more likely it is to accord with the real intention of the parties. It was suggested that help might be derived from the maxim, *falsa demonstratio non nocet*. It is clear, however, that this maxim is useless unless and until the Court has made up its mind as to which of two or more conflicting descriptions ought under the circumstances to be considered the true description. When this is done the false description may, of course, be disregarded, and the maxim merely calls attention to this obvious result. There are in some of the authorities expressions from which it might be inferred that as soon as you have a description in a conveyance which, taken in connection with the extrinsic evi-

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not be put to rest by a forced construction on the operative part—In that case, the question is one of the rectification of the deed and not one of construction.)

1948 Pat 186 (187) [AIR V 35 C 69] (DB). (Recitals in a deed of sale cannot be allowed to contradict the operative clauses if the latter are clear and unambiguous.)

†1922 Pat 619 (622, 633) [AIR V 9] (SB). (When recitals can be utilised for construing a document.)

1941 Pat 472 (474) [AIR V 28]. (Operative portion prevails.)

1925 Rang 209 (209) [AIR V 12]: 3 Rang 53 (DB).

1922 Pat 122 (146) [A I R V 9] (DB). (As soon as there is an adequate and sufficient definition, with convenient certainty, of what is intended to pass by the deed, any subsequent erroneous addition will not vitiate it.)

1916 Pat 8 (10) [A I R V 3] : 1 Pat L Jour 581 (DB). (A mere recital in a deed cannot cut down or abridge clear and unambiguous words in the operative part.)

†('06) 2 Nag L R 57 (59, 60). (Large and general words in the operative part may however be controlled by the recitals.)

(1886) 17 Q B D 275 (286) : 34 W R (Eng) 752 (752): 55 L T 114, Re Moon; Ex parte Dawes. (In this case the recitals were clear and operative part ambiguous).

17. ('57) 1957 Ker L T 825 (826). (Preference ought to be given to that element of the description of the subject-matter which is most consistent with the intention of the parties to be collected from other parts of the deed, illumined if necessary by the surrounding circumstances and subsequent conduct of the parties.)

1956 Pat 349 (353) [AIR V 43 C 88] (DB). (If there is an existing property accurately described and fully described in the schedule, but in some respects it is misdescribed, it will be a case of misdescription which would be treated as mere irregularity.)

1954 Nag 328 (330) [A I R V 41 C 114] : I L R (1954) Nag 634 (DB).

1952 Pat 146 (147) [AIR V 39] (DB).

1951 Pat 315 (318) [AIR V 38 C 69] (DB).

1943 Cal 122 (123) [AIR V 30] : ILR (1942) 2 Cal 378 (DB).

1938 Nag 93 (94) [A I R V 25] : I L R (1938) Nag 50. (In a mortgage deed, the actual area intended to be mortgaged was correctly stated but it was erroneously described as two annas eight pies share—Held, description of the mortgaged property in terms of fractional share was surplusage.)

† 1937 Lah 920 (922) [AIR V 24]. (Description of the boundaries, if it is precise and accurate dominates the description of quantity.)

1943 Cal 122 (123, 124) [AIR V 30] : ILR (1942) 2 Cal 378 (DB). (Declaration of acquisition under S. 6, Land Acquisition Act—Text of declaration certain — Plan of land attached inaccurate — Declaration prevails over plan.)

1930 Bom 125 (126, 127) [AIR V 17] (DB). (Map annexd to deed—Recitals in deed clear — Map inaccurate—Recitals prevail.)

1923 Mad 511 (512) [AIR V 10] (DB). (Words in the body of the document must be read subject to more precise description given, which must be taken as controlling the general words.)

†('09) 37 Cal 293 (308) (DB). (If both the boundaries and quantity are exact but there is divergence between quantity found and quantity specified, preference to be given to that description which is consistent with intention to be collected from other parts of the deed.)

('94) 18 Bom 283 (288, 289) (DB). (Leading description and contrary supplementary description — Latter should be regarded as *falsa demonstratio*.)

[*See also* ('54) Madh B L J 1954 H C R 773 (775) : AIR 1955 N U C 3038. (As a matter of construction where the diagram is contradictory to or is repugnant to the terms of the sale deed the latter will prevail.)]

18. (1915) 1915 App Cas 900 (912, 913) : 84 L J Ch 671 (677).

[*See also* 1934 Nag 280 (281) [AIR V 21].]

dence, fairly identifies a particular parcel or particular parcels of land, that description should be adopted and everything subsequently contained in the indenture which in any way conflicts with it be rejected as a false demonstration.(18a) There are, however, numerous cases which shew that the order in which the conflicting descriptions occur is not at all conclusive."

Where there is discrepancy between the area and the boundaries given of the subject-matter of a document the normal rule is that the boundaries are to be taken as the criterion for determining the properties conveyed, and not the area.(19) This is, however, not an invariable rule.(20) Where

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18a. For such a case in India see 1923 Cal 669 (670) [AIR V 10] : 50 Cal 394 (DB). (As soon as there is an adequate and sufficient definition with convenient certainty of what is intended to pass by a deed, a subsequent erroneous addition will not vitiate it.)

19. 1948 P C 207 (209) [AIR V 35 C 58]. (Statement as to area should be rejected as *falsa demonstratio* — Principle is not restricted to cases between vendor and purchaser but applies to the construction of a grant by Government.)
('64) ILR (1964) Cut 203 (204).
1963 Mad 147 (148) [AIR V 50 C 55].
('57) ILR (1957) Ker 835 (838, 839).
1957 Ker 181 (185) [AIR V 44 C 93] : ILR (1957) Ker 475 (DB).
('55) 1955 Andh W R 659 (664) : AIR 1955 N U C (Andh) 5841).
1953 Mad 769 (774) [A I R V 40 C 294] : I L R (1952) Mad 682 (DB). (Intention of the parties was to sell a parcel of land within well defined boundaries — The measurements should be rejected as *falsa demonstratio*.)
('51) ILR (1951) 1 Cal 168 (184, 185) : AIR 1955 N U C (Cal) 1068.
('51) 1951 Ker L T 117 (118) (DB).
1951 Pat 315 (318) [AIR V 38 C 69] (DB). (Sale deed — Holding number and boundaries — Conflict between — Statement of holding number only supplementary and not dominant — All land within boundaries stated in deed held to have been conveyed under deed.)
1943 Cal 122 (124) [AIR V 30] : ILR (1942) 2 Cal 378 (DB).
1941 Nag 311 (312) [AIR V 28] : ILR (1941) Nag 691.
1939 Nag 197 (202) [AIR V 26] : ILR (1939) Nag 580.
1939 Rang 396 (398) [AIR V 26] (DB).
1937 Lah 940 (941) [AIR V 24].
1937 Nag 281 (283) [AIR V 24].
1933 Rang 24 (25) [AIR V 20]. (Boundaries precisely stated—Statement of measurements treated as surplusage.)
1932 Bom 449 (451) [AIR V 19]. (Wrong survey number can be got over by boundaries.)
929 Pat 49 (50) [AIR V 16] (DB).
1926 Pat 257 (258) [A I R V 13] (DB). (Discrepancy as to subject-matter of sale certificate.)
1924 Lah 74 (74) [AIR V 11]. (In case of substantial shortage in area, contract may be rescinded.)
1924 Mad 493 (493) [AIR V 11] (DB). (Boundaries prevail against measurements.)
1924 Pat 226 (228) [AIR V 11] (DB). (An erroneous statement about dimension or quantity will not vitiate adequate and sufficient description of property intended to pass.)
1920 Cal 799 (799) [AIR V 7] (DB). (But where boundaries are uncertain area must also be considered.)
†1920 Pat 644 (645) [AIR V 7].
1920 Lah 322 (323) [AIR V 7]. (Variation between measurements and plans — Reliance should ordinarily be placed on the latter.)
1917 Upp Bur 18 (19) [AIR V 4] : 2 Upp Bur Rul 110.
†('12) 14 Ind Cas 286 (289) (DB) (Mad). (If the description by boundaries is vague, it yields to quantity.)
('10) 34 Mad 108 (110). (For the application of this rule, the boundaries must be precise and accurate.)
†('09) 37 Cal 293 (308) (DB).
('02) 15 C P L R 163 (166).
('83) 1883 All W N 38 (38) (DB).
('80) 5 Bom 208 (213). (Space described by boundaries and survey number — Measurement in square yards was held a surplusage and of no consequence.)
('70) 14 Suth W R 117 (117) (DB). (Sale of a taluq with a wrong specification of area — *Held*, the whole area in the taluk passed.)
[*See also* 1935 All 662 (663) [AIR V 22]. (Portion of the deed gave boundaries — Another portion gave survey number and area which did not tally with the boundaries — *Held*, evidence may be received to show what was intended to pass.)
1931 Cal 596 (598) [AIR V 18]: 58 Cal 676 (DB). (Seeming inconsistency between boundaries and area—Extrinsic evidence and evidence of user by acts of parties admissible for gathering intention of parties.)
(1957) 1957-1 All E R 74 (75), *Truckell* v. *Stock*. (Conveyance — Reference to plan — Conveyance of dwelling house — Footings and eaves projecting beyond area conveyed as depicted by plan—Footings and eaves held conveyed, even though not covered by plan.)]

20. ('57) ILR (1957) Ker 835 (838, 839). (When from the proved circumstances it is clear that the intention of the parties was only to convey the extent mentioned in the document, even though the boundaries would take in a larger area, effect has to be given to their intention and the description of the boundaries cannot be allowed to prevail.)
1933 Pat 60 (61) [AIR V 20] (DB). (But it is

the boundaries given are vague and the area is exactly specified the property conveyed will be taken as that described by the area and not by the boundaries.(21)

(5) Where the language of a document is clear and unambiguous, its construction cannot be affected by the subsequent(22) or the

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a matter for examination in each case as to what was the intention of the parties and understanding between them at the time of entering into the contract.)

('09) 2 Ind Cas 123 (125) (DB) (Cal). (True construction will be to bring several clauses into harmony and express real intention.)

21. ILR (1964) Cut 203 (204).

†1941 Nag 162 (163) [AIR V 28].

1934 Cal 851 (851) [AIR V 21].

1931 Lah 349 (351) [AIR V 18].

('10) 7 Ind Cas 574 (575) (All). (Quantity of land exactly described — Boundaries uncertain and could be applied to entire plot of which only a portion sold — Specific area described held passed and not the plot covered by boundaries.)

('09) 1 Ind Cas 650 (653) (DB) (Cal). (Boundaries prevail over area only when boundaries are certain — If boundaries are uncertain, specified quantity within those boundaries passes.)

[*See also* ('58) 1958 Cal L Jour 252 (256) (DB). (Where the language of a deed of sale is perfectly plain and straightforward, showing both the area and the specific plots, no explanation is required to show what particular items of property were sold.)

1936 Pat 287 (288) [AIR V 23] (DB). (Discrepancy between *designation* of property in the body of grant and its description by boundaries —Designation of property was held to prevail.)]

22. 1963 S C 890 (897) [AIR V 50 C 134] : (1963) Supp 2 S C R 417. (The course of conduct of the parties is of no relevance for the construction of a document which is itself unambiguous. AIR 1958 M P 246, Reversed on another point.)

1960 S C 301 (304) [AIR V 47 C 53] : (1960) 2 S C R 117.

1948 P C 3 (6) [AIR V 35 C 2] : ILR (1947) Kar (PC) 327.

1934 P C 58 (59) [AIR V 21] : 61 Ind App 35 : 61 Cal 313.

('03) 30 Cal 738 (752) : 30 Ind App 139 (PC).

1967 Cal 119 (125) [AIR V 54 C 28] (DB).

1965 Assam 90 (91) [AIR V 52 C 33] : ILR (1963) 15 Assam 496.

('58) 1958 Cal L Jour 252 (261) (DB).

1958 Madh-Pra 246 (254) [AIR V 45 C 92] (DB). (Reversed on another point in AIR 1963 S C 890.)

[*See* 1957 All 94 (98) [AIR V 44 C 23] : ILR (1954) 2 All 556 (DB). (The subsequent conduct of a transferee in dealing with the transferred property may be relevant only if it is of material assistance in establishing the nature of the transaction or the intent of the transferor in entering into the transaction. But the subsequent conduct may also be the result of a subsequent change in design in which case such subsequent conduct will not adversely affect the validity and genuineness or minimise or nullify the operative effect of bona fide transaction made earlier.)]

1957 Pat 278 (284) [AIR V 44 C 90] : 36 Pat 471 (DB). (Facts set out fully in document and admitted—Party's opinion about legal effect of those facts is of no consequence in construing it—Evidence of conduct and acts of parties is inadmissible to show that document is not what it purports to be, although subsequent conduct is admissible to prove that deed was acted upon.)

1957 Pat 126 (127) [AIR V 44 C 41].

('56) 1956 Andhra W R 569 (571) (DB).

1956 Mad 72 (77) [AIR V 43 C 18] : ILR (1956) Mad 867 (DB).

1955 Bom 419 (429) [AIR V 42 C 112].

1954 Pat 586 (589) [AIR V 41 C 190] (DB). (Terms of document (ancient grant) unambiguous — Court cannot say that the document means something else because parties have gone on for a long time so understanding it.)

1952 Vindh Pra 25 (28) [AIR V 39].

1947 Bom 49 (51) [AIR V 34 C 14] : ILR (1946) Bom 984.

1946 Mad 353 (361) [AIR V 33 C 187] : ILR (1946) Mad 599 (DB).

1943 Nag 81 (82) [AIR V 30] : ILR (1943) Nag 10.

1941 Oudh 369 (372) [AIR V 28] (DB). (Construction as to a deed of gift—Subsequent conduct of parties cannot be taken into account to ascertain intention of donor.)

†1935 Nag 35 (41) [AIR V 22] : 31 Nag L R 188 (DB). (It is only when after other methods of interpretation have been exhausted there remains a doubt as to the effect of the instrument that it is permissible to give evidence of the acts under it as a guide to the intention of the parties.)

1935 All 729 (734) [AIR V 22] (DB). (Per Sulaiman C. J.)

1934 Bom 434 (443) [AIR V 21] (DB).

('34) 147 Ind Cas 397 (398) (DB) (Oudh).

1933 Bom 377 (380) [AIR V 20] (DB). (Per Beaumont C. J.)

1926 Bom 209 (212, 213) [AIR V 13] (DB). (Subsequent conduct of the parties in reference to the terms of the document can only be evidence of the construction they put upon it.)

†1925 Mad 471 (472) [AIR V 12]. (Parties' understanding of the document should not influence the Court unless it gives clue to the meaning of any expression which is not clear.)

prior(23) conduct of the parties. They may, of course, be taken into consideration when the instrument is ambiguous.(24)

1922 Cal 300 (301) [AIR V 9] (DB). (Parties acted on erroneous construction of the document — The Court was nevertheless bound to construe the document according to its natural meaning in the light of circumstances in which it was executed.)
†1921 Cal 750 (752) [AIR V 8] (DB).
†1920 Cal 270 (270) [AIR V 7] (DB).
1918 Mad 807 (809) [AIR V 5] (DB).
1922 All 508 (509) [AIR V 9] (DB). (Nothing *ex post facto* can be taken into account in interpreting an instrument.)
('12) 5 Sind L R 107 (120) (DB).
(1900) 1900 App Cas 260 (268, 269) : 69 L J Ch 516 : 82 L T 429, *North Eastern Rly. Co.* v. *Hastings*. (Relied on in AIR 1934 P C 58.)

23. †1929 PC 34(36) [AIR V16]: 56 Ind App 51 : 53 Bom 230. (Antecedent communings which led up to the contract cannot be used to explain the contract.)
1955 Andh W R 659 (661) : AIR 1955 N U C 5841 (Andh). (Extrinsic evidence of the intention of the parties to a contract of sale from declarations and negotiations preceding the contract is inadmissible to interpret the meaning of the written contract or of the intention of the parties to the transaction.)
1954 Mad 1045 (1048) [AIR V 41 C 365].
1949 Cal 174 (176) [AIR V 36 C 42] (DB). (When parties have entered into a formal contract, that contract must not be explained or interpreted by the antecedent communings or even formal contract which led up to it. This is especially true of a conveyance. AIR 1929 P C 34, Rel. on.)
1943 Nag 81 (82) [AIR V 30] : ILR (1943) Nag 10. (Antecedent correspondence not to be considered.)
1942 Nag 115 (116) [AIR V 29] : ILR (1942) Nag 592 (DB). (The Court cannot take into consideration the nature of the preliminary negotiations or previous conversation to contradict or vary the express and unambiguous terms of a document.)
1938 Bom 125 (128) [AIR V 25] (DB). (Negotiation or correspondence prior to the document.)
[But see 1925 Mad 471 (472) [AIR V 12]. (Prior conduct or conduct at the time of the execution of the document may be of some evidence.)]

24. 1950 S C 15 (21) [A I R V 37 C 5] : I L R (1951) 1 Cal 511 : 1950 S C R 30. (Per Mahajan J. — Extrinsic evidence to determine the effect of an instrument is permissible where there remains a doubt as to its true meaning. Evidence of the acts done under it is a guide to the intention of the parties in such a case and particularly when acts are done shortly after the date of the instrument.)
1967 Cal 119 (125) [AIR V 54 C 28] (DB).
('59) 63 Cal W N 590 (593) (DB).
1957 All 94 (98) [AIR V 44 C 23] : ILR (1954) 2 All 556 (DB).
('56) 1956 Andhra W R 569 (571) (DB). (Transaction whether conditional mortgage or out and out sale with condition of repurchase depends on intention of parties when they entered into transaction – Terms of document susceptible to more than one interpretation — Subsequent conduct can be looked into to ascertain the intention.)
('56) 1956 B L J R 314 (316). (It is open to the Court to call in aid acts under the deed as a clue to the intention. This principle, however, does not apply unless there is ambiguity, for even usage does not justify deviation from terms which are clear and plain.)
1955 Bom 419 (429) [A I R V 42 C 112]. (When the words in a document are ambiguous they may be explained by the previous or contemporaneous conduct of the parties.)
1954 Orissa 23 (24) [AIR V 41 C 7] : ILR (1953) Cut 531 (DB).
1954 Pat 586 (589) [A I R V 41 C 190] (DB). (Terms of ancient grant ambiguous — Parties understanding it in a particular way and acting on this understanding — Court can uphold that construction of deed which justifies long usage.)
1953 Mad 566 (568) [AIR V 40 C 219].
1951 Nag 394 (397) [A I R V 38 C 124] : ILR (1950) Nag 50 (DB).
('49) 28 Pat 664 (673) (DB). (When the words of an ancient instrument are ambiguous the Court may call in aid the acts done under it as a clue to the intention of parties — "*Contemporanea expositio est optima es fortissima in lege.*")
('48) 83 Cal L Jour 229 (237, 239) (DB). (Contract open to different meanings — Conduct of parties can be referred to elucidate it.)
1947 Lah 117 (126) [A I R V 34 C 25] : I L R (1946) Lah 300 (DB). (Trust, creation of — Subsequent conduct can be looked at to show whether trust was created — Subsequent acts amounting to breach of trust — No inference can bs drawn that trust was not created.)
1946 Cal 441 (443) [AIR V 33 C 98] (DB).
1946 Mad 353 (361) [A I R V 33 C 187] : I L R (1946) Mad 599 (DB).
(1937) 20 Nag L Jour 39 (41, 42). (Sale deed — Description of property closing with words "excluding Sir and Khudkasht" — Subsequent dealing of parties was taken into consideration for determining whether proprietary rights were retained or only cultivating rights were retained.)
1936 Nag 168 (169) [A I R V 23] : I L R (1936) Nag 60. (Conduct of the parties was taken into consideration for the purpose of determining whether an alleged lease of 'sir' fields for 99 years, comprised only the cultivating rights in them or both proprietary and cultivating rights.)
1935 Nag 35 (41) [A I R V 22] : 31 Nag L R 188. (In the construction of ancient grants and

(6) An ambiguous document should be so construed as to make it accord with the law rather than to make it conflict with it.(25) The Court must lean towards an interpretation which does not invalidate the document provided such an interpretation can be reasonably justified on a natural construction of the terms thereof.(25a)

(6a) An interpretation which would be contrary to the dominant intention of the parties should not be accepted unless the words compel the Court to do so.(25b)

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deeds, Court can call in aid acts done under the deed as a clue to the intention.)
1935 Oudh 209 (212) [AIR V 22]: 10 Luck 307 (DB).
1934 Lah 39 (41) [AIR V 21] : 15 Lah 270 (DB). (Acts, statements of parties and also administrative records of property.)
1932 Mad 689 (691) [AIR V 19] (DB).
1931 Mad 404 (416) [A I R V 18] : 54 Mad 269 (DB).
†1928 All 34 (37) [AIR V 15] (DB).
1928 Pat 225 (226) [A I R V 15] (DB). (Only after every other means to construe a deed has been exhausted.)
1925 Cal 346 (351) [AIR V 12] (DB).
1925 Oudh 264 (266) [AIR V 12]. (Wajib-ul-arz construed.)
1924 Rang 283(287) [AIR V 11]: 2 Rang 253(DB).
1921 Cal 750 (752) [AIR V 8] (DB).
†1919 Cal 542 (544) [AIR V 6] (DB). (In case of ambiguity, there is no better way of seeing what the parties intended than seeing what they did.)
('12) 16 Ind Cas 376 (377) (DB) (Cal).
('13) 20 Ind Cas 332 (335) (DB) (Cal).
('13) 21 Ind Cas 204 (206) (DB) (Cal). (Subsequent conduct.)
('73) 19 Suth W R 432 (433) (DB). (Conduct immediately after the document, and not long after and independent of the deed, is to be considered.)
('67) 2 Agra 150 (150) (DB). (Intention may be gathered from the conduct of parties, and effect given to a grant before the commencement of the dispute under litigation.)
[*See also* 1952 Trav-Co 277 (281, 286) [AIR V 39] : I L R (1951) Trav-Co 840 (DB). (In order to find out whether the document was a partition deed or maintenance deed, due weight has to be given to the evidence as to how the parties to the document understood it and acted upon it.)
1951 Kutch 42 (43) [A I R V 38 C 38]. (In the case of a latent ambiguity in a document the construction put on a document by the parties themselves is the one which may safely be adopted.)
1949 Pat 197 (202) [A I R V 36 C 60] : 26 Pat 717 (DB). (Where the original title deed evidencing a grant is not forthcoming, evidence of subsequent dealings with the property may be admissible to show the nature of the grant.)
1946 Pat 447 (455) [A I R V 33 C 153] (DB). (In the case of ancient deed whose words are not clear or are ambiguous, evidence is admissible as to the interpretation placed upon ancient documents by persons who lived at the time of the execution of the documents or at a time not remote from its execution.)]

25. 1950 P C 34 (36) [AIR V 37 C 16] : 77 Ind App 33 : ILR (1950) Mad 862. (Deed of adoption executed by widow in French India — Adoption to Hindu widow permissible under French Law —Interpretation doubtful — Deed must be construed as a document executed in contemplation of the law of the widow's domicile, namely the French law.)
†('01) 23 All 181 (190) : 28 Ind App 35 (PC). (Construction of a mortgage decree.)
1937 Cal 167 (168) [A I R V 24] : I L R (1937) 1 Cal 690 (DB). (Two possible constructions— Law favours construction making deed valid.)
†1933 Bom 87 (88) [A I R V 20] (DB). (But this purpose should not be effected by giving the language used by the parties a meaning other than it naturally bears.)
1932 Sind 217 (219) [A I R V 19] : 26 Sind L R 377 (DB).
1929 Lah 812 (813) [AIR V 16]: 10 Lah 381 (DB).
[*See also* ('97) 18 All 39 (49): 23 Ind App 138 (PC). (It is more reasonable to ascribe to the parties the intention to make a perfect contract rather than an imperfect one.)
1936 Lah 587 (589) [A I R V 23]. (A construction so as to promote substantial justice and not to deprive under the law of limitation the plaintiff of what was justly due to him, was adopted.)]

25a. 1956 Bom 74 (75) [A I R V 43 C 16] : ILR (1955) Bom 1083 (DB). (The inclination of the Court in construing a contract must be in favour of validating rather than avoiding a contract. When a law makes a contract void the Court must strictly construe the provisions of that law.)
('54) I L R (1954) 6 Assam 18 (28) : A I R 1955 N U C 3639 (DB).
[*See also* 1955 Assam 81 (84) [A I R V 42 C 17]. (In construing a will endeavour should be made to give effect to the document as far as possible and not to adopt a construction which may have the effect of defeating it.)
1954 Nag 328 (330) [A I R V 41 C 114] : I L R (1954) Nag 634 (DB). (Courts must construe contracts, '*ut res magis valeat quam pereat*, i.e. that it may be made to operate rather than be inefficient.)]

25b. ('54) 1954 Andh L T (Civil) 35 (40) : AIR 1955 N U C 3608.
('46) 14 I T R 277 (286) (DB) (Lah).

(7) Deeds and contracts of the people of India ought to be liberally construed; the form of expression, the literal sense, is not so much to be regarded as the real meaning of the parties which the transaction discloses.(26)

(8) The legal nature of a document must be determined by its contents and not by the value of the stamps affixed to it or paid for it,(27) or by the name given to it by the parties.(28)

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26. 1959 S C 620 (625) [AIR V 46 C 85] : (1959) Supp (2) S C R 107. (A document executed by laymen without legal assistance must be construed liberally without recourse to technical considerations.)

1951 S C 293 (301) [AIR V 38 C 50] : 1951 S C R 1125 : I L R (1952) 2 Cal 209. (The technical rules of interpretation of provisos and exceptions with reference to their scope and legal effect adopted in construing statutes should not ordinarily be imported in interpreting deeds and documents executed by laymen. 1949 Cal 278 [AIR V 36] Reversed on another point.)

1915 P C 18 (19) [AIR V 2] : 37 All 369.

('72) 18 Suth W R 359 (364, 370) : Ind App Supp Vol. 47 (P C). (Benignant construction should be adopted.)

†(1857) 6 Moo Ind App 393 (411, 412) : 18 Suth W R 81 (PC).

1955 Bom 419 (425) [AIR V 42 C 112].

1947 Lah 117 (130, 131) [AIR V 34 C 25] : I L R (1946) Lah 300 (DB). (Regard should be had to the effect rather than the language of the deed.)

1947 Oudh 45 (58) [A I R V 34 C 17] : 21 Luck 463 (DB).

1916 Cal 843 (856) [AIR V 3] (FB).

1935 Cal 659 (661) [AIR V 22] (DB). (Mere form of instrument is a delusive guide to the intention of the parties.)

1934 Cal 379 (383) [AIR V 21] : 61 Cal 106 (DB). (Notions present to Hindu testator differ from those of English testator though words used by both are similar.)

1927 Sind 62 (64) [AIR V 14] (DB).

1915 Bom 229 (230) [A I R V 2] : 40 Bom 74 (DB). (6 Moo Ind App 393 (PC), *Foll.*)

('09) 33 Bom 53 (65, 66) (DB).

('12) 16 Ind Cas 561 (563) (Bom).

†('11) 14 Oudh Cas 189 (191). (Reasonable intention shall be construed though words sound to contrary meaning.)

('08) 32 Bom 386 (390) (DB).

[*See also* 1952 Cal 705 (710) [A I R V 39] (DB). (It is a fundamental rule of construction that the liberal sense of the words used by the settlor should be accepted and that in case of doubt, that interpretation should be accepted which accords most with the expressed intention of the settlor appearing from the deed.)

1950 Pat 218 (220) [A I R V 37 C 54] : 29 Pat 209 (DB). (Meaning of every word in an Indian will must always depend upon the setting in which it is placed, the subject to which it is related and the locality of the testator from which it may receive its true shade of meaning.)]

1936 Mad 528 (529) [AIR V 23]. (The Court should place itself in the position of the parties to ascertain in the best way it can what was the intention of the parties when they entered into the transaction.)

1936 Lah 234 (234) [A I R V 23]. (Question whether a transaction is a sale or exchange has to be decided by looking at its substance.)]

27. 1966 S C 337 (339) [A I R V 53 C 68]. (Amount of stamp paid on a deed, though relevant is not conclusive on the question of construction.)

('56) I L R (1956) Cut 59 (64) : A I R 1955 N U C 3420 (DB).

1954 Punj 116 (117) [AIR V 41 C 55].

1952 Trav Co 277 (286) [AIR V 39] : ILR (1951) Trav Co 840 (DB).

1916 Mad 601 (602) [AIR V 3] : 38 Mad 134 (DB). (Question in this case was whether the power-of-attorney which was executed on stamp paper of the value of one rupee, was merely for that reason a special and not a general power-of-attorney.)

[*See also* 1954 Cal 179 (183) [A I R V 41 C 67]. (*Held*, that the fact of affixing of stamps on the back of the contract according to the requirements of Art. 43 of Sch. I of the Stamp Act read with R. 17 (f) of the Rules made it quite clear that the document was intended to have the appearance of a Broker's Note.)]

28. 1966 S C 337 (339) [AIR V 53 C 68]. (The nomenclature of a deed, though relevant, is not conclusive on the question of construction.)

1959 S C 620 (625) [AIR V 46 C 85] : 1959 Supp (2) S C R 107. (The heading of the document, though relevant, would not determine its character.)

1958 S C 532 (535) [AIR V 45 C 79] : 1959 S C R 265. (True nature of a document cannot be disguised by labelling it something else.)

1921 P C 89 (90) [AIR V 8]. (Calling a document a will does not make it so.)

1940 Pat 633 (641) [AIR V 27] : 20 Pat 13 (SB). (Deed called lease held to be a sale.)

1967 Him Pra 29 (31, 32) [AIR V 54 C 9]. (Name given by parties to a document is not conclusive as to its real legal nature and effect — Where language used in the document is unambiguous and clear real nature of the document is to be determined by its contents, uninfluenced by any intention of the parties.)

1967 Mad 227 (228) [AIR V 54 C 68] : 61 I T R 474 : ILR (1966) 2 Mad 590 (DB).

1965 Assam 90 (91) [AIR V 52 C 33] : ILR (1963) 15 Assam 496. (Simply because a document describes a transaction as sale, this by itself can raise no presumption that the transaction is

a sale. The form in which the deed is clothed is not decisive.)

('64) ILR (1964) Cut 229 (234). (To ascertain whether a document creates a licence or a lease, the substance of the document must be preferred to the form. The real test is the intention of the parties.)

('63) 1963 Jab L Jour 744 (745). (It is the substance, not so much the form, which determines the nature of the transaction which is deposited in it. The Court is entitled to hold that a transaction which appears from the deed is only a legal mask for quite another sort of transaction; it must clear off the mask to see the real face of the transaction notwithstanding that the mask is legally perfect in itself. Fulfilment of certain formalities and the apparent form of the document cannot save the veil being torn off and discarded. The true nature of a document cannot be disguised by labelling it something else.)

1962 Andh Pra 94 (99) [AIR V 49 C 25] : ILR (1961) 1 Andh Pra 579 (DB).

ILR (1960) Mad 955 (964).

('61) 1961-2 Mad L Jour 265 (269) (DB). (Even though a deed may be styled as a 'release deed' if the intention to transfer any right of the executant in the subject-matter of the deed is clear, the document could be treated as conveyance effectively transferring the rights of the executant.)

1959 Ker L R 722 : 1959 Ker L J 912 : 1959 Ker L T 773 (773).

1958 Ker 307 (308) [AIR V 45 C 108] : ILR (1957) Ker 859 (DB).

1957 Andh Pra 288 (290) [AIR V 44 C 96]. (A document, though styled as a release can be treated as a conveyance if it appears clearly that the intention of the executant of the document was to transfer his rights.)

1956 Bom 575 (576) [AIR V 43 C 224]. (Document described as 'Mudat Kharedi Khat' or as a conditional sale deed—Transaction intended to be effected was held a mortgage and not a sale.)

('56) 1956-1 Mad L Jour 98 (110) : AIR 1955 NUC 2447 (DB). (Per Ramaswami J. — Description of a document will not make a maintenance arrangement into a partition arrangement or *vice versa*.)

('55) 1955-2 Mad L Jour 180 (183, 184) : AIR 1955 NUC 4542. (Document termed a "will" but containing gift *in praesenti* — Document held gift.)

1954 All 195 (196) [AIR V 41 C 108]. (It is not the garb with which parties clothe the transaction but it is the spirit permeating the transaction that should be the determining factor.)

1954 Bhopal 17 (19) [AIR V 41 C 6].

1954 Bom 370 (374) [AIR V 41 C 107] : ILR (1954) Bom 615 (DB). (Substance of transaction appearing to be lease — Transaction clothed to appear as licence by use of ingenious word — Transaction is lease.)

1954 Mad 161 (164) [AIR V 41 C 62].

1954 Punj 115 (115) [AIR V 41 C 54].

1952 Trav-Co 277 (284, 286) [AIR V 39] : ILR (1951) Trav-Co 840 (DB).

('48) 1 Sau L R 25 (26). (In construing a document what matters is the real wording and meaning of the document and merely calling it an agreement will not make it an agreement if really and substantially it is a partition deed.)

('47) 52 Mys H C R 187 (198) (DB). (Document described as settlement held to be gift deed.)

1946 Oudh 247 (249) [AIR V 33 C 78]. (The fact that a deed is described as a partition deed is no bar to treat the deed as evincing a family settlement, when the expressions in the deed itself point to its being a family settlement.)

1941 All 56 (60) [AIR V 28] : ILR (1941) All 17 (DB). (In order to ascertain the real character of a document one has to look to the terms of the deed, and the description of the document given by the executant cannot be an infallible guide.)

1941 Oudh 12 (14) [AIR V 28]. (Transaction called perpetual lease was held to be a sale.)

1941 Oudh 198 (200) [AIR V 28]. (Deed called lease held to be mortgage.)

1940 Bom 225 (225) [AIR V 27] : ILR (1940) Bom 453 (DB).

1936 Cal 556 (560) [AIR V 23] : 63 Cal 1098 (DB). (Substance and not the form of the document should be looked into.)

1936 Mad 918 (918) [AIR V 23]. (In order to determine the nature of the document one must look to its substance and not to its form or description.)

1933 Cal 381 (382, 384) [A I R V 20] : 60 Cal 167. (Marginal note does not control the transaction set forth in the document.)

1933 Lah 517 (518) [AIR V 20].

† 1933 Mad 795 (796) [A I R V 20] (DB). (Substance and not merely form or colour of transaction should be looked into.)

1932 Mad 689 (690) [A I R V 19] (DB). (But the name by which the document is called by the parties is a circumstance to be taken into consideration along with the contents of the document.)

† 1932 Nag 163 (164) [A I R V 19] : 28 Nag L R 255. (But title given by the executant himself

(9) The general rule is that the same meaning must be given to an expression in every part of a document in which it occurs.(29) But this rule is not invariable. A difficulty or ambiguity may be solved by adopting different meanings.(30)

(10) The construction of a document cannot be altered or wrested to something different from the plain meaning in order to escape from what may seem to be the harsh consequences of the law.(31)

(11) Government grants must be construed in favour of the Government.(32) This rule is in the nature of a rule of substantive law and its scope is that whereas the transferee from a subject acquires, unless the contrary appears, all the rights which the transferor has in the property as enacted by this section, a grantee from the Government gets only what is granted by the deed and nothing passes by implication.(32a) The general rule that the Government grants should be construed in favour

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to his writing cannot be eliminated from consideration.)

✠1928 Mad 349 (350) [A I R V 15] (DB). (The name by which the instrument is called by the maker must be borne in mind and should not lightly be brushed aside; but it is not conclusive.)

†1925 Cal 370 (372) [A I R V 12]. (Document styled as 'amaldari' was construed as a lease and was held to be inadmissible without registration.)

1922 Oudh 42 (43, 44) [A I R V 9] (DB). (Name 'perpetual lease' was held not to exclude the presumption of absolute ownership where 'akhtyarat bator malikana' was conferred by the deed.)

1921 Cal 741 (743) [AIR V 8] : 48 Cal 359 (DB).

1921 Oudh 254 (255) [A I R V 8]. (Document styled as 'patta instimrari' was held to confer complete underproprietary title.)

1914 Oudh 366 (366) [A I R V 1]. (Transaction styled as sale was construed as a mortgage by conditional sale.)

('05) 29 Bom 19 (28) (DB). (Do.)

('04) 6 Bom L R 630 (631) (DB).

(1865) 3 Suth W R 200 (204) (DB). (Document styled as "will" construed as a gift.)

[*See* 1956 Mad 248 (249) [A I R V 43 C 78]. (Deed termed as settlement and registered — Beneficial interest postponed — Deed held was settlement and not will.)

Also see S. 58, Note 12 and S. 105, Note 14.

29.† 1928 P C 115 (116) [AIR V 15].

('59) I L R (1959) Mad 601 (618) (DB). (Unless there is something repugnant in the context.)

('49) ILR (1949) 1 Cal 498 (505). (Unless it is clearly repugnant to or excluded by the context.)

1947 Oudh 17 (19) [A I R V 34 C 9] : 21 Luck 539 (DB).

1938 Oudh 140 (145) [A I R V 25] : 14 Luck 89 (FB). (Different meaning may be given if there are reasons to do it.)

1939 Mad 614 (620, 629) [AIR V 26] : ILR (1939) Mad 622 (DB).

†1933 Oudh 182 (185, 187) [A I R V 20] : 8 Luck 354 (DB). ("Lawalad" was construed as meaning "sonless" at one place and "issueless" at other.)

1927 All 228 (230) [AIR V 14] (DB).

30. 1928 P C 115 (116) [AIR V 15].

1949 F C 106 (110) [AIR V 36 C 18] : 1949 F C R 36 : ILR (1950) 1 Cal 209. (Where in a clause in a deed, the expression to be construed also appears in the clause following and both have been used in different contexts, with different objects and not necessarily having the same meaning it cannot be said that the words being unambiguous no question of interpretation, strictly speaking, arises.)

1947 Oudh 17 (19) [AIR V 34 C 9] : 21 Luck 539 (DB). (Different meanings can be attached where there are reasons for so doing.)

31. 1949 F C 106 (109) [AIR V 36 C 18] : 1949 F C R 36 : ILR (1950) 1 Cal 209.

1916 Cal 775 (781) [AIR V 3] (DB).

✠(1880) 5 App Cas 714 (719) : 50 L J Ch 57 : 43 L T 449 : 29 W R (Eng) 1, Pearks v. Mosley,

[*See also* 1954 Assam 45 (48) [AIR V 41 C 10] : I L R (1953) 5 Assam 94. (Plain terms of contract should not be ignored or altered merely because they appear to be unreasonable.)

1938 Cal 490 (498) [A I R V 25]. (Deed must be construed in the light of what it purports to say and its legal consequences.)]

32. 1916 Mad 186 (191) [AIR V 3] (FB).

1947 Nag 95 (100) [AIR V 34 C 31] : I L R (1946) Nag 766 (DB). (A grant must necessarily be construed according to its own terms and in the light of its own attendant circumstances.)

1925 Bom 12 (17) [AIR V 12] : 49 Bom 99 (DB).

('88) 12 Bom 534 (544) (DB).

('75) 1875 Bom P J 325. (Grant in favour of Khot–Khot was held not entitled to cut wood.)

[*See also* ('79) 4 Bom 264 (274) : 7 Ind App 55 (PC).

32a. 1955 S C 298 (307) [AIR V 42 C 53] : 1955 S C R 1311. (When the grant is embodied in a deed the question ultimately reduces itself to a determination of what was granted thereunder.)

of the Government is capable of important relaxations in favour of the subject. Thus, where the grant is for valuable consideration, it is construed in favour of the grantee for the honour of the Government and where two constructions are possible, one valid and the other void, that which is valid ought to be preferred, for the honour of the Government ought to be more regarded than the Government's profits.(32b) All other grants must be construed in favour of the grantee.(33)

(11a) The rule of construction applicable to ordinary agreements between parties does not apply to treaties or agreements between two sovereign States having for their object cession of jurisdiction for the purpose of the governance of territory.(33a)

(12) The language of one document does not afford much assistance to the construction of another.(34) But it has been held that documents which

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32b. 1957 S C 286 (292) [AIR V 44 C 41] : 1956 S C R 889 : ILR (1957) Punj 819.

33 ('58) 1958 Cal L Jour 252 (260) (DB). (Words of a deed executed for valuable consideration are to be construed, as far as they properly may, in favour of the grantee but subject always to the general rule that the terms must be construed in accordance with the express intention.)

('47) 1947 All W R (HC) 284 (287). (Particularly so where the grantee is a public body and the grant is intended for the benefit of the public.)

1939 Mad 802 (803) [AIR V 26] (DB).

† ('38) 42 Cal W N 937 (939). (Where the dispute is whether a document is conveyance or a declaration of trust the Court ought to find an out and out conveyance.)

1937 Cal 167 (168) [AIR V 24] : I L R (1937) 1 Cal 690 (DB).

1922 Pat 122 (145) [A I R V 9] (DB). (Where doubt can be removed by construing a deed adversely to the grantor, this will be done especially where the deed is for valuable consideration.)

1920 Nag 206 (206) [A I R V 7]. (In other words the maxim *verba chartarum fortius accipiuntur contra proferentem* is applicable.)

1916 All 251 (252) [AIR V 3] (DB).

† ('12) 17 Ind Cas 494 (496) (DB) (Cal). (Deeds for valuable consideration.)

('07) 11 Cal W N 809 (811) (DB). (Doubtful grants.)

(1875) 44 L J Ch 514 (519): 32 L T 363 : 23 W R (Eng) 514, Wood v. Saunders.

33a. 1950 Orissa 67 (71, 73, 74) [A I R V 37 C 12] : I L R (1949) 1 Cut 1 : 51 Cri L Jour 683 (SB). (Agreements in such cases being acts of State cannot be scrutinised in the light of the principles of Municipal Law. Such agreements are not reached in the exercise of the recognition of legal right or under colour of legal right.)

34. 1953 S C 304 (306) [AIR V 40 C 71] : 1953 S C R 848. (Will — Rules of construction by analogy is a dangerous one to follow in construing wills differently worded and executed in different surroundings.)

1951 S C 103 (105) [AIR V 38 C 13] : 1950 S C R 949. (It is seldom profitable to compare the words of one will with those of another or to attempt to find out to which of the wills, upon which decisions have been given in reported cases, the will in question approximates closely.)

1950 S C 15 (22) [AIR V 37 C 5] : 1950 S C R 30 : I L R (1951) 1 Cal 511. (Per Mahajan J. Unless the language of two documents is identical, an interpretation placed on one document is no authority for the proposition that a document differently drafted, though using partially similar language, should be similarly interpreted.)

('05) 27 All 383 (391) : 32 Ind App 135 : 8 Oudh Cas 270 (PC). (Especially when they are not in any sense parts of the same transaction or not even contemporaneous.)

(1900) 24 Mad 214 (218) : 27 Ind App 162 (165) (PC).

1959 Madh Pra 151 (161, 162) [A I R V 46 C 52] (FB). (But the general principle underlying the cases can be looked into and applied.)

1943 All 337 (339) [AIR V 30] : I L R (1943) All 802 (FB).

1938 Oudh 140 (145) [AIR V 25] : 14 Luck 89 (FB).

('04) 31 Cal 195 (201) (SB). (Judicial decisions are not infallible guide when particular document is to be construed.)

(1966) 8 Law Rep 791 (798) (DB).

1965 Orissa 121 (122) [AIR V 52 C 44]. (Unless the terms are exactly similar to each other.)

('59) I L R (1959) Mad 601 (611) (DB).

1957 Cal 217 (220) [AIR V 44 C 66]. (On the question of construction of similar leases the decisions are binding as far as they (a) lay down canons of construction and (b) state the meaning of words and phrases which have become terms of art.)

1957 Mad 558 (559) [AIR V 44 C 162] (DB).

1957 Pat 278 (283, 284) [AIR V 44 C 90]: 36 Pat 471 (DB). (Subsequent deed not between original lessor and lessee but between successor-in-interest of original lessor and a stranger challenged — This deed cannot explain the first document not contemporaneous but evidencing separate transaction although in respect of same land.)

('56) (1956) 1 Mad L Jour 98 (104) : A I R 1955 N U C 2447 (DB).
('55) 1955 All W R (HC) 459 (461) : A I R 1955 N U C 1704 (DB).
('55) 1955 Ker L Tim 148 (150) : AIR 1955 N U C 2562 (DB). (It is, however, useful to keep in view the guiding principles adopted in decided cases in determining the question whether a particular instrument is a gift or a will.)
('55) 1955 B L J R 93 (95) : A I R 1955 N U C 3239 (DB). (It is hardly likely for two instruments to be exactly alike although many of the recitals contained in both may be similar.)
1954 Pat 586 (590) [AIR V 41 C 190] (DB). (Decisions based upon the construction of another document couched in similar but not the same language are not binding as an authority.)
1953 Madh Bha 143 (144) [AIR V 40 C 49] (DB). (Deed whether mortgage or sale — Little assistance can be derived from decided cases.)
1953 Mad 566 (568) [AIR V 40 C 219]. (Decisions may serve as useful guide if they contain general rules of construction.)
1952 Nag 327 (328) [A I R V 39] : I L R (1953) Nag 170 (DB).(Unless they are exactly similar.)
1952 Trav-Co 277 (279) [AIR V 39] : I L R (1951) Trav-Co 840 (DB). (It may not be profitable to rely upon other documents which, themselves ambiguous in their nature have become the subject-matter of judicial decisions, though the legal principles enunciated in such pronouncements may be of utility for the purpose of guidance.)
1951 Him Pra 69 (72) [AIR V 38 C 23]. (Construction of deed of adoption.)
1951 Mad 318 (320) [AIR V 38 C 81]. (But where Court lays down a principle of interpretation of certain words and expressions on basis of a decision of higher authority, that principle of interpretation must be treated as binding, unless on other relevant facts and circumstances the principle is to be denied the effect, which it must otherwise have.)
1951 Pat 254 (259) [AIR V 38 C 52] : 30 Pat 613 (DB). (Decisions based upon the construction of another document, couched in similar but not the same language, is not binding as an authority.)
('50) (1950) 2 Mad L Jour 239 (243) (DB).
('50) 2 Pepsu L R 584 (589) (DB). (Will — In construing a particular document it is not necessary to refer to decided cases as each case has to be decided on its own facts.)
1950 Raj 25 (26) [A I R V 37 C 10] (DB). (It is unsafe to rely on the construction made of a different document executed under different circumstances although some of the words in the two documents may be the same.)
('49) : I L R (1949) All 368 (378) (DB). (Other documents, while helping to a certain extent in elucidating the meaning of the words used, cannot be authorities for construing words used in a particular context in a will which the Court has to construe.)
1949 Cal 278 (281) [AIR V 36 C 85]. (Each document has to be construed in accordance with the language used and with due regard to the surrounding circumstances—It is the duty of a Judge to ascertain the construction of a document before him and not act on a construction put by another Judge upon an instrument perhaps similar but not the same—Reversed on another point in AIR 1951 S C 293.)
('49) 1949 Ker L Tim 103 (111) (DB). (Document is not to be construed with reference to authorities as to how a similar document was construed in other cases.)
1948 All 81 (85) [AIR V 35 C 38] : I L R (1947) All 556 (DB). (Will.)
1948 Oudh 9 (14) [AIR V 35 C 3] : 22 Luck 308 (DB).
1947 Oudh 45 (57) [A I R V 34 C 17] : 21 Luck 463 (DB).
1946 Cal 55 (59) [AIR V 33 C 17] : I L R (1946) 1 Cal 1 (DB). (Unless there be a case construing a will expressed in identical language the only cases to which reference may legitimately and usefully be made are those in which some principle of construction is laid down.)
1946 Oudh 20 (23) [AIR V 33 C 10].
1939 Oudh 257 (264) [AIR V 26] : 14 Luck 723 (DB).
1938 Bom 125 (128) [AIR V 25] (DB).
1938 Pat 585 (588) [AIR V 25] : 17 Pat 737 (DB).
†1937 Oudh 490 (492) [AIR V 24] : 13 Luck 577.
1937 Pat 616 (616) [AIR V 24].
1935 All 43 (45) [AIR V 22] (DB).
1935 Cal 656 (658) [AIR V 12] (DB). (Language of one document not in suit cannot be called to construe the document in suit.)
1935 Nag 35 (39) [AIR V 22] : 31 Nag L R 188 (DB).
('36) 160 Ind Cas 632 (634) (Nag). (The reason for such a rule is that every document varies in so many particulars, that no two documents are hardly found to be identical.)
†1933 Oudh 182 (187) [AIR V 20] : 8 Luck 354 (DB). (Each case should be determined on its own circumstances.)
1929 All 908 (909) [AIR V 16] (DB). (Specially where the languages, though similar, are not identical.)
1929 Cal 166 (167) [AIR V 16] (DB).
1928 Mad 648 (651) [AIR V 15].
1928 Sind 45 (46) [AIR V 15] : 22 Sind L R 117 (DB). (Unless the language of the documents is identically the same.)
1927 Mad 357 (358) [AIR V 14]. (When two different plots are sold under two different documents, it is not reasonable to ask the Court to read the terms of one document into another.)
1925 Cal 1248 (1249) [AIR V 12] (DB).
1925 Mad 471 (472) [AIR V 12].
1914 Oudh 255 (258) [AIR V 1]. (Two deeds forming one transaction. One can be referred for construing the other.)
1916 Oudh 329 (331) [AIR V 3].
('12) 18 Ind Cas 127 (127) (Oudh).
('12) 15 Ind Cas 851 (851) (All).
('11) 9 Ind Cas 223 (223) (DB) (Cal).

have come into existence at the same time affecting the same transaction should be read together and so construed as to avoid conflict as far as possible.(34aa)

(12a) In the absence of the deed evidencing a transaction, it is unsafe to infer its true nature from the bare reference to its terms contained in another deed.(34a) But where the original title deed evidencing a grant is not forthcoming, evidence of subsequent dealings with the property may be admissible to show the nature of the grant.(34b)

(13) An ancient document should not be construed in the light of present usages and modern understanding of the law.(35)

(14) The effect of deleting words in a printed form of mercantile contract is the same as if the deleted words had never formed part of the print at all.(36)

(15) Words which have acquired a technical meaning must be given that meaning,(37) but the meaning of words as used in English law should

('11) 36 Mad 68 (70) (DB). (A decision based on one document should not be applied to construe another document unless the language is identically the same).

('58) (1958) 2 W L R 186 (192). (Too close comparisons with words used in wills in other cases to be avoided.)

[*See also* 1959 S C 620 (626) [AIR V 46 C 85] : (1959) Supp (2) S C R 107. (In construing document, the usefulness of precedents is usually of a limited character; after all Courts have to consider the material and relevant terms of the document with which they are concerned and it is on a fair and reasonable construction of the said terms that the nature and character of the transaction evidenced by it has to be determined.)

1958 Pat 546 (546) [AIR V 45 C 175]. (For an interpretation of the terms of the compromise, it is fruitless to look into the reliefs claimed by the plaintiff in the suit. What has to be done is to look into the terms of the compromise itself.)

('54) ILR (1954) Mys 209 (210) : AIR 1955 N U C 949. (The way in which similar words have been construed in a decision may be of some help but in every case the document under consideration has to be read as a whole and the meaning of the words in question gathered from the document and the circumstances in which it was executed.)

1950 Pat 218 (220) [AIR V 37 C 54] : 29 Pat 209 (DB). (It is dangerous to construe one will by construction of more or less similar words adopted by Court in another case.)]

34aa. ('47) 52 Mys H C R 56 (62) (DB).

34a. 1942 P C 54 (56) [AIR V 29] : 69 Ind App 110 : ILR (1943) Mad 1 : ILR (1942) Kar (PC) 111. (Deed held not surrender, but partition deed.)

[*See also* 1946 Oudh 20 (22) [AIR V 33 C 10]. (Where specific reference is made in the second will to the previous one which has been only altered on certain points by the second will, the two wills ought to be read together.)]

34b. 1949 Pat 197 (202) [AIR V 36] (DB).

35. ('09) 4 Ind Cas 173 (174) (DB) (Cal).

[See however ('49) 28 Pat 664 (674) (DB). (Even evidence of modern usage is admissible for the purpose. As with respect to ancient deeds the state of the subject at their date can seldom, if ever, be proved by direct evidence, modern usage and enjoyment for a number of years is evidence to raise a presumption that the same course was adopted from an earlier period and so to prove contemporaneous usage and enjoyment at the date of the deed. (1859) 7 H L C 650 (684), *Waterpark* v. *Fennel*, Ref.)]

36. 1927 P C 195 (198) [AIR V 14] : 54 Ind App 317 : 55 Cal 1. (But words expressly added must be construed.)

('58) 1958-3 W L R 312 (320).

37.† ('97) 24 Cal 834 (846, 849) : 24 Ind App 76 (PC). (Unless some inconsistent words are used which make it perfectly clear that the technical meaning was not intended—Malik imports absolute estate.)

('76) 1 Mad 312 (328, 330) : 5 Ind App 61 (PC).

1954 Bhopal 17 (19) [AIR V 41 C 6]. (Technical meaning may be attributed only if the circumstances call for it.)

1952 Nag 55 (57) [AIR V 39] : ILR (1952) Nag 60. (Expression "choli bangdi" or "haldi kumkum" is a traditional set of words employed on occasion of gift made to a woman either at the time of her marriage or under coverture.)

('50) ILR (1950) Bom 568 (570). (Word "freehold" used in contract for sale of land — Same meaning as in English law has to be given, as far as Indian conditions permit.)

1950 Orissa 67 (71) [AIR V 37 C 12] : 51 Cri L Jour 683 : ILR (1949) 1 Cut 1 (SB).

1920 Cal 166 (166) [AIR V 7] (DB). (Malik imports absolute estate.)

1916 Mad 500 (500) [AIR V 3] (DB). (Kayam patta imports heritable estate.)

[*See* ('51) ILR (1951) 2 Cal 81 (85) : AIR 1955 N U C 848. (But decision cannot be based upon one single word which has acquired a

not be imported into the construction of Indian documents.(38)

(16) Where a document contains printed and written or typewritten conditions, the Court's duty is to reconcile its terms as far as possible but if that is not found possible the written conditions are to be given greater weight than the printed ones.(39)

See also the undermentioned cases.(40)

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technical meaning, without reference to other provisions contained in the deed.)]

[*See also* 1953 S C 7 (9) [AIR V 40 C 3] : 1953 S C R 232. (Words "malik kamil" (absolute owner) and "naslan bad naslan" (generation after generation) used in a will are descriptive of a heritable and alienable estate in the donee and they connote full proprietary rights unless there is something in the context or in the surrounding circumstances, which indicate that absolute rights were not intended to be conferred.)

1952 Nag 220 (223, 224) [AIR V 39]: ILR (1949) Nag 581 (DB). (Certain phrases have now acquired technical significance and if they are used, that normally concludes the matter—They are phrases like "subject to", "condition precedent" and so forth. But even then, it is a matter of construction and these words are not necessarily crucial.)

1949 Mad 690 (691, 692) [AIR V 36 C 307](DB). (Technical words, or words of known legal import, must have their legal effect, even though the testator uses inconsistent words, unless those inconsistent words are of such a nature as to make it perfectly clear that the testator did not use the technical terms in their proper sense.)]

38. 1928 P C 33 (34) [AIR V 15] : 52 Bom 176 : 55 Ind App 74.

1949 F C 64 (68) [A I R V 36 C 11] : 1948 F C R 239 : I L R (1950) 1 Cal 17. (But a rule of construction which is not based on any technicality of English law and is helpful to the Court in getting at the substance of the intention of the parties can certainly be invoked even in construing a Hindu will.)

1950 Mad 112 (113) [AIR V 37 C 56]. (In construing a will of an ordinary agriculturist in a mofussil district prepared without the aid of any persons qualified to give legal assistance the principles of English Courts should not be strictly applied. The primary duty of a Court is to ascertain the testator's intention. In doing so, Courts are entitled and bound to bear in mind other matters than merely the words used.)

1942 All 402 (403) [A I R V 29] : ILR (1942) All 871 (DB).

† 1936 Pat 450 (453) [AIR V 23] : 15 Pat 680 (DB).

[*See also* ('50) I L R 1950 Bom 568 (570). (Though the term 'free-hold' has no well defined meaning in Indian law where the term has been used in a contract for sale of land the Court must assign to it a legal meaning as closely resembling the meaning of the term in England as Indian conditions permit).]

39. 1949 Cal 231 (233) [AIR V 36 C 65] : I L R (1945) 1 Cal 87. (Clause in contract whether printed, typewritten or in manuscript makes no distinction in its legal effect—Prima facie all are of equal effect—Where, however, printed and written clauses are inconsistent, greater force must be given to the manuscript.)

† 1942 Mad 139 (141) [A I R V 29] : ILR (1942) Mad 33 (DB).

† 1939 Bom 435 (440) [A I R V 26] : ILR (1939) Bom 454.

1919 Pat 252 (252) [AIR V 6].

40. 1968 S C 39 (42) [AIR V 55 C 11]. (Grant and exception out of it — Exception must be construed in favour of grantee — Grant clear but exception so framed as to be bad for uncertainty — Grant is operative and the exception fails.)

1964 S C 24 (26, 27) [A I R V 51 C 3] : (1964) 2 S C R 885. (Grant of soil of village including bed of the river does not necessarily include grant of title to the flowing water of the river.)

1951 S C 293 (299, 300) [A I R V 38 C 50] : 1951 S C R 1125 : ILR (1952) 2 Cal 209. (Deed of indenture executed by widow and her adopted son M creating trust in favour of deity—Widow constituting herself first shebait for her lifetime — After her death her adopted son to be shebait—After his death his wife K and after her death heirs of adopted son to act as shebaits —In case adopted son were to die without issue after death of his wife K, shebaitship to devolve upon adopted son's heirs according to Hindu Law—Upon K's death adopted son marrying A —Adopted son dying leaving minor son D by K and widow A—Held word 'heirs' had been used in its general sense and could not be limited to issue only and extended to all persons entitled to succeed under law—A's adopted son left a son D—Contingency contemplated did not arise —A was entitled to joint shebaitship with D in respect of the debutter properties—Reversing AIR 1949 Cal 278 and appellate judgment of Calcutta High Court dated 19-5-1950 confirming it.)

1950 P C 105 (108) [AIR V 37 C 37]. (Grant comprising whole of what was then regarded as an inam village — Grant should be held to be one of whole inam village — That the village so granted had once formed part of a larger village is irrelevant consideration.)

(1966) 8 Law Rep 791 (797, 798) (DB). (Deed prescribing family debts should be jointly incurred by all and they should not be binding on joint family property. Deed also providing for arrangement to prevent wastage of family property—Held deed was a family arrangement and not a partition deed.)

1963 Cal 325 (330) [A I R V 50 C 58] : 67 Cal W N 110 (DB). (Ambiguous words are to be taken most strongly against covenantor.)
1962 Pat 28 (34) [A I R V 49 C 10] (DB). (Not only in statutes but also in documents, the words "and" and "or" are sometimes used as synonyms and in the same sense.)
('63) ILR (1963) 2 Ker 65 (70) (DB). (At least so far as the Travancore area is concerned, there is a presumption, when a Marumakkathayee governed by the notions and concepts of the Marumakkathayam system of law executed a gift in favour of a Marumakkathayee, that the donor intended to benefit not merely the donee *eo nomine* mentioned in the gift deed, but his intention was that the property should be enjoyed by the donee and his or her tavazhi with all the incidents of tarwad property.)
('61) I L R (1961) 2 Ker 514 (516). (Claims of parties based on lease deeds executed by them —Their rights to be adjudged in the light of description of properties in those documents— Court should not give the go-by to every recital therein and leave the parties at large.)
(1960) 2 Mad L J 13 (16) (DB). (Construction of deeds — Applicability of maxim *expressio unis est exclusio ulterius* is not absolute. Its applicability depends on intention of parties as appears upon face of instrument.)
1960 Pat 420 (422) [A I R V 47 C 145] (DB). (Sale deed — Sale of a stated area out of two separate plots taken together – Deed not specifying the area sold in each plot—Deed not void for uncertainty — Purchaser can select the portion which he wants in each plot.)
1959 All 440 (449) [AIR V 46 C 111]. (Genuine transaction intended to be acted upon, cannot be assailed on the ground that the motive of the parties was to avoid a particular statute.)
1959 Madh Pra 151 (161) [AIR V 46C 52] (FB). (Where two businessmen, both intelligent and shrewd, enter into a contract for transfer of shares in managing agency business, it is difficult to conceive that they left the question of the price to be paid for the shares, which was one of the essentials of the transfer, undetermined.)
1957 Pat 278 (284) [AIR V 44 C 90] : 36 Pat 471 (DB). (Facts fully set out in document and admitted—Party's opinion about legal effect of facts is of no consequence in construing document.)
1956 Pat 457 (463, 464) [A I R V 43 C 112] (DB). (General words of a release in a compromise do not mean release of rights other than those then put up and have to be limited to the circumstances which were in the contemplation of the parties when it was executed.)
1955 Cal 510 (511, 512) [A I R V 42 C 149]. (Where it is recorded in the record of rights against a khas tank of a landlord that the tank is to supply water for irrigation to some particular C. S. plots, the entry should be construed as recording a grant.)
1954 Cal 480 (482, 483) [AIR V 41 C 163] : ILR (1955) 2 Cal 102 (DB).
1953 All 705 (706) [A I R V 40 C 343] (DB). (When an owner of a grove sells the grove by declaring that he was selling it with every right that he possessed therein, it follows that his right to the land is also conveyed to the vendee unless it is expressly reserved by him.)
1952 Trav-Co 277 (279, 281) [AIR V 39] : ILR (1951) Trav-Co 840 (DB). (Deed of "Anubhava udampadi" — Whether maintenance deed or outright partition — Tests of construction laid down—Deed held out and out partition deed.)
1951 Pat 206 (207) [AIR V 38 C 39] : 30 Pat 86 (DB). (In construing a will or a settlement which makes a provision for children subject to a prior life interest, in the case of ambiguity, the Court must presume in favour of that construction by which the children will take a vested interest at twenty-one or on marriage.)
1947 Bom 98 (102) [A I R V 34 C 33]. (Contract in writing — Ambiguities patent—Grammatical and ordinary meaning of words used taken as a whole and surrounding circumstances which must have been present to the minds of parties, must be considered—If this produces an absurdity or a repugnancy with the rest of the instrument, Court can depart from it so far as may be necessary to avoid that repugnancy but no further—Court is only entitled to imply a term if it is necessary to give the contract business efficacy but not otherwise.)
1947 Mad 137 (144) [AIR V 34 C 74] : ILR (1947) Mad 272 (DB). (Marumakathayam law — Gift to wife alone or some children alone—Donee cannot be presumed to take it with incidents of tarwad property — Presumption will arise only if gift was in favour of wife and children or in favour of all children who by themselves form a tavazhi.)
1946 Cal 55 (61) [AIR V 33 C 17] : ILR (1946) 1 Cal 1 (DB). (Document (will) in particular language — It is not correct to go by translation of individual words as given in dictionary— Exact effect of language used should be translated.)
1947 Nag 210 (211) [AIR V 34 C 62] : ILR (1947) Nag 740 (DB). (Per Bose J.)—Terms implied by law need not be expressly mentioned—Where statute implies conditions which are to apply unless expressly abrogated those conditions will apply although not expressly included, unless expressly abrogated.)
1944 Oudh 65 (70) [A I R V 31] : 19 Luck 320 (DB). (Deeds of family settlements are of a nature peculiarly their own and the rules of interpretation which would be applicable to pure deeds of transfer cannot be applied in case of such deeds.)
1941 Lah 416 (418) [AIR V 28]. (Sale of share in adna malkiyat with all rights appertaining thereto passes also shamilat.)
1941 Nag 102 (103) [AIR V 28] : ILR (1942) Nag 263 (DB). (Case law not very helpful in construing documents.)
1941 Oudh 507 (508) [AIR V 28]. (Transferor possessing proprietary and under-proprietary rights—Transfer of rights includes under-pro-

9. A transfer of property may be made without writing in every case in which a writing is not expressly required by law.

Oral transfer.

Synopsis

1. Law before the Transfer of Property Act.
2. Scope of the section.
3. Section does not affect any rule of Muhammadan law.
4. "Transfer of property." See S. 5.
5. Transfers expressly required by this Act to be in writing.
6. Transfers expressly permitted by this Act to be made without writing.
7. Other transfers of property.
8. Creation of easements.
9. Gifts to religious and charitable endowments.
10. Partition of property.
11. Family arrangement.
12. Release, relinquishment and surrender.
13. Award.
13a. Charge.
14. "Writing."

1. Law before the Transfer of Property Act. — Before the passing of this Act, parties were governed, in the presidency towns, by their *personal law* as to certain classes of cases, and by the rules of justice, equity and good conscience in certain other classes of cases. In the mofussil, outside the presidency towns, they were governed by their personal law.(1)

The Hindu law did not require any writing for the validity of a transfer of property.(2) Indeed there was no transaction which, under the Hindu law, absolutely required a writing.(3) But there was a difference of opinion as to whether delivery of possession of the property transferred was necessary.(4) The Muhammadan law also

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prietary rights in absence of reservation.)
1941 Rang 244 (245) [AIR V 28]. (What English words together form the equivalent of a given series of words of other language is a question of fact while what in particular circumstances and a given context, a given set of English words connotes, is generally a question of law.)
1940 Oudh 415 (415) [AIR V 27] (DB). (Sale of share in parent 'patti' with all internal and external rights includes transfer of proportionate share of 'shamilat patti.')
1940 Oudh 118 (118) [A I R V 27] : 15 Luck 288. (Sale — Person buying portion of another person's share in village—There is no presumption that he buys corresponding share in house of his vendor in village.)
1940 Pat 512 (513) [AIR V 27] (DB). (It is not very profitable to attempt to construe a deed by reference to authorities.)
1915 Mad 795 (797) [A I R V 2] : 38 Mad 141 (DB). (A conveyance of land to be held and enjoyed along with "appurtenances" is wide enough to convey a way which never existed as an easement, but which when all the parcels were in the possession of the grantor, was used for the convenience of the whole tenement.)
(1913) 83 L J Ch 263 (263) : (1913) 3 Ch 39 (50), Eastwood v. Ashton. (Property accurately described by dimensions—Plan attached including additional strip of land—Plan should not be rejected as *falsa demonstratio*.)

Section 9 — Note 1

1. Ilbert, Government of India, 3rd Edn., pp. 279, 280.

2. ('77) 26 Suth W R 55 (63) : 3 Ind App 259 (PC). (No special mode of transfer is required under Hindu law — Even a verbal transfer will do.)
('07) 3 Nag L R 72 (75). (Case from Berar before the Act was applied to Berar.)
('97) 19 All 524 (526) (DB). (It is sufficient that the transferor has done an act which has necessarily resulted in the transfer of the estate to the transferee.)
('78) 1 Bom 91 (93, 94) (DB). (Resigning certain miras lands in favour of other persons.)
('72) 18 Suth W R 293 (294) (DB). (Verbal lease.)
('69) 1 N W P H C R 59 (61) (DB). (Waiver of right.)
('68) 9 Suth W R 351 (352) (DB). (Sale.)
('68) 4 Mad H C R 98 (100) (DB). (Creation of easement.)
(1864) 2 Mad H C R 26 (27) (DB).
(1862) 1 Mad H C R 100 (100) (DB). (But writing was regarded as of additional force and value.) [*See also* ('85) 7 All 482 (485) (FB). (Per Mahmood, J.—(Obiter.)]

3. (1864) 2 Mad H C R 37 (39) (DB). (Case of oral will.)

4. In the following cases it was held that delivery was necessary.
(1856) 6 Moo Ind App 267 (278, 279) (PC). (Grantor's law applied to the grant.)
('82) 6 Bom 193 (200) (FB).
† ('82) 6 Bom 168 (175) (FB). (It is general but not invariable rule.)
('81) 5 Bom 143 (150). (Sale.)
('72) 9 Bom H C R 121 (128) (SB). (Transfer of land.)

did not require a transfer to be made in writing.(5) In the case of sales it did not even require delivery of possession but title passed by mere declaration and acceptance.(6) In cases of gifts it required delivery of possession.(7)

It was held by their Lordships of the Privy Council in the undermentioned case(8) that an *oral mortgage* of immovable property made outside the presidency towns before this Act came into force was a valid transaction. In another case(9) an oral transfer of the right of redemption, made outside the presidency towns was held by the Privy Council to be valid. See also the undermentioned cases.(10)

2. Scope of the section. — It is a general principle of law that everything is to be taken as permissible unless there is a prohibition against it.(1) Where, therefore, a transaction is not required by law to be in writing, it may be brought about without writing. This section is an enactment of this general principle in so far as *transfers of property* are concerned, and seems to have been inserted *ex abundanti cautela* in view of a different principle as to transfers of property, adopted in England. Under the Statute of Frauds in England the *general rule* adopted was that all transfers of property *should be in writing*, while the general rule and policy adopted by the Legislature in this country, as shown by this section, is that all transfers of property *may be made without writing* unless they are expressly required by law to be in writing.(2)

The *test* therefore in this country, to determine whether a transaction (be it a transfer or not) can be made without writing is to see if it is *expressly* required by law to be in writing.(3) If the transaction is a "transfer of property" and there is no express

('67) 4 Bom H C R (A C) 31 (34) (SB). (Gift.)
('81) 5 Bom 143 (150). (Sale.)
('81) 7 Cal 753 (764, 765) (DB).
('77) 2 Bom 299 (319) : 1880 Bom P J 57 (DB). (Sale of a house.)
('73) 10 Bom H C R 491 (493) (DB).
(1862) 1 Mad H C R 100 (100) (DB).
[*The following cases held that delivery was not necessary*].
('89) 1889 Bom P J 42 (DB)
('87) 14 Cal 446 (448) (DB). (It is doubtful if Hindu law required delivery of possession to constitute gift of immovable property. But gift of movable property does require delivery of possession.)
('86) 1886 Bom P J 33 (DB).
('83) 6 Mad 404 (406) (DB).
('82) 5 Mad 6 (8) (DB).
('75) 23 Suth W R 131 (131) : 14 Beng L R 307 (DB).
('74) 22 Suth W R 99 (100) (DB). (Conveyance made by a person in possession and enjoyment for long—Conveyance without possession, held, valid.)
('71) 3 N W P H C R 2 (3) (DB). (Purchaser from the guardian of a minor must show that he purchased bona fide.)
(1863) 1 Bom H C R 19 (20) (DB).
(1863) 1 Bom H C R 5 (5) (DB). (Sale.)

5. ('68) 9 Suth W R 351 (352) (DB). (Sale.)

6. ('94) 16 All 344 (353) (FB). (Per Banerji, J.)
('75) 23 Suth W R 131 (131) : 14 Beng L R 307 (DB). (Under the Mahomedan law, delivery of possession is not necessary to the transfer of ownership of either movable or immovable property except in the case of gifts.)

7. ('83) 9 Cal 138 (142) (DB).
('71) 16 Suth W R 88 (90) (DB). (Even though a deed may have been executed.)
[*See* ('31) 3 All 266 (271, 275) (PC). (Verbal gift with delivery of possession is valid gift under Muhammadan law.)]
Also see S. 123, Note 4.

8. 1916 P C 41 (43) [AIR V 3] : 38 All 494 : 43 Ind App 264.
Also see S. 2, Note 5 and S. 59, Note 2.

9. 1914 P C 27 (29) [AIR V 1] : 42 Cal 801 : 42 Ind App 1.

10. ('87) 14 Cal 109 (119) : 13 Ind App 160 (PC). (Case before T. P. Act — Surrender of permanent lease, if regarded as a transfer, need not be in writing.)
1915 Oudh 177 (179) [AIR V 2] (DB). (Oral sale before T. P. Act valid.)
('09) 2 Ind Cas 662 (668) (DB) (Cal). (Conveyance of property in mofussil.)

Section 9 — Note 2

1. ('89) 11 All 267 (287) (FB). (This principle applies equally to substantive and adjective law.)

2. 1965 Bom 74 (75) [AIR V 22 C 18] : I L R (1964) Bom 702.
('49) 1949 Trav-Co L R 18 (18, 19).
† 1937 Mad 882 (892) [AIR V 24] : I L R (1937) Mad 638 (FB).

3. 1937 Mad 882 (892) [AIR V 24] : I L R (1937) Mad 638 (FB). (Transaction not falling within S. 105 of the Transfer of Property Act held to be valid without writing.)

provision of law requiring it to be in wrintig, *this section* will enable it to be made without writing.(4) If, on the other hand, the transaction is not a "transfer of property" and there is no express provision of law requiring it to be in writing, the *general principle* referred to above will enable it to be validly made without writing. The general principle would also be applicable in the States in which this Act does not apply. Thus, in the Punjab an alienation of property need not be evidenced by any writing as there is no express provision requiring it to be in writing. It is sufficient if the person entitled to the property does an act which necessarily results in the transfer.(5) The law in Travancore also permits oral sales of immovable property.(5a)

See also the undermentioned cases.(6)

3. Section does not affect any rule of Muhammadan law. — Section 2 declares that nothing in Chap. II of this Act (and this section occurs in that chapter) shall be deemed to affect any rule of Muhammadan law. Under the Muhammadan law, writing is not essential to the validity of a gift, either of movable or of immovable property, which is complete and valid on proof of a declaration of gift by the donor, an acceptance of the gift, express or implied by or on behalf of the donee, and delivery of possession over the subject of the gift by donor to the donee. But whether a gift for consideration can be made orally depends upon the answer to the question whether it does or does not amount to a sale as defined in S. 54 which is in Chap. III and applies to sales by Mahomedans.(1) (See S. 54, Note 4).

4. "Transfer of property."—See section 5.

5. Transfers expressly required by this Act to be in writing. — The following transfers of property are expressly required by this Act to be in writing:

(1) Sales of tangible immovable property of the value of Rs. 100 or upwards or of a reversion or other intangible thing—Section 54.

(2) Simple mortgages of specific immovable property for any amount, and other mortgages of such property (other than mortgages by deposit of title deeds) securing a sum of Rs. 100 or upwards—Section 59.

(3) Leases of immovable property from year to year or for any term exceeding one year or reserving a yearly rent—Section 107.

(4) Exchanges of immovable property of the value of Rs. 100 or upwards—Section 118 read with S. 54.

(5) Gifts of immovable property—Section 123.

(6) Transfer of actionable claims—Section 130.

[*See also* 1918 Low Bur 6 (6) [AIR V 5] (DB). (Oral power-of-Attorney; empowering agent to transfer interest in immovable property worth more than Rs. 100—There is nothing in the Transfer of Property Act or in the Registration Act to show that it must be by a registered document.)].

4. 1937 Mad 882 (886) [AIR V 24] : ILR (1937) Mad 638 (FB). (Per Stone, J., in the Order of Reference.)

5. 1935 Lah 821 (823) [AIR V 22] (DB). (Mortgage by deposit of title deeds can be made orally.)

1 930 Lah 9 (11) [AIR V 17] (DB).

1 1916 Lah 54 (55) [AIR V 3]: 1916 Pun Re No. 32 (DB). (Hypothecation of movable property.)

5a. ('49) 1949 Trav-Co L R 18 (19).

6. 1941 Lah 407 (410) [AIR V 28] : I L R (1942) Lah 79 (FB). (Oral transfer of any value is valid outside municipal and cantonment limits in the Punjab.)

1914 Low Bur 62 (62) [AIR V 1]. (Partition may be made orally.)

('13) 6 Low Bur Rul 170 (172) (DB). (Partition did not require writing.)

('09) 5 Nag L R 70 (72). (Case from Berar before Transfer of Property Act was extended to Berar.)

('07) 29 All 267 (269, 270). (Mahomedan law—Gift.)

Section 9 — Note 3

1. 1951 All 86 (88, 89) [AIR V 38 C 12] : I L R (1952) 1 All 477 (FB).

In the first five cases referred to above, it may further be noted that in order that title may pass under the transfer, there must be not only writing but *registration* thereof; and title to the property cannot pass in any other way.(1) It may be useful also to remember in this connection that the Indian Registration Act, 1908, does not purport to deal with the question what transfers should, in order to be valid, be by a registered document. It merely provides that in the case of certain transactions which *have been reduced to writing* such writing would not be operative and could not be tendered in evidence unless it is registered according to the provisions of that Act.

6. Transfers expressly permitted by this Act to be made without writing.—Where a transfer is *expressly permitted* by this Act to be effected in a mode other than writing it is obviously unnecessary to resort to this section in order to enable such transfer to be effected without writing.

The following transfers are expressly permitted by this Act to be effected without writing :

(1) Sales of tangible immovable property of a value less than Rs. 100 — Section 54.

(2) Mortgages by deposit of title deeds and mortgages (other than simple mortgages) where the principal money secured is less than Rs. 100 — Section 58, clause (f) and S. 59.

(3) Leases of immovable property not being one from year to year or for any term exceeding one year or reserving a yearly rent—Section 107.

(4) Exchanges of immovable property of a value less than Rs. 100—Section 118 read with S. 54.

(5) Gifts of *movable* property—Section 123.

7. Other transfers of property.—In *Aryaputhira* v. *Muthukumaraswami*,(1) Mr. Justice Sadasiva Aiyar expressed the view that all transfers of immovable property *inter vivos* were intended to be included in the one or the other of the transactions coming under the heads "sale", "mortgage", "lease", "exchange" and "gift" dealt with by this Act. The implication of the view was that a transaction would not operate to transfer property unless it could be regarded as falling within one or the other of the five said categories. In *Bishan Dial* v. *Ghaziuddin*,(2) Mr. Justice Banerji also doubted whether, since the passing of the Transfer of Property Act, 1882, ownership can be transferred otherwise than under the provisions of that Act.

The view, above stated, has, however, not been followed by the High Court of Madras in later cases. In *Madan Pillai* v. *Badrakali Ammal*,(3) it was assumed by a

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Section 9 — Note 5

1. 1941 Nag 5 (6) [AIR V 28] : ILR (1941) Nag 615 (DB). (Transfer of mortgagee rights requires writing.)

1933 Pat 264 (266) [AIR V 20] : 12 Pat 616 (DB). (Title to land cannot pass by mere admission where the statute requires a deed.)

1928 Bom 250 (252) [AIR V 15] : 30 Bom L R 451 (DB).

1924 Pat 185 (186) [AIR V 11]. (Title to land cannot pass by admission when statute requires deed.)

[*See also* ('13) 36 Mad 564 (569) (DB). (After the T. P. Act, no waiver or transfer of rights can be recognized in the case of immovable property in the absence of a registered instrument.)]

[But see ('10) 8 Ind Cas 443 (443) (Low Bur). (Oral sale with possession held, good — The decision cannot be supported unless the Court intended to apply the doctrine of part performance.)]

Section 9 — Note 7

1. 1914 Mad 489 (491) [AIR V 1] : 37 Mad 423 (DB).

[*See also* 1915 Mad 103 (104) [AIR V 2]: 43 Mad 849 (DB). (In this case also Sadasiva Aiyar, J., reiterated this view.)]

Also see S. 5, Note 2.

2. ('01) 23 All 175 (181) (DB).

3. 1922 Mad 311 (313) [AIR V 9] : 45 Mad 612 (FB).

Full Bench of the High Court of Madras that there can be a transfer of property not falling within any of the said five categories. And in *Fowler* v. *Secretary of State of India*,(4) it was held that the Act is not exhaustive of all modes of transfer and that in cases of transfer, not covered by the special provisions contained in the Act, it is competent to the parties to convey rights other than in the mode prescribed by the Act.

By virtue of the provisions of this section such transfers of property can be made without writing if they are not required to be in writing by any express provisions of law.

The following are instances of transfers of property which have been held to be capable of being effected without writing :

(1) A transfer of land by a husband to his wife to be enjoyed by her during her life-time in discharge of her claim for future maintenance.(5)

(2) A grant of land by way of *guzara* unless it amounts to a gift or lease.(6)

(3) A hypothecation of *movable* property.(7)

See also the undermentioned cases.(8)

8. Creation of easements. — As to whether the *creation* of an easement is a "transfer of property" within the meaning of this Act, see Note 7 on S. 54. But whether a transfer of property or not, there is no provision of law requiring it to be in writing. It follows that an easement can be created without writing either under the provisions of this section or on general principles of law.(1)

See also Preamble, Note 5.

9. Gifts to religious and charitable endowments. — A gift to a Hindu idol is not a transfer to a *living person* and is not a "transfer of property" within the meaning of this Act (See S. 5). There is, however, no provision of law apart from this Act requiring gifts to be made in writing, and on general principles need not be made in writing.(1) On the same principle a Muhammadan *wakf* need

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4. ('21) 13 Mad L W 230 (245). (A relinquishment or surrender by a Government ryot to the Government of the properties included in his patta is neither a mortgage nor a sale, nor a gift nor a lease as defined in the Transfer of Property Act and is not by law required to be in writing or in any of the modes prescribed by the Act.)

[*See also* 1919 Mad 1113 (1114, 1115) [AIR V 6] (DB). (Mode of transfer by an award is not covered by the T. P. Act and hence oral award can pass title.)]

5. 1914 Nag 54 (54, 55) [AIR V 1]: 10 Nag L R 111. (The transfer in question is one not specifically dealt with by the T. P. Act — The question must therefore be decided under the Hindu law — No transaction need be in writing under that law — Therefore the grant, if proved by oral evidence, would be perfectly valid.)

6. 1919 Oudh 241 (246, 247) [AIR V 6]: 21 Oudh Cas 360 (DB). (Per Kanhaiya Lal, J. C., Daniels, A. J. C. doubting.)

7.† 1916 Bom 77 (80) [AIR V 3].

8. ('59) 1959-2 Mad L Jour 502 (506). (A contract to settle property in consideration of marriage need not be in writing.)

1952 Bom 425 (434) [AIR V 39] (DB). (To enable the parties to come to an agreement to treat a sale as a mortgage by a subsequent agreement no writing need be executed by and between the parties.)

('49) 1949 Trav-Co L R 18 (21). (Agreement to sell immovable property need not be in writing.)

1936 Cal 770 (771, 772) [AIR V 23]. (Lease of land, not covered by S. 107, T. P. Act, can be made orally.)

1927 Pat 7 (8) [AIR V 13] : 6 Pat 245 (DB). (A sale of right to turn of worship is not a sale of ownership in immovable property and need not be in writing and registered.)

1926 Nag 9 (9) [AIR V 13]. (Agricultural lease need not be in writing.)

1919 Mad 547 (548, 549) [AIR V 6] (DB). (Assignment of equitable mortgage need not be in writing.)

Section 9 — Note 8

1. 1926 Mad 543 (544) [AIR V 13]. (Creation of an easement is not a transfer.)

1929 Mad 79 (80) [AIR V 16]. (The transfer of an existing easement may stand on a different footing. AIR 1926 Mad 543, followed.)

† 1917 Cal 681 (685) [AIR V 4]. (Creation of an easement is a transfer, but outside T. P. Act.)

('09) 31 All 612 (62 , 622) (DB). (Creation of an easement is not a transfer.)

Section 9 — Note 9

1. ('55) ILR (1955) Mys 383 (385) (DB). (Hindu Religious and Charitable Endowment — Dedi-

not be in writing.(2)

10. Partition of property. — Whether a partition of property is a "transfer of property" within the meaning of this Act, see Note 4 on S. 5. But whether a "transfer of property" or not, it need not be in writing inasmuch as there is no provision of law either in this Act or apart from it which requires it to be in writing, and can, therefore, as seen in Note 2, be made without writing.(1) It has been held by their Lordships of the Supreme Court that a partition under Mitakshara in the sense of a mere severance of the joint status of the members of the coparcenery may be effected orally or by writing ; even where the partition takes place by metes and bounds it may be effected orally but if reduced to writing will be within the mischief of S. 17 (1) (b) of the Registration Act.(2)

11. Family arrangement. — The expression "family arrangement" has obtained a somewhat technical meaning in law. It refers to an arrangement between members of a family, on a compromise of disputed or doubtful claims, or for the *preservation of the family property.*(1) See also S. 5, Note 4.

In either case "it is based on the assumption that there was an *antecedent title of some kind* in the parties and the agreement *acknowledges and defines* what the title is." In such cases the consideration which each party receives is the settlement of disputes ; the real consideration is not the sacrifice of a right but the abandonment of a claim. In no sense of the term is there any *alienation* of the property or the conveyance of any title by one party to another in such cases. It is therefore not a "transfer of property" at all. Such a transaction is not required by any law to be in writing, and on general principles, though not under this section, it may be made without writing.(2)

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cation of property —Writing not necessary.)
1930 Pat 610 (613) [AIR V 17] (DB).
1924 Nag 254 (255) [AIR V 11] : 20 Nag L R 60.
†1919 Mad 809 (811) [AIR V 6]: 42 Mad 440 (DB)

2. 1936 All 202 (204, 205) [AIR V 23] (DB).

Section 9 — Note 10

1. 1966 Mad 419 (421) (Pr 9) [AIR V 53 C 134].
† ('09) 31 All 412 (422, 423) : 36 Ind App 71 (PC).
1931 Cal 223 (229) [AIR V 18] : 58 Cal 136 (DB). (Partition is a transfer.)
1924 All 304 (304) [AIR V 11].
1915 Mad 103 (104) [A I R V 2] : 43 Mad 849 (DB).
('10) 34 Mad 72 (73) (DB). (Co-widows can effect absolute division of property orally.)
('09) 3 Ind Cas 247 (250) (DB) (Cal). (25 Cal 210 and 7 Suth W R 35 (PC), Relied on.)
† ('98) 25 Cal 210 (213) (DB).
Also see S. 2, Note 4.

2. 1958 S C 706 (713) (Pr 11) [AIR V 45 C 94] : 1959 S C R 479.

Section 9 — Note 11

1. ✠ 1943 All 101 (104, 105) [AIR V 30] : ILR (1943) All 411 (FB). (Arrangement may bind the parties to it if it is for the benefit of the family or for the maintenance of peace and harmony and the avoidance of future discord or for the preservation of the property. AIR 1930 All 498 and AIR 1926 All 194, Overruled.)
✠('09) 3 Ind Cas 247 (251) (DB) (Cal).
[*See also* 1935 Rang 355 (357) [AIR V 22].

2. ✠ 1943 All 101 (104) [AIR V 30] : ILR (1943) All 411 (FB). (But if a family arrangement dealing with immovable property worth more than Rs. 100 is reduced to the form of a document for the purpose of formally recording the arrangement and the document is not registered, the absence of registration will make the document inadmissible in evidence and is fatal to the proof of the arrangement indicated in the document.)
1958 Andh Pra 147 (155) [AIR V 45 C 46] (DB). (Generally by such an arrangement it is intended to set at rest competing claims amongst the various members of the family to secure peace and amity. The compromise is on the footing that there is an antecedent title of some sort in the parties and the settlement acknowledges and defines title of each of the parties. In such an event the settlement need not be reduced to writing and even if it is embodied in a document it need not be registered. AIR 1955 S C 481 and ILR 33 All 356 (PC), Rel. on.)
1928 All 641 (643) [AIR V 15] : 51 All 79 (FB).
1943 Nag 92 (93, 94) [AIR V 30] : ILR (1944) †Nag 335.
1935 Rang 355 (357) [AIR V 22].
† 1930 All 498 (502) [AIR V 17] (DB).
1921 All 248 (250) [AIR V 18] : 43 All 1 (DB).

But where a transaction amounts, not merely to a *recognition of pre-existing title*, but to a transfer of clear title from one person to another, and such transfer is by law expressly required to be in writing, the requirements of the law cannot be evaded or displaced by the parties choosing to describe the transaction as a "family arrangement."(3)

12. Release, relinquishment and surrender. — As to whether and when a release, relinquishment or surrender of an interest or right is a "transfer of property" within the meaning of this Act, see Note 4 on S. 5. But whether a transfer or not, there is no provision of law requiring such a transaction to be in writing. On general principles, if not by virtue of this section, it can be effected without writing. Thus, a release of certain items of mortgaged property from the mortgage claim,(1) or a surrender of the lease-hold interest by the lessee in favour of the lessor,(2) or a surrender by a Hindu widow of her interest in favour of the next reversioners(3) may be made without writing. See also the undermentioned cases.(4) It is, however, only a *limited* owner like a Hindu widow that can surrender or relinquish so as to accelerate the next reversioner's succession. A *full* owner can only transfer by sale or gift which under the Act, can be made only by a registered instrument.(5)

13. Award. — A *bona fide* award affecting immovable property, whether by way of transfer or otherwise, is not anywhere required to be in writing and need not consequently be in writing.(1)

13a. Charge. — As to whether a charge can be created orally, see S. 100, Note 16.

14. "Writing." — The word "writing" has not been defined in this Act, and consequently, the definition thereof given in the General Clauses Act, 1897, will apply. Under S. 3, cl. (65) of the latter Act, "expressions referring to 'writing' shall be construed as including references to printing, lithography, photography and other modes of representing or reproducing words in a visible form."

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3. 1930 All 498 (502) [AIR V 17] (DB).
[*See also* ('03) 13 Mad L Jour 500 (500) (DB). (Transfer made in compromise of claim—Writing is not necessary, though a transfer of immovable property.)]

Section 9 — Note 12

1. 1935 Mad 113 (114, 115) [AIR V 22] : 58 Mad 371 (DB). (Contract to release between mortgagee and stranger need not be in writing.)
1926 Nag 21 (24) [AIR V 13] : 23 Nag L R 86.
('06) 33 Cal 613 (622) (DB). (Impliedly overruled on another point in AIR 1942 P C 50.)

2. † 1919 Cal 694 (695) [AIR V 6] (DB). (It can be inferred from the acts of the parties.)
1918 Cal 233 (233) [AIR V 5] (DB).
('13) 19 Ind Cas 124 (124) (DB) (Cal).
('02) 6 Cal W N 905 (911) (DB).
Also see S. 111, Note 9.

3 1965 Bom 74 (76) [AIR V 52 C 18] : ILR (1964) Bom 702. (Hindu mother can relinquish or abandon her interest in joint family property orally in favour of her sons.)
1952 Pat 67 (68) [AIR V 39] (DB).
1927 Nag 44 (45, 46) [AIR V 14]: 22 Nag LR 169.

4. 1935 Rang 448 (449) [AIR V 22]. (Release by joint tenant of his interest in favour of other joint tenant.)
1933 All 854 (856) [AIR V 20] (DB). (Relinquishment of beneficial interest in property is not transfer of ownership.)
1931 Cal 223 (229) [AIR V 18] : 58 Cal 136 (DB). (Certain transactions e. g. partition, surrender, release, are not required to be in writing but if they are in writing, the instrument is required to be registered.)
('21) 13 Mad L W 230 (245). (Relinquishment by Government ryot to Government of properties included in his patta need not be in writing.)

5. 1920 Nag 265 (266) [AIR V 7].

Section 9 — Note 13

1. 1931 Sind 107 (109) [AIR V 18] : 25 Sind L R 405. (Transfer of interest in immovable property does not in all cases necessarily require registered document under the Act.)
† 1927 Sind 206 (208) [AIR V 14] (DB).

10. Where property is transferred subject to a condition or limitation absolutely restraining the transferee or any person claiming under him from parting with or disposing of his interest in the property, the condition or limitation is void, except in the case of a lease where the condition is for the benefit of the lessor or those claiming under him : provided that property may be transferred to or for the benefit of a woman (not being a Hindu, Muhammadan or Buddhist), so that she shall not have power during her marriage to transfer or charge the same or her beneficial interest therein.

Condition restraining alienation.

Synopsis

1. Scope of the section.
2. Section does not apply to grant under the Government Grants Act (XV of 1895).
3. "Is transferred."
4. "Subject to a condition or limitation."
5. Condition, limitation and covenant.
6. "Absolutely restraining."
7. Condition restraining alienation except in favour of a specified person.
8. Restraint on alienation for a particular period.
9. Alienation restricted to a specified class of persons.
10. Prohibition of alienation to specified persons.
11. Condition restraining transfer of company's shares.
12. "From parting with or disposing of his interest."
13. Condition against alienation in a lease.
14. Condition against alienation in gifts.
14a. Condition against alienation in religious endowments.
15. Condition in decrees and awards restraining alienation.
16. Agreements or covenants not to alienate.
17. Covenants against alienation in leases.
18. Agreement by mortgagor not to alienate mortgaged property.
19. Proviso—Restraint on anticipation.

1. Scope of the section.—The general principle embodied in S. 8 is that a grant *prima facie* carries with it all the legal incidents thereof, but that it may be modified according to the wish of the parties, the maxim being *modus et conventio vincunt legem*—the form of agreement and the convention of parties overrule the law.(1) Where a grant does not carry with it all the legal incidents thereof, but is modified by conditions and restrictions, it is a conditional or *restricted transfer*. Where it carries with it all the legal incidents thereof it is an *absolute transfer*.

This section deals with a *restricted* transfer, the restriction being imposed by way of a condition or limitation *absolutely restraining the alienation* of the property transferred, and it provides that such a condition or limitation is void. The reason is that though according to the general principles above stated, parties are at liberty to make restricted transfers, this liberty is not absolute, but is subject to the qualification that the restriction sought to be imposed is not against *public policy*. An absolute restraint on such a legal incident of property as the power of alienation will tend to create *perpetuity* and this, the law has always regarded with great disfavour as being opposed to public policy.(2)

Section 10 — Note 1

1. † (1798) 4 R R 586 (590, 591) : 101 E R 1264, Dood Michinson v. Carter.

2. ('61) ILR (1961) Mys 932 (939).
1957 Pat 570 (573) [AIR V 44 C 175] (DB).
1957 Pepsu 21 (22) [AIR 44 C 5].
1955 Mad 350 (357) [AIR V 42 C 94].
('49) 1949-1 Madh B L R 484 (486). (Covenants for reconveyance do not offend against perpetuity.)
†('36) 63 Cal 209 (213) : 162 Ind Cas 965 (DB).
('07) 10 Oudh Cas 136 (138) (DB).
('01) 4 Oudh Cas 163 (166, 167). (Transaction of village, with a condition not to transfer to anybody except the party concerned.)
(1798) 4 R R 586 (590, 591): 101 E R 1264, Doed Mitchinson v. Carter.

This principle is not confined to the English system of jurisprudence. It has been recognised also by the Hindu(3) as well as the Muhammadan(4) systems of jurisprudence.

The present section thus merely enacts what had already been a well-recognised rule of law.(5) In territories and in cases to which the Transfer of Property Act may not apply, the principle underlying it will clearly apply.(6)

In order that the section or the general principle on which it is based may apply, it is, however, necessary, that the alienation restrained must be of the *property transferred*. It does not matter whether such property is an estate in fee or life interest or any other lesser estate.(7) Thus, where a *life estate* is granted, a condition absolutely restraining the transfer of *that estate* would be void.(8) Similarly, where a completely representative estate such as a widow's estate in Hindu law, inalienable except for necessity, is created, a condition absolutely restraining the *alienation of the property in case of necessity would be void*.(9) But where the property transferred is a *particular interest* in property and the transferee is restrained from alienating *another* interest in the property, this section or the principle underlying it does not apply. Thus, where no full proprietary right is transferred but merely a right to the *usufruct* thereof, a restric-

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3. 1955 Mad 350 (358) [AIR V 42 C 94].
1947 Bom 191 (193) [AIR V 34 C 61] : I L R (1946) Bom 997 (DB). (The Hindu law recognizes rules against perpetuity and against restraints on alienation except in case of gifts or bequests for religious or charitable purposes.
1929 Mad 64 (66) [AIR V 16].
('02) 29 Cal 260 (277). (Overruled on another point in 37 Cal 128 (FB).)
('89) 16 Cal 71 (80) : 15 Ind App 149 (PC).
('82) 4 Mad 200 (203) (DB). (4 Mad H C R 345, Followed.)
('85) 7 All 516 (522, 523) (DB). (There is no rule of Hindu law which is inconsistent with the object of the Legislature as expressed in S. 10.)
('70) 4 Beng L R O C 265n (266n.)
[*See also* ('70) 13 Suth W R 285 (290) (DB).]

4. 1955 Mad 350 (358) [AIR V 42 C 94].
1953 Sau 180 (187) [AIR V 40 C 89] (DB).
1952 All 1 (4) [AIR V 39] (DB).
1937 Oudh W N 423 (426). (Condition restraining alienation by donee is void.)
1935 Rang 318 (321) [AIR V 22] (DB).
1925 Mad 997 (998) [AIR V 12] (DB). (Direction against alienation was held to be only a pious wish.)
1922 All 205 (206) [AIR V 9] : 44 All 633 (DB). (28 All 342 *Foll.*)
1920 Cal 140 (141) [AIR V 7].
('06) 28 All 342 (344, 345) (DB).
('12) 36 Bom 214 (250).
('12) 13 Ind Cas 689 (689, 690) (Cal). (Conveyance by husband to wife for dower—Condition that wife would not be entitled to alienate the property is invalid.)
('11) 11 Ind Cas 702 (703) (All). (According to the Hanafi law any derogation from the completeness of a gift is null.)
('11) 11 Ind Cas 534 (535) (All).
('83) 5 All 505 (508) (DB). (The condition will be regarded as merely a recommendation.)
('83) 5 All 285 (288) (DB). (Condition against alienation will not vitiate the gift.)
('71) 6 Mad H C R 356 (359) (DB).
[*See also* ('03) 27 Bom 500 (514) (DB). (Gift with condition that donee should have only a life estate — Condition is void.)]

5. ('11) 10 Ind Cas 489 (490) (DB) (Cal).

6. 1924 Lah 674 (675) [AIR V 11]. (Section 10 embodies an equitable principle which applies to the Punjab.)

7. (1900-04) 14 C P L R 114 (116, 117). ((1852) 21 L J Ch 511. *Foll.*)
(1852) 21 L J Ch 511 (512) : 89 R R 539, Rochford v. Hackman.
[But see ('12) 15 Oudh Cas 345 (350) (DB). (Right to usufruct of land transferred—Restraint of alienation of that right held valid. Submitted not correct. Reason that because full proprietary right was not transferred that therefore S. 10 does not apply seems to be unsustainable.)
('88) 1888 Pun Re No. 131, p. 351 (352). (Mortgagee undertaking not to alienate his rights—It was assumed that this was a condition against alienation. It was also held that it was not absolute restraint and that therefore S. 10 did not apply—Submitted not correct. (There was no condition against alienation but only a covenant.)]

8. See the first two cases cited in foot-note 7 above.
[*See also* 1958 Andh Pra 658 (659, 660) (Prs 4, 5) [AIR V 45 C 191]: ILR (1958) Andh Pra 510 (DB).
1916 Cal 644 (644) [A I R V 3] (DB). (Life interest is just as much property as an absolute interest.)]

9.† 1918 Pat 469 (475) [AIR V 5] : 3 Pat L Jour 199 (SB).

tion that the transferee of the usufruct shall have no power to alienate the *property* is not bad under this section.(10)

Second paragraph of S. 5 provides that nothing contained in that section shall affect any law for the time being in force relating to transfer of property to or by companies. It has therefore been held in the undermentioned case(11) that this section does not apply to sales under the Companies Act.

The section applies only to transfers *inter vivos* and not to wills.(12)

2. Section does not apply to grant under the Government Grants Act (XV of 1895) —Before the Transfer of Property Act, 1882, was enacted it was never doubted that the Government had power to make a transfer of property in any terms and under any condition whatever.(1) After the said Act was passed, apparently doubts came to be expressed as to whether it would apply only to transfers by act of parties who were subjects of the Government or whether it would apply also to transfers of property by the Government itself.(2) For the purpose of clearing this doubt, the Government Grants Act was passed in the year 1895, and it was provided in Ss. 2 and 3 thereof as follows :

Transfer of Property Act, 1882, not to apply to Government grants.

"2. Nothing in the Transfer of Property Act, 1882, contained shall apply or be deemed ever to have applied to any grant or other transfer of land or of any interest therein heretofore made or hereafter to be made by or on behalf of the Government to, or in favour of, any person whomsoever, but every such grant and transfer shall be construed and take effect as if the said Act had not been passed.

Government grants to take effect according to their tenor.

3. All provisions, restrictions, conditions and limitations over contained in any such grant or transfer as aforesaid shall be valid and take effect according to their tenor, any rule of law, statute or enactment of the Legislature to the contrary notwithstanding."

A condition in a Government grant, restraining the grantee from alienating his property would not be governed by this section and is not invalid.(3) (See also Preamble Note 4). The question whether as a fact there is such a condition must be decided on the facts of each case.

Where a *jaghir* grant by the Government was couched in the most appropriate mode in an English document of conveying an absolute estate in fee simple, it was held that the introduction of the words "as *jaghir*" was not to be construed as showing an

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10. 1965 Andh Pra 367 (370, 371, 372) [AIR V 52 C 89]. (Document of family arrangement — Property given to paternal grandmother to enjoy usufruct in lieu of maintenance—Restrictions not to damage fruit trees or mortgage or give permanent lease — Grandmother settling property upon her daughter—*Held*, that grandmother got restricted estate terms of which were not opposed to S. 10. 1934 All 358 [AIR V 21], *Rel. on.*)

1964 Orissa 59 (62) [AIR V 51 C 25] : ILR (1963) Cut 830 (DB). (Deed of partition — Construction—Partition between Hindu father and sons —Eldest son even though having no interest in family propertise given some properties by way of maintenance of his family with no power of alienation — Interest of eldest son in property restricted in its enjoyment to him personally—Restriction against alienation is valid.)

1934 All 358 (359) [AIR V 21]. (Case under Agra Tenancy Act (1901) S. 156.)

11. 1955 Mad 350 (358) [AIR V 42 C 94].

12. 1922 Oudh 168 (169) [A I R V 9] : 8 O L J 656. (Will by husband in favour of his wives—Condition that one of co-widows will not transfer her share without the consent of others is valid and binding.)

Section 10 — Note 2

1.✠ 1926 Mad 706 (717) [A I R V 13] : 49 Mad 349 (DB).

2. 1926 Mad 706 (717, 718) [AIR V 13] : 49 Mad 349 (DB).

3. ('47) 1947 All L J 462 (465) (DB).

1937 All 533 (534) [A I R V 24] (DB). (Grant of remission of the land revenue for maintenance —Property sold in Court auction—Sale valid to the extent of land only.)

1926 Mad 706 (717) [A I R V 13] : 49 Mad 349 (DB).

intention to control the right of alienation inherent in the operative terms of the transfer.(4)

3. **"Is transferred."** – The section applies only where property is *transferred* subject to a condition. Where there is no transfer of property, a restraint imposed on alienation of property is not affected by this section.(1a) In the case of a *family settlement*, for instance, there is no transfer of property between the parties, but merely an acknowledgment and definition of the title of the respective parties to the properties taken by them under the arrangement. A restraint on alienation imposed in such arrangement, on a party thereto in respect of the property taken by him, is not affected by this section. The validity of such restraint must be decided by reference to general principles of law, and not by principles underlying this Act except in so far as they are in accordance with general principles of law.(1) It has been held by their Lordships of the Privy Council that a partial restraint on alienation in a family settlement cannot be said to be contrary to justice, equity and good conscience and would therefore be valid.(2) In *Nageshar Sahai* v. *Mata Prasad*,(3) it was held that, apart from S. 10, an *absolute restraint* on alienation in a family settlement would be invalid on general principles of law. This decision was affirmed by their Lordships of the Privy Council in *Mata Prasad* v. *Nageshar Sahai*(4) on another point, but they expressed "their entire concurrence with the judgment of the Judicial Commissioner's Court."

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4. ('85) 9 Bom 561 (568) (DB).

Section 10 — Note 3

1a. 1967 Guj 192 (194, 195) [A I R V 54 C 36]. (Voluntary agreement by which the father places restrictions on his power of disposal over family property in the interests of his minor sons and to protect property against debts — No question of any transfer arises.)
('61) ILR (1961) Mys 932 (938, 939). (Partition is not transfer of property—S. 10 does not apply.)
1960 Assam 178 (181, 182) [A I R V 47 C 43] : ILR (1959) 11 Assam 423 (DB).
1955 Mad 350 (358) [AIR V 42 C 94]. (Partition).
See also cases cited in foot note (1).

1. 1967 S C 1595 (1598) [A I R V 54 C 333] : (1967) 2 S C W R 734. (Family arrangement—Division of property amongst members for convenient enjoyment — Alienation of property restrained—Restriction is not hit by S. 10.)
1964 Pat 214 (219) (Pr 6) [AIR V 51 C 58] (DB).
1958 Him Pra 5 (7) [AIR V 45 C 2]. (A compromise amounting to settlement of disputed and doubtful claims relating to land is not transfer—S. 10 inapplicable.)
1957 Pat 570 (574) [A I R V 44 C 175] (DB). (A deed of partition of family arrangement cannot be considered even as an exchange so as to come within the mischief of S. 10.)
1955 Mad 350 (358) [AIR V 42 C 94].
1955 Trav-Co 231 (232) [AIR V 42 C 94] : I L R (1954) Trav-Co 1264.
1953 Punj 282 (283) [A I R V 40 C 123] : I L R (1954) Punj 165 (DB). (Gift to pichhlag son—Objection by collaterals — Agreement between parties that donee or his descendants would have no right to sell or mortgage property—Agreement held amounted to compromise and not to transfer and, therefore restriction was not hit by section.)
1946 Pat 55 (58) [AIR V 33]. (Compromise giving possession to widow in lieu of the maintenance —Absolute restraint on alienation — *Held* that commpromise did not involve any transfer at all and in this view S. 10 will not apply.)
1943 Lah 168 (170) [AIR V 30]. (Gift of land by Hindu widow to her husband's sister B — Suit by reversioner K challenging gift – Compromise —B to retain half of land and K to take other half — B not to alienate land during her life-time — On extinction of B's line land to revert to K — *Held* S. 10 was inapplicable as compromise did not amount to alienation.)
1929 Oudh 193 (201) [AIR V 16] : 4 Luck 452 (DB).
† 1923 Bom 276 (279, 280) [AIR V 10] : 47 Bom 597 (DB).
[See however 1968 Bom 25 (28) [AIR V 55 C 6]. (One of two co-widows adopting son to her deceased husband—Deed executed by widows and son allotting share of property to each of them as full owner — Term restraining alienation during life-time of widows—Term held void as full title was conferred upon them irrespective of the fact that widows had right to obtain only a limited estate.)]

2. † 1932 P C 158 (160, 161) [AIR V 19] 7 Luck 257 : 59 Ind App 236. (Affirming 1929 Oudh 193 [AIR V 16].)
1946 Pesh 12 (14) [AIR V 33 C 6]. (Such restriction is opposed to public policy.)

3. 1922 Oudh 236 (244) [A I R V 9] : 25 Oudh 189 (DB).
See also the undermentioned cases to the same effect :
1955 Mad 350 (358) [A I R V 42 C 94]. (The principle underlying S. 10 would be applicable where the condition involves an absolate restraint on alination in a family settlement.)

4. 1925 P C 272 (280) [A I R V 12] : 28 Oudh Cas 352 : 47 All 883 : 52 Ind App 398.

See also the undermentioned case.(5)
See also Note 12.

4. "Subject to a condition or limitation."—The section applies only where the transfer is made subject to a condition against alienation, that is, where the condition is annexed to the *property transferred*. Where *A* who is the full owner of certain property, retains a life-interest in it without power of alienation and transfers the remainder to *B*, there is no condition annexed to the property transferred to *B*, in other words, there is no "transfer subject to a condition" and this section consequently does not apply.(1)

Words of limitation such as "you are to enjoy, you and your sons, grandsons from generation to generation"(2) or "to you and your sons and grandsons"(3) or "to you and the generations born of your womb successively"(4) or "to your *putra, pautradi krame*"(5) denote the grant of an estate of inheritance and do not import any restraint on alienation.

The creation of an interest in property "restricted in its enjoyment to the owner personally" within the meaning of S. 6, Cl. (d) cannot be said to be a transfer "subject to a condition against alienation." In *Lachhmeshwar Sahai* v. *Mt. Moti Rani Kunwar*(6) a partition deed was entered into by *A*, his wife *B*, and his three sons *C*, *D* and *E*. *A*, *C*, *D* and *E* each took a four-anna share. They agreed that after *A's* death his share should remain in the possession and occupation of *B* for her life without power of alienation. It was held by their Lordships of the Privy Council that the document could not be regarded as conferring a life-interest on *B* coupled with a repugnant condition prohibiting alienation absolutely, but should be treated only as a personal right granted to *B* to appropriate the profits of the share after *A's* death, falling within S. 6, Cl. (d) of the Act. See also Notes 10, 11 and 12 on S. 6.

The question whether property is transferred subject to a condition restraining alienation or whether the clause restraining alienation is intended as transferring only a limited interest has to be decided on the terms of the deed as a whole.(7)

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5. 1923 Bom 276 (278) [AIR V 10] : 47 Bom 597 (DB). (Widow restricting herself to lesser interest than a widow's estate under a deed of family arrangement — *Held*, the condition was valid as there was no transfer within S. 10.)
1926 Mad 1202 (1202, 1203) [A I R V 13] : 51 Mad L J 552 : I L R 50 Mad 331 : 26 Mad L W 37. (Grant of a mulgeni lease is an alienation.)

Section 10 — Note 4

1. 1919 All 80 (81) [AIR V 6] (DB).
('11) 14 Oudh Cas 189 (192).
[*See also* 1925 All 65 (65) [AIR V 12]. (Vendor reserving certain interest so long as his descendants' line continues.)]

2. ('89) 13 Bom 373 (375) (DB).

3. ('72) 11 Beng L R 86 (112) (PC).
†1920 Bom 73 (75) [AIR V 7] : 44 Bom 304 (DB).
('72) 1872 Bom P J 33.

4. ('79) 4 Cal 23 (28) : 5 Ind App 138 (PC).

5. †('97) 24 Cal 834 (849) : 24 Ind App 76 (PC).
1918 Mad 81 (81) [AIR V 5] (DB). (Words of restriction, after this expression, must be treated as repugnant condition.)

6. 1939 P C 157 (159) [AIR V 26] : ILR (1939) Kar 274.
[*See also* 1946 Pat 55 (58) [AIR V 33 C 17]. (Compromise giving possession to widow in lieu of maintenance — Absolute restraint on alienation — *Held* no transfer was involved and so S. 10 did not apply—Compromise only created interest restricted in its enjoyment to widow personally within the meaning of S. 6 (d) : 1939 P C 157 [AIR V 26], Rel. on.)]

7. 1953 S C 7 (10) (Pr 13) [AIR V 40 C 3] : 1953 S C R 232 : ILR (1953) 1 All 896. (In cases where intention of testator is to grant an absolute estate, an attempt to reduce the powers of the owner by imposing restraint on alienation would certainly be repelled on ground of repugnancy; but where restrictions are the primary things which the testator desires and they are consistent with the whole tenor of the will, it is a material circumstance to be relied upon for displacing the presumption of absolute ownership implied in the use of the word "Malik".
1964 Orissa 59 (62) [AIR V 51 C 25] : ILR (1963) Cut 830 (DB). (Deed of partition — Construction — Partition between Hindu father

5. Condition, limitation and covenant. — A condition signifies a quality *annexed to an estate* by virtue of which it may be defeated, enlarged or created upon an uncertain event. Conditions are either *precedent* or *subsequent*. Where a condition must be performed before a person can take an interest in property it is called a *condition precedent*.(1) But where the effect of the condition is either to enlarge or defeat an estate *already created* it is ealled a *condition subsequent*.(1a)

Illustrations

(1) *A* grants property to *B* on condition that *B* shall marry *A's* daughter *C*. This is a condition *precedent*, inasmuch as *B's* estate will commence only on his marriage with *C*.

(2) *A* grants property to *B* on condition that on failure of issue living at the time of *B's* death, the property is to return to *A* and his heirs. This is a condition *subsequent*, as the effect of the condition is that on the happening of the condition, the estate *already created* in favour of *B* is *defeated*.(1b)

(3) *A* grants property to *B* for life on condition that if *B* pays *A* a certain sum of money on a certain date, he shall have an estate in fee simple. This is also a condition *subsequent* inasmuch as on the performance of the condition, the life-estate *already created* in favour of *B* is *enlarged* into an estate in fee simple.

A condition must be distinguished from a *covenant*. A condition, as has been seen already, is a quality *annexed to the estate* and is imposed by the grantor. A covenant, on the other hand, is merely an *agreement* between two or more parties by which either of the parties pledges himself to the other that something shall be done.(2) The non-performance or the breach of the covenant will not defeat a grant, as in the case of the breach of a condition, though it may give rise to an action in damages.(3)

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and sons — Eldest son even though having no interest in family properties given some properties by way of maintenance of his family with no powers of alienation — Restriction against alienation is valid.)

1958 Ker 265 (269) [AIR V 45 C 94] (DB). (Deed of maintenance arrangement — Clause prohibiting alienation is valid.)

1957 Ker 119 (121) [AIR V 44 C 69] (DB). (*Held* on construing all clauses of partition arrangement together, that interest intended to be conveyed in favour of one C, the donee, was in the nature of a life interest and not an estate of inheritance. It was not a case where an absolute estate has first been created and later clauses were merely repugnant to the absolute estate.)

1957 Ker L T 1119 (1121) (Pr 3). (Gift deed provided in effect that property was to be taken for support of donee and her santhanams—She was to attorn to Jenmi direct and pay michavaram and other dues – She was to enjoy property for her lifetime without in any way encumbering same so that properties would devolve upon santhanams.

Held, that intention of donor was to settle property on children who were minors at the time and mother was only to have a life estate in the property.)

1952 Mad 166 (167) [AIR V 39]. (*Held* that the document conferred only a life estate and the clause restricting the alienation was not in derogation of an absolute grant but was a condition of the grant itself.)

Section 10 — Note 5

1. 1964 S C 587 (592, 593) [AIR V 51 C 76]: (1964) 2 S C R 480.

[*See* ('99) 23 Bom 271 (278) (PC). (Will — Direction to adopt M, given to widow of testator's deceased son — Bequest of residuary property to M *Held*, adoption was a condition precedent before M could take any interest. Affirming 20 Bom 718.)

[*See also* 1911-11 Ind Cas 634 (635) (Cal) (DB). (Gift to N on condition of his living in dwelling house with the heirs in succession—Gift fails if N ceases to reside in the house.)]

1a. Woodfall, Law of Landlord and Tenant, 22nd Edn., pp. 222, 223. 1964 S C 587 (592, 593) [AIR V 51 C 76]: (1964) 2 S C R 480.

1b. *See* ('79) 4 Cal 23 (28): 5 Ind App 138 (PC). (The provision making the estate defeasible on failure of issue is referred to by the Privy Council as a 'condition'.)

2. Wharton, Law Lexion, 14th Edn., p. 277. 1957 Pepsu 21 (22) [AIR V 44 C 5].

(1901) 11 M L J 132 (140): ILR 24 Mad 449 (DB). (Contract to sell does not create an interest in or charge on property but is only a covenant not running with the land.)

[*See also* ('49) 1 Madh B L R 484 (486). (Covenant executed by transferee for reconveyance in favour of transferor is not void.)]

3. 1920 Mad 1006 (1007, 1010) [AIR V 7]: 43 Mad 503 (SB). (Assignment in breach of covenant not to alienate is operative.)

('09) 36 Cal 745 (748) (DB). (Do)

A condition, again, must be distinguished from *limitation*. The *limitation* of an estate is the *measure or quantity* of an estate. Where *A* grants to *B* "for life," or to *B* "in fee simple" or to *B* "until he becomes bankrupt", the words "for life," "in fee simple" and "until he becomes bankrupt," show the *measure* of the estate that is granted and are thus words of limitation. The distinction between a condition and a limitation is stated by the Lord Chancellor in *Brandon* v. *Robinson*(3a) in the following words :

> "There is no doubt, that property may be given to a man, until he shall become bankrupt. It is equally clear, generally speaking, that if property is given to a man for his life, the donor cannot take away the incidents to a life-estate; and, as I have observed, a disposition to a man, until he shall become bankrupt, and after his bankruptcy over, is quite different from an attempt to give to him for his life, with a proviso that he shall not sell or alien it. If that condition is so expressed as to amount to a limitation, reducing the interest short of a life-estate, neither the man nor his assignees can have It beyond the period limited."

Again in *Woodmeston* v. *Walker*(3b) Lord Brougham said

> "It is impossible so to tie up the use and enjoyment of it (i.e., property) as to create in the donee a life-estate which he may not alien: Although the object may be attained indirectly, in a manner consistent with the known rules of law, by annexing to the gift a clause of forfeiture or defeasance on the happening of a particular event, or on a particular act being done, *for in that case the donee takes by the limitation a certain estate*, of which the *event or act is the measure*; and upon the happening of the event, or the doing of the act, a new and distinct estate accrues to a different individual."

See also the undermentioned cases.(3c)

The question whether a grant is made subject to a condition, or to a limitation, or to a covenant is to be determined upon a consideration of the facts of the particular case.(4) In England, the use of the words "provided always," "subject to a condition," in a conveyance of real estate would by themselves make the estate conditional; but in a lease no precise form of words is necessary to make a condition; it is sufficient if the words used were intended to have the effect of a condition.(5) In this country where the technicalities of the English law of property do not apply, the question in every case would depend upon the intention of the parties as gathered from the words used, and not upon a technical form of words used in the document of grant. In the

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1938 Cal 478 (479) [AIR V 25] (DB). (If a term is granted subject to a condition against assignment, an assignment by the lessee will be void; but if the restraint is by covenant only, the lessee, by assigning, commits a breach of covenant but the assignment itself is not void, though the landlord can put an end to it as soon as the assignment comes to his knowledge if the lease contains a power of re-entry.)

1922 Nag 224 (225) [AIR V 9] : 18 Nag L R 89. (Covenant in a lease that the lessee shall not sub-let without the permission of the lessor is valid and for a breach thereof the lessee will be liable in damages.)

1916 Pat 161 (164) [AIR V 3] (DB). (Do.)

† ('03) 26 Mad 157 (160, 162) (DB).

1957 Pepsu 21 (22) [AIR V 44 C 5].

3a. (1811) 11 R R 226 (228) : 34 E R 379.

3b. (1831) 34 R R 56 (56) : 39 E R 370.

3c. (1882) 30 W R (Eng) 887 (888) : 21 Ch D 838, In re Machu. (Limitation is ordinarily the definition or circumscription in any conveyance of the interest of the grantee.)

(1876) 3 Ch D 148 (155) : 24 W R (Eng) 754, Hattan v. May. ("To A until the happening of an event" — This is the measure of its limitation.)

4. Woodfall, Law of Landlord and Tenant, 22nd Edn., pp. 222, 223.

1938 Cal 478 (479) [AIR V 25] (DB). (Clause in patta providing that in case of transfer transferee shall pay one-fourth of consideration money to landlord and in default of such payment, transfer shall be void — Clause held in the nature of a restrictive condition and not covenant.)

5. (1863) 135 R R 736 (738) : 143 E R 490, Shaw v. Coffin. (Agreement by a tenant that he will not underlet without written permission of the landlord does not create a condition.)

(1828) 32 R R 393 (396) : 6 L J K B 185, Deod Henni Ker v. Watt. (Lease providing that leased land not to be assigned, transferred or under-let to other than specific persons was held to be a condition.)

[*See also* (1882) 30 W R (Eng) 887 (888) : 21 Ch D 838, In re Machhu.]

undermentioned case,(6) a lease of lands contained a clause that the lands demised were not to be sub-let without the consent of the lessor but no provision was made for forfeiture in the event of a breach of the clause. The clause was in the middle of a number of other provisions all of which were in the nature of what would be covenants in the English law. Mr. Justice Chapman was inclined to construe the clause as a *covenant* and not as a *condition* but held that even if it was a condition it would be void as it was not for the benefit of the lessor. Mr. Justice Atkinson also agreed with the view that the clause was only a *covenant* and not a *condition* which would invali date a transfer made by the lessee in breach of the clause. But he expressed the opinion *obiter* that a *covenant* against alienation might be void under S. 10. This, it is submitted, is not correct. This section has no application to *covenants*. See also the case cited below.(7)

6. "Absolutely restraining." — The section does not prohibit a partial restraint on the disposition of property, but renders void an *absolute* restraint on disposition.(1a) An absolute restraint on disposition is a clog on the owership.(1) "If a feoffment be made" says Littleton(2)

> "upon the condition that the feoffee shall not alien it *in any way*, this condition is void, because when a man is enfeoffed of lands or tenements, he hath power to alien them to any person by the law. For, if such a condition should be good, then the condition should oust him of *all the power* which the law gives him, which should be against reason; and therefore such a condition is void."

The word "absolutely" must be construed in a reasonable manner(3) and, in deciding the question whether the condition or limitation restraining the disposition of property is *absolute* or partial, the Court has to look at the *substance* and not so much to the *form* of the condition or limitation,(4) and see whether, for all practical purposes, the disposition of property is prohibited.(5) "The test" said Jessel, M. R., in *In re Macleay*,(6) "is whether the condition takes away the whole power of alienation *substantially*. It is a question of substance and not of form."

If a condition against alienation is to be valid, it must not really take away all

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6. 1916 Pat 161 (163, 166) [AIR V 3] (DB).

7. ('08) 35 Cal 1069 (1073, 1074) (DB). (Clause forbidding alienation seems to have been considered not a condition.)

Section 10 — Note 6

1a. ('63) 1963 Ker L T 355 (356, 357) (pr. 3) (Restraint on alienation to strangers in the deed of partition being a partial restraint is not invalid.)

1960 Assam 178 (181, 182) (pr. 7) [AIR V 47 C 43] : ILR (1959) 11 Assam 423 (DB). (Agreement requiring parties to sell lands amongst themselves and on their not purchasing same to sell it to one of the members of the community —Condition imposed or limitation placed on right of transfer was not an absolute one—S. 10 not applicable.)

1955 Mad 350 (358) [AIR V 42 C 94].

('49) 1949-1 Madh B L R 484 (486).

1944 Nag 187 (187, 188): [AIR V 31] : ILR (1945) Nag 174. (Partition between two brothers—Agreement that if share of one's sold, the other would be entitled to buy for certain price is enforceable againit sons of parties. Such agreement imposes only a partial restriction and is not void. 1932 P C 158 [A I R V 19] followed. Section 14 also is not offended in such a case.) 1927 All 170 [AIR V 14] (F B).)

[*See also* 1926 Mad 1202 (1202) [AIR V 13]: 50 Mad 331. (In the absence of restriction against assignment of any portion of demised property the restraint on the alienation of the demised premises will not prevent the alienation of a portion.)]

1. (99) 1 Bom L R 498 (499) (DB). (Government, having absolutely granted: the house-sites which are no part of vatan property, cannot clog the ownership with a prohibition against alienation.)

2. Coke on Littleton, Page 360.

3. 1935 Lah 503 (504) [AIR V 22].

4. †1935 All 493 (495) [AIR V 22] : 57 All 861 (DB).

1921 All 97 (98) [AIR V 8] (DB). (Vendee agreeing to sell or mortgage not to anybody except the vendor or his heirs at a fixed price is absolute restraint.)

[*See also* 1955 Mad 350 (358) [AIR V 42 C 94]].

5. 1935 All 493(495) [AIR V 22]: 57 All 861(DB).

6. (1875) 32 L T 682 (683) : LR 20 Eq 186.

power either by express words or by the *indirect effect of the frame of the condition*; for you cannot do that indirectly which you cannot do directly.(7)

Illustrations.

(1) *A* transfers property to *B* but with a condition that he should not transfer it to *any one*. The condition is *void*.(8)

(2) *A* transfers property to *B* on condition that *B* shall not alienate it *without first consulting and obtaining A's consent*. The condition is void.(9) The reason is that *A* can, in such a case, always prevent alienation by *B* by simply withholding his consent and, consequently, the restraint imposed, though in *form* not absolute is in *substance* absolute.(10) In the words of Mr. Justice Pandalai of the High Court of Madras, such a restraint is "a restraint sufficiently absolute to fall within S. 10."(11)

(3) *A* executed a document whereby he and his two wives were to be joint owners of his property and it was provided that neither he nor his wives would have the right to transfer the property separately *unless all combined to make the transfer*. The High Court of Allahabad held that the condition was void as being an absolute restraint.(12) Their Lordships observed : "No doubt there was one exreme possibility in which when Basdeo Singh and his two wives all agreed there could be a valid transfer under the deed. . . . . .It seems to us that for all *practical purposes* Basdeo Singh reserved to himself the absolute power of preventing alienation of any kind. Unless he himself was prepared to waive this condition, he gave no power to his wives to transfer the property gifted to them under any circumstances. We therefore think that this amounted to an absolute restraint on alienation within the meaning of S. 10."

(4) *A* compromise between *A* and *B* provided that *B* should get a life-interest without power of transferring it *except in case of necessity and unless his other property is not sufficient*. It was held that this was an absolute restraint.(13)

(5) *A* transferred property to *B* with a covenant that *B should not, if he wished to alienate it, do so piecemeal but must do so only as a whole*. It was held that the restraint was *partial* and not absolute.(14)

(6) *A* transfers property to *B* with a condition that, if *B* transfers the property *A* shall have a *right of pre-emption*. The condition is not invalid under this section.(15) There is no absolute restraint against alienation in such a case.(16) As to whether and when such a condition will offend the rule against perpetuities—see Note 10 on S. 14.

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7. (1875) 23 W R (Eng) 718 (719) : L R 20 Eq 186, In re Macleay.

8. 1955 Punj 49 (50) [AIR V 42 C 18]. (Deed of compromise giving absolute estate — Restraint on alienation held void.)
1926 Mad 648 (650) [A I R V. 13] (DB). (Condition void but transfer valid.)
1924 Lah 729 (729) [AIR V 11] (DB). (Restrictions contained even in compromise are the derogation from the full proprietary rights.)
1919 Oudh 70 (72) [AIR V 6] (DB). (Deed of gift restraining donee from transferring whole or any part of property gifted—Restraint is void.)
1916 Cal 644 (644) [AIR V 3] (DB). (A life interest is just as much property as an absolute interest and any condition absolutely restraining the transferee from disposing of that property is void.)
1915 Mad 296 (299) [AIR V 2] : 15 Mad L T 361: 29 Mad LJ 617: ILR 38 Mad 867 (DB). (Grant for maintenance—Restriction on alienation void).
†('12) 17 Ind Cas 284 (286, 287) (Cal) (DB). (Grant for maintenance with condition against alienation.).

9. ('06) 3 All L Jour 621 (622, 623).

10. 1935 All 493 (495) [AIR V 22] : 57 All 861 (DB). (Per Sulaiman, C. J.).

11. 1935 Mad 33 (34, 35) [AIR V 22].

12. 1929 All 492 (492, 493) [AIR V 16] (DB).

13. 1937 All 235 (236, 237) [A I R V 24]. 1932 P C 158 [AIR V 19], Distinguished.)

14. 1921 Sind 118 (118, 120) [A I R V 8] : 17 Sind L R 1 (DB)

15. 1922 All 293 (294) [AIR V 9]. (Property should not be transferred to a stranger without written consent of co-sharers—Valid.)
1921 Sind 118 (120) [A I R V 8] : 17 Sind L R 1 (DB). (Covenant by vendee to give right of first refusal to vendor and his heirs and to sell as a whole is valid.)
('11) 9 Ind Cas 171 (173) (DB) (Mad). (A provision in a lease deed that should necessity for alienation arise by lessee who had permanent rights, the property should be surrendered to the lessor is valid.)
('71) 6 Mad H C R 248 (255, 256) (DB). ("You shall not sell" is void. "If you sell you shall give me the first offer" may be perfectly valid. 'You shall not alienate so as to destroy the rights of your son" is perfectly valid.).
[*See also* 1924 All 400 (410) [AIR V 11] : 46 All 333 (DB).]

16. 1929 All 667 (668) [AIR V 16] (DB).

(7) *A* devised property to *B* upon condition that if *B* wanted to sell it, it must be offered first to *A's* wife for £3000. The amount of £3000 was found to be about one-fifth of the real value of the properties. It was held that the restraint was, in substance, an absolute one against sale and was void.(17)

(8) A khorposh maintenance grant of a pargana was subject to the restriction that no creditor of the grantee will be competent to attach the property or sell it for the debts of the grantee or if it is actually sold the settlement will stand cancelled. It was held that the restraint on alienation was not absolute.(17a)

(9) Where in an agreement for reconveyance the condition was that the vendor was to take resale for his and his family use and not for speculative purposes, it was held that if by the conditoin it was intended that the vendor although at the time of making the request for resale had no intention of acquiring it for the sake of disposing it of to a third party for profit, yet he could never thereafter dispose of the property as he liked, such a term would be void under this section.(17b)

See also the undermentioned case.(18)

7. Condition restraining alienation except in favour of a specified person. — Where *A* transfers property to *B* subject to a condition that *B* will not transfer it *except to A himself*, or to *some other named person* the condition is void.(1) In *Muschamp* v. *Bluet*,(2) decided in the year 1617, Sir John Bridgman observed as follows :

> "I conceive that the condition is void ; for to restrain generally, and that he shall not alien to any but to J. S., is all one ; for then the feoffor may restrain him from aliening to any except to himself, or such other person by name, whom he may well know cannot, nor never will, purchase the land ; so that this condition shall take away all his power, and shall make a perpetuity in the feoffee, which is quite contrary to law, neither is there any authority to warrant this restraint."

In *Attwater* v. *Attwater*(3) the Master of the Rolls observed :

> "It is obvious, that if the introduction of one person's name, as the only person to whom the property may be sold, renders such a proviso valid, a restraint on alienation may be created, as complete and perfect as if no person whatever was named ; inasmuch as the name of a person who alone is permitted to purchase, might be so selected, as to render it reasonably certain that he would not buy the property, and that the property could not be aliened at all."

In the undermentioned case(4) where *A* transferred property to *B* on condition that *B* would not *sell* it to any one except *A*, it was held on a construction of the document that the condition was one for pre-emption and was as such valid.(5)

8. Restraint on alienation for a particular period. — The general trend of opinion in England is that a restraint on alienation for a limited *period* is an absolute restraint and as such is void.(1) This view is followed in this country also.(2)

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17. (1884) 26 Ch D 801 (823) : 53 L J Ch 722, In re Rosher.

17a. 1945 Pat 162 (176) [A I R V 32] : 23 Pat 871 (DB).

17b. ('50) ILR (1950) All 32 (45) (DB).

18 ('88) 1883 Pun Re No. 131, P. 351 (355) (DB). (Held, no absolute restriction because alienation by consent of both parties was not prevented and because transfer by succession was not prevented—Submitted not correct.)

Section 10 — Note 7

1. 1935 All 493(495) [AIR V 22]: 57 All 861(DB).
1929 All 381 (382) [AIR V 16] (DB).
('01) 4 Oudh Cas 163 (166, 167). (Condition that alienation should be made to talukdar and no one else.)

2. (1617) 123 E R (Common pleas) 1253 (1256) : J Bridg. 132.

3. (1853) 104 R R 458 (462) : 23 L J Ch 692.

4. 1925 All 97 (98) [AIR V 12].

5. See Illustration 6 in Note 6.

Section 10 — Note 8

1. (1868) 37 L J P C 1 (5, 7), L R 2 P C 4, Renaud v. Guillet.
[*See* ('11) 11 Ind Cas 301 (303) (DB) (Cal).]

2. 1955 Mad 350 (357, 358) [AIR V 42 C 94].
1933 Lah 201 (202, 203) [AIR V 20] : 14 Lah 353 (DB). (Restraint till youngest son attains majority.)
('30) 121 Ind Cas 298 (299) (DB) (Lah). (Testator restricting alienation by sons during lifetime of their mother.)

A contrary view is expressed in the undermentioned case(3) that a restraint on alienation of a portion of the property transferred during the lifetime of a person is valid as a partial restraint. It is submitted that this view is not correct. The Privy Council decision on which this case rested for its conclusion dealt with a restraint, *not as to time* but as to the persons to whom the property might be transferred.

9. Alienation restricted to a specified class of persons. — In *Doe d Gill* v. *Pearson*,(1) where *A* transferred property to *B* with the condition that *B* shall have no power of disposal except in favour of *B's sister or sisters or to their children*, it was held that the restraint was *partial* and not absolute. In *Attwater* v. *Attwater*,(2) where *A* transferred property to *B* with an injunction that *B should never sell it out of the family; but if sold at all, it must be to one of his brothers hereafter named*, it was held by Romilly, M. R., that the words "out of the family" were merely descriptive of the effect of the sale, and that the restriction of alienation to one of the brothers named was absolute. *Attwater's case* was distinguished in *In re Macleay*,(3) on the ground that the decision must be taken to have rested on the particular wording of the document of transfer. In the latter case a devise in fee was made to a brother of the testatrix "on the condition that he never sells it *out of the family*." Jessel, M. R., held that the condition was valid and said "the will shows there were a great many members of the family at the time when it was made. You have, therefore, a class which probably was large, and was certainly not small. Therefore the whole of the power even of selling is not taken away, but only taken away to a limited extent." He followed the case of *Doe d Gill* v. *Pearson*.(4) The view of Jessel, M. R., in *Macleay's case* has been approved by their Lordships of the Privy Council in *Mohammad Raza* v. *Mt. Abbas Bandi Bibi*.(5) In that case a compromise of conflicting claims was effected in 1870, before the passing of this Act, by way of a family arrangement, whereby *S* took certain properties which she claimed, upon the condition that she would not alienate the property to any one *outside the family*. The question of the validity of the restriction had to be decided on general principles of justice, equity and good conscience. Their Lordships observed :

> "On the assumption that Sughra Bibi took under the terms of the document in question, an absolute estate subject only to this restriction, their Lordships think that the restriction was *not absolute* but *partial*; it forbids only alienation to strangers, leaving her free to make any transfer she pleases within the ambit of the family."

In the undermentioned case(6) where the grantee was restrained from alienating the property to any one except "the nearest relatives and on their refusal, to the pattidars," it was held by the Oudh Chief Court that the restraint was absolute. In view of the Privy Council decision above referred to, it is submitted that this view is open to reconsideration.

A transfer by *A* to *B* on condition that *B* shall not transfer the property except

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1922 Oudh 236 (244) [AIR V 9] : 25 Oudh Cas 189 (DB). (Restraint extending over a period of indefinite duration is void.)

3. 1935 Lah 503 (504, 505) [AIR V 22].

Section 10 — Note 9

1. (1805) 8 R R 447 (453) : 102 E R 1253.

2. (1853) 104 R R 458 (462) : 23 L J Ch 692.

3. (1875) 44 L J Ch 441 (443) : L R 20 Eq 186.

4. (1805) 8 R R 447 (453) : 102 E R 1253.

5. 1932 P C 158 (160) [AIR V 19] : 7 Luck 257 : 59 Ind App 236.

[*See also* ('63) 1963 Ker L T 355 (356, 357). (Condition in partition forbidding sale to stranger — Partial restriction. 1932 PC 158 [AIR V 19], Foll.)

1957 Trav-Co 156 (157) (Pr 6) [AIR V 44 C 49] (DB). (Where a partition deed states that in case any of the sharers desired to sell the share allotted to him (or her) it shall be sold to whomsoever among the other sharers who offers to purchase it, such a restraint is valid.)]

6. 1925 Oudh 125 (126) [AIR V 12] : 27 Oudh Cas 350.

to *A and his heirs for fixed sum of money* has been held in the undermentioned cases(7) to be an absolute restraint for all practical purposes.

In the undermentioned decision of the High Court of Madras(8) a partition deed among father and sons provided that certain property should be held by them as tenants in common. It restrained the sons from alienating their share to strangers to the family but gave a right to sell within the family at a *maximum price* which was far below the real value of the property. There was no obligation to buy at that price. It was held that under the circumstances the restriction was an *absolute* one and therefore void.

As has been seen in Note 6, a *partial* restraint on alienation is not prohibited by this section. As to whether such a restraint will, where a transfer is made absolutely, be void for repugnancy under S. 11, see Note 9 on that section.

10. Prohibition of alienation to specified persons.—A prohibition against alienation to a specified person or persons, is only a *partial* and not an *absolute* restraint. The reason is that the persons to whom the grantee cannot alienate must be a very small number compared to the persons to whom he is *not prohibited* from alienating, and it cannot be said that the whole power of alienation is taken away by the prohibition. In *In re Macleay*,(1) the Master of the Rolls said: "You may restrict alienation in many ways. You may restrict it by prohibiting a particular class of alienation or by *prohibiting it to a particular class of persons*."

11. Condition restraining transfer of company's shares.—The shares in a company allotted to the share-holders are *prima facie* transferable. But the share-holders are not precluded from contracting for value that they shall submit to reasonable restriction in the right of transfer. A restriction precluding the share-holders altogether from transferring the shares may be invalid, but a restriction which does no more than give a right of pre-emption is valid.(1)

12. "From parting with or disposing of his interest."—A condition not to *assign* a lease is not violated by the *mortgage* of the lease.(1) A general restriction on alienation does not apply to a transfer by *operation of law*.(2) But an execution sale founded on a mortgage or charge voluntarily made in breach of a condition against alienation is not to be considered as a sale *in invitum* for this purpose, so as to take it out of the operation of the condition.(3)

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7. 1935 All 493 (494, 495) [AIR V 22] : 57 All 861 (DB). (1921 All 97 [AIR V 8], Foll.)
1935 Sind 182 (184) [AIR V 22] : 29 Sind L R 321 (DB).
1921 All 97 (97, 98) [AIR V 8] (DB).
8. 1939 Mad 769 (771, 772) [AIR V 26] : I L R (1939) Mad 954 (SB).

Section 10 — Note 10

1. (1875) 44 L J Ch 441 (443) : L R 20 Eq 186.

Section 10 — Note 11

1. 1928 P C 291 (293) [AIR V 15].

Section 10 — Note 12

1. 1955 Mad 350 (358) [AIR V 42 C 94].
1918 Mad 373 (376) [AIR V 5] (DB). (Under English mortgage, if absolute interest not transferred.)
('12) 14 Ind Cas 293 (294) (DB) (Cal). (If mortgage results in sale, it is violation.)
('03) 72 L J P C 50 (52): 1903 App Cas 190, Josef Mulder.
2. 1925 Cal 471 (472) [AIR V 12].
†1924 Nag 222 (224) [AIR V 11]. (20 Cal 273, Followed.)
1922 Cal 96 (97) [AIR V 9] (DB).
1915 Cal 200 (210) [AIR V 2] (DB). (7 Bom 262 and 20 Cal 273, Followed.)
('12) 17 Ind Cas 284 (287) (DB) (Cal). (Following Rockford v. Hockman (1852) 89 R R 539; Joel v. Mills, (1857) 112 R R 231.)
('01) 14 C P L R 114 (117). (17 Cal 126, Followed.)
†('93) 20 Cal 273 (278) (DB). (Citing Davidson's Conveyancing, Vol. V page 177.)
('83) 7 Bom 262 (265) (DB).
('83) 6 Mad 159 (164, 165, 166) (DB).
(1815) 16 R R 293 (296) : 105 E R 644, Doe v. Bevan.
[*See also* 1926 Sind 143 (143) [AIR V 13] (DB).]
Also see S. 12, Note 8.
3. 1922 Cal 96 (97) [AIR V 9] (DB). (1915 Cal 242 [AIR V 2], Followed.)
('12) 14 Ind Cas 293 (295) (DB) (Cal).

The creation of a *charge* is not a transfer of property and a condition against alienation will not be broken by the creation of a charge.(4)

13. Condition against alienation in a lease.—It was long settled in England that a landlord had the power of restraining alienation by his tenant, by a proviso against alienation.(1) This principle has been embodied in this section. In excluding leases from the main provision of this section the Legislature has clearly recognised that the owner of immovable property should be able to transfer by way of a lease a right to enjoy such property without necessarily rendering himself liable to accept as a tenant some person who may on various ground be obnoxious to him.(1b) A condition against alienation in a lease is valid under this section if it is for the benefit of the lessor.(1a) This would be so even if the lease is a permanent one.(2)

It has been held in the undermentioned cases(3) that a provision in restraint of alienation by the lessee, is *ipso facto* for the benefit of the lessor. If this is correct, then the words "where the condition is for the benefit of the lessor or those claiming under him" would be rendered unnecessary and superfluous. It is submitted that it is not permissible in interpreting statutes to construe words as being superfluous, if such a construction can be avoided. In *Sital Prasad* v. *Dildar Ali*,(4) Mr. Justice Chapman of the Patna High Court observed :

> "It is clear from the terms of S. 10, Transfer of Property Act, that the mere existence of a condition in general terms against subletting is not, of itself, sufficient to prove that the condition was for the benefit of the lessor. There must be something else, either in the circumstance of the case or in the nature of the property, or there must be something in the wording of the lease, from which it might be inferred that the provision was intended directly for the benefit of the lessor."

Where there is a *provision for re-entry* by the landlord on breach of the condition it is, of course, quite clear that the condition would be for the benefit of the lessor.(5) But it does not follow that the *absence* of such a provision will render the condition not one for the benefit of the lessor.(6) It has, however, been held in the undermentioned case(7) that in the absence of a provision for re-entry on breach of the condition, the condition cannot be said to be for the benefit of the lessor.(7a) The case

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4. 1926 Cal 451 (453) [AIR V 13](DB).

Section 10 — Note 13

1. (1815) 16 R R 293 (296) : 105 E R 644, *Doe* v. *Bevan*.

1b. 1945 Pat 162 (176) [AIR V 32] : 23 Pat 871 (DB). (Per Beevor, J.)

1a. ('55) 1955 Mad W N 580 (582). (A condition restraining alienation contained in a document which required registration in law but was in fact not registered, is unenforceable.)
1919 Cal 942 (943) [AIR V 6] : 45 Cal 940 (DB).
('83) 7 Bom 256 (260) (DB).
[*See also* 1941 Oudh 198 (200) [AIR V 28]. (Usufructuary mortgage.)]

2. 1942 Oudh 374 (377, 378) [AIR V 29] : 17 Luck 805 (DB).
1928 Oudh 344 (346) [AIR V 15] : ILR 3 Luck 636 (DB).
('83) 7 Bom 256 (260) (DB).
[*See* 1939 Cal 523 (525) [AIR V 26]. (It is permissible for a landlord to insert a stipulation in a permanent lease providing for the fulfilment of certain conditions, without which a transfer by the lessee would not be binding on the landlord.)]

3. 1915 Mad 1071 (1072) [AIR V 2] (DB). (26 Mad 157, Followed.)
('03) 26 Mad 157 (160, 161) (DB).

4. 1916 Pat 161 (163) [AIR V 3] : 1 Pat L Jour 1 (DB).

5. 1942 Cal 452 (454) [AIR V 29] (DB). (Condition that on transfer by lessee, lessor should be paid one-fourth of the price and that otherwise lessor would be entitled to re-enter.)
1916 Pat 161 (163) [AIR V 3] : 1 Pat L Jour 1 (DB). (Per Chapman, J.)
(1910) 7 Ind Cas 346 (347) (Cal).

6. *See* 1916 Pat 161 (163) [AIR V 3] : 1 Pat L Jour 1 (DB).

7. ('11) 10 Ind Cas 374 (375, 376) (DB) (Cal).

7a. ('61) 65 Cal W N 1050 (1052) (DB). (Lease —Stipulation restraining sub-letting—Breach of—Absence of provision for re-entry — No forfeiture of lease.)

purports to follow the decision in *Nilmadhab* v. *Narattam*,(8) where their Lordships observed as follows :

> "There being no such proviso in the lease, the condition against alienation cannot be said to be for the benefit of the lessor, and hence it is void under the provisions of S. 10, Act IV of 1882, and the lease cannot be said to have determined under the provisions of S. 111, clause (g) of the same Act."

An examination of *Nilmadhab's case*, however, shows that the restriction against alienation was imposed by way of a *covenant by the lessee* and not by way of a *condition* As will be seen in Note 17 a *covenant* restricting alienation by a lessee is not governed by S. 10 or by clause (g) to S. 111 at all and grounds which would render such a restriction invalid in a *covenant* would not necessarily be grounds which would render such restrictions invalid in a *condition*. The judgment in *Nilmadhab's case*, however, uses the words "covenant" and "condition" as being interchangeable, and purports to apply S. 10 and clause (g) of S. 111 to what is really a *covenant* in the case. It is submitted that, in this respect, the decision cannot be supported.

It must, however, be noted here that there is an apparent inconsistency between this section and clause (g) of S. 111 of the Act. A condition in a lease against alienation, if it is for the benefit of the lessor, will under this section be valid, and the consequence of a breach of a valid condition is, as has been seen in Note 5 already, *to put an end to the lease*, whereas the breach of a condition in the lease will *not*, under clause (g) of S. 111, put an end to the lease, *unless there is a provision for re-entry* by the lessor in the event of a breach of the condition. Section 10, however, only deals with *conditions restraining alienation* while clause (g) of S. 111 deals with conditions in *general* in leases. In such cases the rule of interpretation of statutes is that the general provision applies only to cases not covered by the specific provision.(9) It follows that clause (g) of S. 111 must not be construed as governing cases falling under S. 10, but as dealing only with conditions *other than those restraining alienation.*

Since the breach of a valid condition in a lease would operate to put an end to the lease itself, it follows that the assignment or alienation made in breach of the condition would also be void.(10)

The clause in this section in favour of the validity of a condition in a lease was held to be not inconsistent with the provisions of S. 11 of the Bengal Tenancy Act (since repealed by Act 10 of 1956) and not affected by it in any way.(11)

14. Condition against alienation in gifts. — Section 126 of the Act provides that the donor and donee may agree that on the happening of a specified event which does not depend upon the will of the donor, a gift shall be suspended or revoked. In the undermentioned case(1) *A* made a gift to *B* on condition that the land would be liable to be taken back in the event of *B* transferring it. It was held by the Allahabad High Court that the gift was a gift subject to a power of revocation valid under S. 126

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8. ('90) 17 Cal 826 (827, 828) (DB).

9. See Notes on the Preamble in the AIR Commentaries on the Civil Procedure Code 7th (1963) Edn.

10. 1938 Cal 478 (479) [AIR V 25] (DB). (Citing Redman, Law of Landlord and Tenant, 8th Edn., page 389.)

11. 1926 Cal 451 (452, 453) [AIR V 13] (DB).
('10) 6 Ind Cas 685 (687) (DB) (Cal). (Section 10 of T. P. Act is not repealed by implication by S. 11 of Bengal Tenancy Act.)

[*See* ('92) 19 Cal 774 (776) (DB). (A transfer of a tenure made in terms of the provisions of S. 12 of the Bengal Tenancy Act of 1885, is not binding on the landlord if there be a contract between the landlord and tenant that the transfer shall not be valid and binding until security to the satisfaction of the landlord has been furnished by the transferee and such security has not been furnished.)]

Section 10 — Note 14

1. ('07) 4 All L Jour 708 (709) (DB).

of the Act, and was not void under Ss. 10 and 12 of the Act. This case was dissented from by the same High Court in *Brij Devi* v. *Shiva Nanda Prasad.*(2) It was there held that such a condition would be void under S. 10 and that S. 126 must be construed as referring to conditions *other than condition restraining alienation.* In the course of the judgment their Lordsihps observed as follows :

> "The provisions of Ss. 10 and 12, Transfer of Property Act, are perfectly general. They refer to all transfers, transfer by gift, sale or otherwise. Section 126 appears in a chapter which is headed 'Of Gifts.' Sections 10 and 12 appear on Chap. II headed 'Of Transfers of Property by Act of Parties.' In this chapter the conditions which may be imposed and may not be imposed upon the transfer of moveable and immovable property are enumerated. Section 10 refers specifically to condition restraining alienation by the transferee. The provision of the section declaring such a condition void is made to apply to every transfer of proprietary interest in immovable property. One exception only is made in the section itself, namely, in the case of a lease, where the condition is for the benefit of the lessor or those claiming under him. Now S. 126 permits a donor in certain circumstances to impose a condition entitling the donor to revoke the gift. This section, it was contended by the learned counsel for the plaintiffs, was in equally general terms and therefore conferred upon the donor in the present instance the right to restrain alienation on the part of the donee, such alienation being 'an event happening' not dependent upon the will of the donor. We are unable to sustain this argument. It appears to us that the condition imposed upon a donee must, before it can be valid, be consistent with the general principles in regard to conditions in transfers contained in Chap. II of the Act, and in particular in S. 10 thereof."

The later decision of the Allahabad High Court has been followed by the Punjab High Court in the following case.(2a)

Where, at the time of the gift by *A* to *B*, *B* agreed that the gift would be revoked on his transferring or mortgaging the property without *A's* consent, it was held by the High Court of Rangoon that *B's* promise was only a personal one to *A*, that further there was no *absolute restraint*, that therefore S. 10 was not contravened, and that the case fell within S. 126 of the Act.(3)

In the later decision of the Allahabad High Court, referred to above, it is assumed that S. 126 of the Act deals with *conditions.* In the decision of the Rangoon High Court, the view seems to be taken that the agreement was not a *condition* but was merely a personal promise to which S. 10 would not apply, or if it were regarded as a condition then it was only a condition partially restraining alienation to which again S. 10 would not apply. It is submitted that really there does not appear to be any conflict between this section and S. 126. The words "donor and donee may *agree*" in the latter section show that it refers to *covenants* and not *conditions*, while S. 10 refers to *conditions.* A condition against alienation in a gift deed would not be governed by S. 126 while an *agreement* for revocation of the gift would not be governed by S. 10.

Where, upon an objection by the collaterals of the donor to a gift to his *pichhlag* son, an agreement was made between the parties that the donee or his descendants would not have the right of sale or mortgage over the subject-matter of the gift, it was held that the agreement amounted to a compromise and not a transfer and that, therefore, the restrictions on the alienation were not hit by this section.(4)

14a. Condition against alienation in religious endowments. — It has been held by Allahabad High Court that the rule contained in this section does not affect an idol to which a transfer by way of an endowment is made because the idol by itself is

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2. 1939 All 221 (222, 223) [AIR V 26] : ILR (1939) All 298 (DB).

2a. 1956 Punj 255 (255) [AIR V 43 C 109].

3. 1929 Rang 226 (228) [AIR V 16]: 7 Rang 306.

4. 1953 Punj 282 (283) [AIR V 40 C 123] : ILR (1954) Punj 165 (DB).

incapable of making any transfer or disposing of its interest in the property.(1) But a contrary view is taken by the Patna High Court.(2)

15. Condition in decrees and awards restraining alienation. — Property obtained under a *decree of Court* cannot be said to have been obtained on a "transfer of property" within the meaning of this Act. (See S. 5). A condition absolutely restraining alienation imposed by such decree is not therefore within this section. (But such a condition would be void on general principles of law on which this section itself is based.) In *Wazir Muhammad* v. *Har Prasad*,(1) a decree settled the rights of two parties and contained a provision that one of them should not alienate the property which he got from the other. The Oudh Chief Court observed :

> "If it be held that the condition is absolute, that it has the force of a statutory prohibition against alienation, then, no doubt, the violation of the condition would render the transfer totally void. But we agree with the opinion previously expressed in this Court by Mr. Chamier(2) that there is an essential distinction between restrictions on transfers imposed by the Legislature and restrictions imposed by contract or decree. The general policy of the law is to promote the free alienation and circulation of property and to discourage the introduction of restrictions calculated to interfere with the fulfilment of these objects. But cases may and do arise in which for the protection of particular interests, it is deemed expedient to depart from this general principle and to fetter the privilege of free alienation. In such cases the prohibition against transfer being founded upon considerations of public interest must be treated as absolute. But no such force can be attributed to a *restriction which has its origin in an agreement of parties or a decree of Court.* The contract or decree does not purport to affect the rights or interests of any one but the parties themselves; it merely regulates the relations of the parties *inter se.*"

It has been held that a compromise decree which contains a term contrary to the provisions of this section is not a nullity but binds the parties thereto unless it is set aside.(2a)

It has been held that a condition in an award imposing an absolute restraint on alienation of property would be invalid as opposed to the provisions of this section.(3)

16. Agreements or covenants not to alienate. — As has been pointed out in Note 5 the section has no application to *agreements* not to alienate property. Such an agreement is not, like a condition, a *quality annexed to the property* and will not put an end to or affect the validity of the alienation made in breach of the agreement. But, where the agreement is valid, the parties would be entitled, under the law of contracts, to the remedies available to them on breaches of contracts. Thus, a party threatening to alienate in breach of the agreement may be restrained by *injunction* from alienating the property. He may, if he has actually alienated the property,

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Section 10 — Note 14a

1. 1957 All 77 (80, 81) (Pr 21) [AIR V 44 C 17] : ILR (1956) 1 All 421 (DB).

2. 1959 Pat 305 (307) [AIR V 46 C 81] : ILR 38 Pat 49. (Restriction on power of shebait to alienate the dedicated property is void.)

Section 10 — Note 15

1. ('12) 15 Oudh Cas 67 (74, 75) (DB). (It was held, however, that the condition was for the benefit of the superior landlord and was therefore valid.)

[*See also* 1914 Oudh 352 (353) [AIR V 1] : 1 O L J 187 : 17 O C 150. (Settlement decree — Restriction on alienation placed by—Transfer is only voidable at the option of superior proprietor)]

2. Compare ('03) 6 Oudh Cas 331 (334, 335). ('11) 14 Oudh Cas 144 (146).

2a. 1967 Guj 81 (85) [AIR V 54 C 16].

1953 Bom 412 (414, 415) [AIR V 40 C 128] : ILR (1953) Bom 948 (DB).

3. 1935 Sind 235 (242) [AIR V 22].

[See however 1932 All 686 (688) [AIR V 19] : 1932 All L J 821. (Partition award — M to be absolute owner of certain property — M not to have power of alienation but his descendants given power — M transferring rights in property—Alienee held entitled to claim partition as against others during M's lifetime though the transfer may be voidable by M's descendants who were not in existence at that time —Transfer was not void.)]

be liable for *damages* to the other party to the agreement. It is only in this respect that the validity or otherwise of such agreement becomes a relevant subject of discussion here.

An agreement for consideration that the parties thereto shall not alienate certain properties for a *limited time* will be valid(1) and will be binding not only on the actual parties to the agreement,(2) but also on the representatives,(2a) and persons taking the property with *notice* of the agreement.(2b) But an agreement preventing alienation in *perpetuity* or for an indefinite period would be opposed to public policy in so far as it seeks to bind other persons who may become entitled to the property.(3) It would however be binding on the actual parties to the agreement.(4) In *Jafri Begam* v. *Syed Ali*,(5) an arbitrator gave an award that two daughters of a Muhammadan should inherit his estate in equal shares and stated in the fifth clause thereof that they should *never* partition the properties. The two daughters agreed to abide by the award. The son of one of the daughters sued, after his mother's death, for partition and it was contended that he could not do so. Their Lordships of the Privy Council observed as follows :

> "As regards the effect of the fifth clause, their Lordships agree with the Judicial Commissioners that it affords no defence to the present action. It may have bound the parties who agreed amongst themselves to abide by it. But as against the present plaintiff the clause

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Section 10 — Note 16

1. †1925 P C 272 (279) [AIR V 12] : 28 Oudh Cas 352 : 52 Ind App 398 : 47 All 883. (Family arrangement between Hindu widow and reversioner, by which property was given to the reversioner and he undertook not to alienate it during lifetime of widow — *Held*, valid and and reasonable.)

('36) 63 Cal 209 (213) (DB). (There is nothing inherently objectionable in a contract between persons tying up properties for a limited time for definite purpose.)

('08) 12 Cal W N 793 (796, 798, 799) (DB). (Agreement among Hindu coparceners not to partition during lifetime of parties is good.)

† ('99) 3 Cal W N 126 (128). (Where there is no consideration it is not binding even on the parties.)

('98) 25 Cal 869 (871) (DB). (Hindu widow getting property under a compromise undertaking not even to lease.)

('72) 8 Beng L R 60 (71, 72). (Agreement not to alienate for 20 years.)

[But see ('11) 11 Ind Cas 301 (302, 303) (DB). (Cal). (Family arrangement — Agreement by reversioners not to alienate during lifetime of widow held invalid as being opposed to Ss. 10 and 11 of the Act — Submitted not correct — Sections 10 and 11 do not apply to agreements but only to conditions — Further AIR 1925 P C 272 is opposed to this view.)]

2. ('08) 12 Cal W N 793 (798, 799) (DB).
('99) 3 Cal W N 126 (128).

2a. ('72) 8 Beng L R 60 (71).

2b. ('72) 8 Beng L R 60 (71, 72). (Agreement not to partition for 20 years held binding on heirs of parties and also on transferee from him with notice of contract.)

('94) 1894 Pun Re No. 19, p. 44 (45). (An agreement contained in a deed of compromise of a suit, that the promissor shall not exercise his powers of transfer of land in dispute except in favour of the promisee is lawful and binding between the parties and enforceable against a person taking from the promissor with notice that he is so bound.)

3. 1958 Madh Pra 246 (252) [AIR V 45 C 92] (DB). (Family arrangement under award — Property allotted to members in full proprietorship — One member binding himself not to alienate certain property—Inalienability clause will not bind his successors.)

1925 Mad 624 (625) [AIR V 12] : 21 Mad L W 362.

('36) 63 Cal 209 (213) (DB). (Agreement to tie up property for an indefinite period is against public policy and is not binding on persons not parties to it.)

('08) 12 Cal W N 793 (798) (DB). (An agreement not to partition for ever, would infringe the inherent right of every co-parcener to apply for a partition of joint estate.

('69) 4 Mad H C R 345 (348, 349) (DB). (An estate cannot be made subject to a condition which is repugnant to any of its ordinary legal incidents.)

† ('99) 3 Cal W N 126 (128). (It is not competent for owners of property by any arrangement to say that joint property shall remain so in perpetuity without being partitioned.)

[*See also* ('75) 24 Suth W R 321 (322) (DB).]

4. 1958 Madh Pra 246 (252) [AIR V 45 C 92] (DB). (Family arrangement under award — Clause against alienation — Family arrangement might be binding upon parties to it.)
('36) 63 Cal 209 (213) (DB).

5. ('01) 23 All 383 (391, 392) : 28 Ind App 111 (PC).

has no effect whatever. The arbitrator had no power to alter the course of legal devolution in a mode at variance with the ordinary principles of Muhammadan Law in the absence of a special custom prevailing in the family. He had no power to make property which was divisible by law, indivisible for ever."

In *Mahram Das* v. *Ajudhia*,(6) *M* a cosharer in a village, transferred to *A*, another cosharer, a two.anna share, by a deed of sale. On the same date *A* by an *ikrarnamah* or agreement agreed that he would not collect the rents and profits of the property transferred to him, that he would not even demand a partition of that share, and that he would not alienate or mortgage it or exercise proprietary rights over it. *A* in breach of the agreement collected rents, and attempted to obtain partition in the Revenue Courts, and *M* brought a suit against him for damages. Mr. Justice Straight observed as follows :

"As I understand it, provisions in a contract of the kind before me, which absolutely debar the person to whom the proprietary rights have passed, from exercising those rights, impose conditions which no Court ought to recognise or give effect to; and that a covenant in a sale deed, the effect of which is to disable the vendee for ever from either alienating or enjoying the interest conveyed to him, is not only contrary to public policy, but in violation of the principle enunciated in Ss. 10 and 11 of the Transfer of Property Act. The agreement, therefore, on the basis of which the plaintiff in this case asks for relief, is one which no Court should, in my opinion, assist him in enforcing, for as I have already remarked, the sale deed and *ikrarnamah* must be read as one instrument and as recording a single transaction."

If the decision is understood as meaning that an agreement absolutely restraining alienation of property is not binding on the *actual parties* to the agreement themselves, it is submitted that it is contrary to the decision of the Privy Council in *Jafri Begam's case*, referred to above. It would appear, however, that their Lordships in *Mahram Das* v. *Ajudhia* have proceeded on the view that the agreement and the sale in that case constituted one single transaction and that the alleged covenant really operated as a *condition* against alienation and as such invalid.

An agreement between parties for *pre-emption* is a valid agreement.(7) As to whether and when such an agreement will offend the rule against perpetuities, see Notes on Section 14. An agreement for consideration, by a transferee of property, undertaking to *make the first offer* to the transferor in case he chose to sell the property may give rise to a claim for damages on breach of the undertaking, but cannot have the effect of restraining the alienation of the property.(8)

A stipulation in a compromise, that certain property transferred thereby should not be saleable in execution of any decree against the transferee cannot stop the course of law and has no effect on the rights of a creditor of the transferee to proceed against the property.(9)

17. Covenants against alienation in leases. — From what has been said in Notes 5 and 16 it follows that the breach of a *covenant* as distinguished from the breach of a *condition*, in a transfer against alienation, may give rise to remedies available as on a breach of contract, but does not—

(a) put an end to the *original transfer itself*, or

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6. ('86) 8 All 452 (455, 456) (DB).

7. 1944 Nag 187 (188) [AIR V 31] : ILR (1945) Nag 174. (Partition between two brothers — Agreement that if share of one is sold, the other will be entitled to buy at a certain price —Agreement does not create interest in property and so S. 10 or S. 14 is not offended; under Contract Act S. 37 it can be enforced against representatives of parties.)
('96) 1896 Bom P J 717 Reprint 817 (819) (DB). (A condition reserving a right of pre-emption as between cosharers is valid unless it sins against the rule about perpetuities.)

8. 1931 Mad 799 (800, 801) [AIR V 18].

9. ('84) 1884 All W N 121 (121) (DB).

(b) render even the *alienation made in breach of the covenant* invalid.

As regards *(a)* the same principle will apply to covenants against alienation *in leases*. The breach will not put an end to the lease itself, but may give rise to damages or other remedies available on breaches of contracts.(1) As regards *(b)*, the rule is the same as in English law. As stated in Redman's *Law of Landlord and Tenant*, 8th Edn., page 389 :

> "If a term is granted subject to a condition against assignment, an assignment by the lessee will be void, but if the restraint is by *covenant* only the lessee, by assigning, commits a breach of covenant, but the *assignment itself is not void* though the landlord can put an end to it as soon as the assignment comes to his knowledge if the lease contains a power of re-entry."

The same principle, it is conceived, will apply to cases not governed by the Transfer of Property Act.(2) In cases governed by this Act, however, the rule seems to be somewhat different. Under S. 108, Clause (j) of the Act, the lessee may transfer absolutely or by way of mortgage or sub-lease the whole or any part of his interest in the property *in the absence of a contract to the contrary*. Where, therefore, there is a *covenant against alienation* (and this is a 'contract to the contrary') the lessee has no right at all to make the alienation. The result, therefore, where the lessee commits a breach of the covenant against the alienation is that the alienation is invalid against the lessor, but *the lease* is not *ipso facto* put an end to. If, however, there is also, along with covenant against alienation, a *covenant for re-entry* on such breach, the lessor can re-enter on the basis of the latter contract, and thus put an end to the lease.(3)

The principles stated above as applicable to leases are independent of the provisions of sections 10 and 111 (g) of the Act, which deal with 'conditions' and not with *covenants*. The question whether a covenant is for the "benefit of the lessor" does not really arise. The validity of such a covenant must be determined by reference to the principles of the law of contracts and not by reference to the question whether it is for the benefit of the lessor. In the decided cases, however, the distinction between covenants and conditions has not, unfortunately, always been kept in view, and questions as to the effect of a breach of a covenant against alienation in a lease have been decided by reference to this section and S. 111 (g) of the Act. Thus, in *Nil Madhub* v.

Section 10 — Note 17

1. 1938 Cal 478 (479) [AIR V 25] (DB).
1921 Bom 27 (27) [AIR V 8] : 45 Bom 1197 (DB). (Where there is a covenant not to assign a lease and the tenant assigns without leave, then clearly the landlord is entitled to damages.)
1917 Cal 236 (240) [AIR V 4] (DB). (If no right of re-entry is reserved, the remedy of the landlord, on breach of covenant, is either by way of injunction or by recovery of damages.)
1916 Pat 161 (164, 166) [AIR V 3] : 1 Pat L Jour 1 (DB).
†('83) 7 Bom 262 (265) (DB).
('70) 7 Bom H C R A C 69 (70). (Lessor may bring action for damages or sue for injunction.)
Also see S. 108 (j), Note 1.

2. 1926 Cal 533 (533) [AIR V 13] : 53 Cal 270 (DB).
1924 Cal 361 (362) [AIR V 11] (DB). (17 Cal 826, Followed.)
1921 Cal 474 (476) [AIR V 8] : 47 Cal 979 (DB). (Covenant not to alienate, though spoken of as 'condition' in the case — Assignment in breach of condition not inoperative.)
1917 Cal 609 (609) [AIR V 4] (DB). (Lease whether agricultural or not, not clear — Covenant by lessee not to transfer — No right of re-entry reserved — No other conditions put in to enforce rights of lessor — Covenant held could not restrain alienation by lessee.)
('11) 10 Ind Cas 489 (490, 491) (DB) (Cal). (The reference to S. 10 as having any bearing on the question is, it is submitted, not correct.)
†('09) 36 Cal 745 (748) (DB). (In the absence of any right of re-entry reserved in a permanent lease, an assignment by a lessee is operative against lessor, notwithstanding a covenant restraining the lessee from transferring without the written permission of the lessor.)
('83) 7 Bom 262 (265) (DB).

3. 1917 Cal 426 (426) [AIR V 4] (DB). (Covenant for re-entry after notice on breach of covenant against alienation — Lessee committing breach — Lessor can re-enter only after giving notice as per terms of the contract.)

Narrottam Sarkar(4) the lessee had *covenanted* with the lessor not to make an alienation. On breach of the covenant by the lessee the lessor claimed to eject the lessee, i.e., to put an end to the lease. There was no provision for re.entry. Their Lordships of the Calcutta High Court held that the lease itself did not determine on breach of the covenant, and in coming to that conclusion observed as follows :

> "We are, however, of opinion that the plaintiffs are not entitled to eject the defendants, as the lease contains no clause giving the lessors a right of re-entry: providing that the lease shall become void in case of a breach of a covenant against alienation. There being no such proviso in the lease, the *condition against alienation* cannot be said to be *for the benefit of the lessor*, and hence it is void *under the provisions of S. 10, Act IV of 1882, and the lease cannot be said to have determined under the provisions of S. 111, clause (g) of the same Act.*"

In *Parmeshri* v. *Vittappa Shanbaga*,(5) *V* leased property to *Y* on a permanent lease, and *Y* undertook not to alienate the property. There was, however, no provision for re-entry. *Y* subsequently sold the holding to *S*. *V* thereupon sued to evict *S* and recover possession of the holding. It was held by the Madras High Court, that *V* could not terminate the permanent lease itself and recover possession. In coming to this conclusion, Sir Bhashyam Ayyangar observed as follows :

> ".....the principle of law governing the case will be found clearly enunciated in Ss. 10 and 111 (g) of the Transfer of Property Act.....The stipulation that the lessee shall have no right to transfer his interest *is clearly one intended for the benefit of the lessor*..... The stipulation against alienation is not void but valid and if the plaintiffs had sued for injunction to restrain the defendants' assignor from making the assignment or sued for damages for breach of the stipulation they would have been entitled to the remedy sought for.....It may also be that a transfer by the lessee, absolutely or by way of mortgage or sub-lease, in breach of the *covenant* not to alienate, will be void as against the lessor .....But the authorities are clear that in the absence of such express condition (i.e. one for re-entry) there will be no forfeiture of the lease.....The difference between a provision against alienation which amounts merely to a 'covenant' not to alienate—a covenant which runs with the land—and one which amounts to a 'condition' which dispenses with the express right of re-entry in the event of a breach, is explained in Woodfall's 'Landlord and Tenant', 16th Edition, pp. 192-193..... I am, therefore, clearly of opinion that the alienation under which the defendants claim does not entitle the landlord to terminate the permanent lease and re-enter upon the land."

As has been seen already the actual decision in both the Calcutta and the Madras cases could be supported on principles independent of S. 10 and S. 111 (g). It is submitted that the grounds of those decisions in so far as they rest on the provisions of these two sections, cannot be accepted as correct. The same observations will apply to the undermentioned cases(6) in which the actual decisions themselves can be supported without reference to S. 10 or S. 111 (g), but which base their conclusions on one or other of the said two cases and on the supposed applicability of S. 10 and S. 111 (g) of the Act.

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4. ('90) 17 Cal 826 (827, 828) (DB).
Also see S. 108 (j), Note 1 and S. 111, Note 13.

5. ('03) 26 Mad 157 (160, 161, 162) (DB).

6. 1956 Tripura 9 (15) [AIR V 43 C 5].
ILR 28 All 400 (401) (DB). (Perpetual lease—Covenant against alienation—No provision for re-entry — Suit for recovery by lessor held cannot succeed.)
1919 Cal 405 (405) [AIR V 6]. (Covenant against alienation—No provision for re-entry—Lessor suing for possession on alienation by lessee—Held, lessor cannot sue for possession in the absence of provision of re-entry—The words 'covenant' and 'condition' are used without distinction and 17 Cal 826 is followed.)
1915 Mad 1071 (1072) [AIR V 2] (DB). (Facts not clear — Restriction appears to be by way of covenant though spoken of as a condition—Assignment in breach of covenant—Held, following 26 Mad 157 that assignment was invalid.)
('11) 9 Ind Cas 171 (173) (DB) (Mad). (The case is one of covenant and yet S. 10 is referred to as being applicable in support of the conclusion.)
[*See also* 1919 Cal 942 (943) [AIR V 6] : 45 Cal 940 (DB). (Lessee agreeing not to alienate—But subsequently alienating—Held that alienation was void – S. 10 was, however, referred to as applying to the case, though the facts show that the restriction was only by way of covenant.)]

See also the undermentioned case.(6a)

A covenant against alienation in a lease is a covenant which runs with the land.(7)

A covenant not to sub-let premises is not broken by the sub-letting of part of the premises.(8)

18. Agreement by mortgagor not to alienate mortgaged property.— The principles discussed in Note 17 will be applicable to agreements between the mortgagor and the mortgagee by which the former undertakes not to alienate the mortgaged property before redemption. The agreement, if binding on the parties, will create only a personal liability between them(1) and will not affect the validity of the alienation made by the mortgagor in contravention of the agreement.(2) But the transferee from the mortgagor will, of course, take the property only subject to the mortage already created and without prejudice to the rights of the mortgagee as it stood on the date of the mortgage.(3) He will be entitled to redeem the mortgage.(4)

The covenant against alienation will not operate even against the mortgagor so as to prevent him from redeeming the property. Thus, an agreement that the mortgagor should redeem the mortgage with his own monies and not with money obtained by a transfer of property, will not disable the mortgagor from transferring the property and redeeming the mortgage with the purchase.money. The reason is that such an agreement would be a clog on redemption and will not be given effect to by Courts of Equity.(5) See Notes on S. 60.

6a. 1921 Cal 741 (746) [AIR V 8] : ILR 48 Cal 359 : 25 Cal W N 13 (DB). (Tenancy created before Act—Provision against transferability—No argument can be founded on S. 10 as to their invalidity.)

7. 1923 Cal 679 (680) [AIR V 10] (DB). (A lease of permanent, heritable and transferable tenancy, contained a covenant to the effect that if the tenant transferred the property he would pay to the landlord out of the purchase-money in his hands, one-fourth as *nazar*, and would obtain registration of the name of the transferee, and that if he failed to do so, the transfer would be invalid and the tenant would continue to be liable for the rent — Held that having regard to the provisions of Ss. 10 and 12 of the Transfer of Property Act, the covenant was valid.)

1916 Pat 161 (166) [AIR V 3] : 1 Pat L Jour 1 (DB). (Per Atkinson, J.)

(1902) 71 L J P C 20 (21) : 1902 App Cas 104, *M. Eacharn* v. *Cotton*.

(1868) 3 Q B 739 (749, 750, 751) : 37 L J Q B 231, *Williams* v. *Earle*. (Lessor can sue an assignee of the lessee for breach of the covenant.)

Also see S. 40, Note 25.

8. ('47) 28 Mys L Jour 36 (60) (DB).

(1956) 2 All E R 357 (359), *Esdalie* v. *Lewis*.

Section 10 — Note 18

1. ('81) 3 All 369 (381) (FB).

(1901) 11 M L J 132 (140) (DB). (Covenant in mortgage giving right to mortgagee to pre-empt does not run with the land — Covenant cannot be enforced against *bona fide* transferee without notice.)

('81) 6 Cal 317 (319) (DB).

[*See also* ('82) 5 Mad 184 (186, 187) (DB). (Observations by way of *obiter dicta*.)]

2. (1901) 11 M L J 132 (140) (DB). (Covenant in mortgage giving right of first refusal if mortgagor sells and to pre-empt otherwise—Covenant cannot be enforced against *bona fide* transferee without notice.)

('81) 3 All 369 (381) (FB).

('66) 1866 Agra F B 7 (13, 14) (FB). (A stipulation not to alienate cannot operate to annul a *bona fide* conveyance to a third person by the mortgagor for paying off the original mortgage debt.)

1918 Cal 557 (562) [AIR V 5] (DB). (Clause restraining alienation does not prevent alienation subject to rights of mortgagee.)

('82) 4 All 518 (523, 524) (DB). (A transfer of mortgaged property in breach of condition against alienation is valid except in so far as it encroaches upon the right of the mortgagee.)

('81) 6 Cal 317 (318, 319) (DB).

Also see S. 65-A, Note 7.

3. 1918 Cal 557 (562) (DB).

('92) 16 Bom 599 (602) (DB).

('87) 1887 All W N 231 (231, 232) (DB). (4 All 518, Explained.)

('82) 4 All 518 (523, 524, 525) (DB).

('76) 1 All 126 (129) (DB). (Transfer is voidable in so far as it is in defeasance of the mortgagee's rights.)

('68) 10 Suth W R 151 (152) (DB).

4. ('81) 3 All 369 (381) (FB).

5 *See* ('92) 16 Bom 599 (602) (DB). (Court will not give effect to any collateral restriction on

19. Proviso—Restraint on anticipation. — The proviso refers to what is called a restraint on anticipation in English law. Such a restraint is valid under this section and is an exception to the general rule of law which regards conditions in transfers of property restraining alienation as null and void. The reason for this exception is to be found in the rules of the English Common law. At Common law, by the act of marriage, the husband and wife became in law one person and so continued during coverture or marriage. Immediately on marriage the husband became owner of the properties that belonged to the wife and it was impossible for the wife to have any power of disposition over property for her separate benefit, independently of her husband.(1) The rules of the Common law giving the husband rights over the wife's property were naturally not favoured by the Courts of Equity, and consequently equity allowed property to be given to trustees in trust for the wife *separately*. Land and other property which was conveyed to trustees for the separate use of the wife could be dealt with by her in equity as if she were *feme sole*, that is, unmarried.(2) Even this was regarded as giving no complete protection to the wife inasmuch as the wife could be morally influenced by the husband to dispose of her properties as he pleased. The Courts of Equity therefore allowed property settled for the separate use of married woman to be so tied down for her own personal benefit that she should have no power during coverture to anticipate or assign her income: for it was considered that to place the wife's property beyond the power of her husband was not a complete protection for her—but that it must also be placed beyond reach of his *persuasion*.(3) In *Tullett* v. *Armstrong*,(4) decided in the year 1838, Lord Langdale, M. R., in discussing the validity of a clause in restraint of anticipation observed as follows :

"The estate for separate use, as sanctioned by Courts of Equity, has its peculiar existence only in the married state. It operates as a protection to a married woman, against the legal power over the wife's property which is vested in her husband. It acts in contravention and control of the legal right of the husband, and as against his legal power it is a sufficient protection; but the power of alienation remaining in the wife, the separate estate, unfettered, is no protection against the moral influence of the husband, and many instances have occurred and daily occur in which the wife, under the persuasion or influence of her husband, has been and is induced to exercise her power of alienation in his favour or for his benefit, and thus defeat the protection intended for her.

"But, as the separate estate itself owed its origin and support to the Courts of Equity, it was understood, that the same Courts might so modify it, as to secure the protection which was intended; and accordingly it was intimated by Lord Thurlow that if a gift clearly expressed that the separate estate should be incapable of assignment in anticipation or of alienation, that intention would be carried into effect, and his Lordship being of that opinion, himself set the example in a case in which he personally took an interest; and from that time, now nearly half a century ago, it has been usual to introduce into wills and settlements a clause giving to women real and personal estate for their separate use, independently of their husbands, without power of assignment, by way of anticipation or of alienation; and such clauses, though their operation has been considered to be, as undoubtedly it is, anomalous and irreconcilable with the ordinary legal rules affecting the limitations of estates, and the legal incidents of property, have been repeatedly approved and carried into effect by this Court and settlements and provisions for family to a very great extent have been framed in reliance upon them. And in *Jackson* v. *Hobhouse*(4a) Lord Eldon emphatically declared that it was too late to contend against the validity of a clause in restraint of anticipation."

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the equity of redemption.)

Section 10 — Note 19

1. Williams and Eastwood, Principles of the Law of Real Property, 1933 Edn., Pages 340, 341.

2. Topham, New Law of Property, 4th Edn., 1932, P. 164.

3. Williams and Eastwood, Principles of the Law of Real Property, 1933 Edn., P. 348.

4. (1839) 49 R R 280 (281) : 41 E R 147.

4a. (1817) 2 Mer 483 : 16 R R 200 (203).

See also the undermentioned cases.(4b)

The proviso, thus, is merely an enactment of the English law on the subject.

Before the year 1929 there was an apparent inconsistency between this proviso and S. 8 of the Married Women's Property Act, 1874, which ran as follows :

"If a married woman (whether married before or after the first day of January, 1866), possesses separate property, and if any person enters into a contract with her with reference to such property, or on the faith that her obligation arising out of such contract will be satisfied out of her separate property, such person shall be entitled to sue her, and, to the extent of her separate property to recover against her whatever he might have recovered in such suit had she been unmarried at the date of the contract, and continued unmarried at the execution of the decree."

It was held by the High Court of Calcutta in *Hippolite* v. *Stuart*,(5) that section 10 of this Act did not affect S. 8 of the Married Women's Property Act, 1874, and that notwithstanding a valid restraint upon alienation, her separate property may be proceeded against under S. 8 of the Act of 1874. The Judges of the High Court of Bombay felt themselves bound to follow *Hippolite's case*, but doubted the correctness of the reasons given in support of that decision.(6) The High Court of Madras,(7) on the other hand dissented from the Calcutta view and held that only such property as was without any restraint on anticipation, could be proceeded against under S. 8 of the Act of 1874. The conflict has now been set at rest by the amendment of the latter section by Act XXI of 1929, by the addition of the following clause in the proviso :

"Provided that nothing herein contained shall—

(a) entitle such person to recover anything by attachment and sale or otherwise out of any property which has been transferred to a woman or for her benefit on condition that she shall have no power, during her marriage to transfer or charge the same or her beneficial interest therein."

In *Hawkes* v. *Hubback*,(8) property had been given in trust to a woman for her life "independent of her husband for her separate use without power of anticipation." The husband died and the woman married again. It was held by Lord Romilly, M. R., that on the second marriage, the restraint on anticipation revived, though the woman could have disposed of the property *before* the second marriage was contracted.

4b. (1890) 38 W R (Eng) 425 (425) : 43 Ch D 630, In re Warmald. (Alienation by married woman of property subject to restraint on anticipation is wholly inoperative — "Anticipate" does not mean attempt to anticipate.)

(1883) 11 Q B D 27 (29) : 31 W R (Eng) Dig 8, Chapman v. Biggs. (Property subject to restraint on anticipation cannot be attached by creditor for debt contracted by husband and wife during coverture.)

(1881) 17 Ch D 454 (460, 461) : 29 W R (Eng) 551, Pike v. Fitzgibban. (General engagements of a married woman entitled to separate estate will be enforced against so much of her separate estate to which she was entitled, free from any restraint on anticipation at the time when the engagements were entered into, as remain at the time when the judgment is given and not against separate estate to which she was entitled at the time of the engagements subject to a restraint on anticipation.)

(1879) 27 W R (Eng) 527 (528) : 11 Ch D 645, In re Ridley Buckton v. Hay. (Restraint on anticipation is valid and is an exception to the general law—*Quaere*, whether inasmuch as the object of restraining a married woman from anticipation is to give her for the beneficial enjoyment of her property, such a restraint ought not to be an exception to the general rule against perpetuities.)

5. ('86) 12 Cal 522 (533) (DB).

6. ('87) 11 Bom 348 (351).

7. ('07) 30 Mad 378 (380) (DB).

8. (1870) L R 11 Eq 5 (7) : 19 W R (Eng) 117

11. Where, on a transfer of property, an interest therein is created absolutely in favour of any person, but the terms of the transfer direct that such interest shall be applied or enjoyed by him in a particular manner, he shall be entitled to receive and dispose of such interest as if there were no such direction.

Restriction repugnant to interest created.

[a][Where any such direction has been made in respect of one piece of immoveable property for the purpose of securing the beneficial enjoyment of another piece of such property, nothing in this section shall be deemed to affect any right which the transferor may have to enforce such direction or any remedy which he may have in respect of a breach thereof]

a. *Substituted* for the original second paragraph by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), S. 8.

Synopsis

1. Analogous law.
2. Scope of the section.
3. Muhammadan law.
4. Hindu law.
5. Government Grants Act.
6. "On a transfer of property."
7. "Created absolutely."
8. "But the terms of the transfer direct."
9. "Shall be applied or enjoyed by him in a particular manner."
10. "As if there were no such direction."
10a. Directions in decrees and awards.
11. Second paragraph.
12. Direction restricting enjoyment in the case of transfers which are not absolute.
13. Contracts restricting enjoyment.
14. Enforceability of restrictive covenants against third parties. See Note 11 and Notes on S. 40.

1. Analogous law.—Section 138 of the Indian Succession Act, 1925, runs as follows :

"*138.* Where a fund is bequeathed absolutely to or for the benefit of any person, but the will contains a direction that it shall be applied or enjoyed in a particular manner, the legatee shall be entitled to receive the fund as if the will had contained no such direction.

Illustration.

A sum of money is bequeathed towards purchasing a country residence for *A*, or to purchase an annuity for *A*, or to place *A* in any business. *A* chooses to receive the legacy in money. He is entitled to do so."

2. Scope of the section. — The important point of difference between S. 10 and this section is that the former deals with transfers *subject to conditions against alienation*, that is to *restricted transfers* of a particular class, while this section deals with *absolute transfers*. It states that where a person has made it clear that he intends to make an absolute transfer, but the terms of the transfer at the same time direct that the property is to be enjoyed with certain restrictions, the restriction is to be disregarded. The reason is that the direction restricting the enjoyment of the property is inconsistent with or repugnant to the intention to make an absolute transfer, that is, a transfer which will carry with it the right of unrestricted enjoyment of the property as a legal incident thereof,(1) and, since the Court cannot give effect to both at the same time, the main provision will be given effect to and the repugnant one disregarded.(2) Of course, before a restriction is disregarded on the ground of repug-

Section 11 — Note 2

1. See Note 7.
2. †1928 Oudh 49 (51, 53) [AIR V 15] : 3 Luck 19 (FB). (Absolute estate conferred by will — Subsequent clause reducing the estate must be rejected as repugnant.) 1965 Punj 110 (111) (Pr 6) [AIR V 52 C 34] :

nancy to the main provision, every attempt should be made to reconcile, if possible, the two provisions to see whether the main object of the transferor was to make an absolute transfer or only a restricted transfer.(2a) But where it is clear that the main object of the transferor was to make an absolute transfer, the inconsistent provision cannot be given effect to.(3) In *Mahram Das*

1964 Cur L J 463 : 66 Pun L R 1059 (DB). (1963 Cur L J (Punj) 556, Reversed.)
1960 Ker 226 (227) [AIR V 47 C 106]. (Property conveyed absolutely in favour A and B as tenants in common—Held subsequent provision that A should not transfer any property during minority of B was repugnant.)
1958 Andh Pra 447 (449) [AIR V 45 C131] (DB).
1958 Madh Pra 246 (252) [AIR V 45 C 92] (DB).
(1958) 1 Mad L J 335 (337) : 71 Mad L W 124 (125).
('57) ILR (1957) Ker 822 (828) (DB).
('56) 1956 Andh W R 582 (584).
1955 N U C (All) 2774 (Pt B) (Pr 14) [AIR V 42] (DB). (Property given to a person absolutely—Any provision made in the will as to any subsequent devolution is void and ineffective.)
1955 Mad 350 (357) [AIR V 42 C 94].
('54) ILR (1954) Trav-Co 355 (362) (DB). (Absolute estate in favour of wife—Subsequent direction inconsistent with the absolute estate—Subsequent direction to be disregarded.)
1953 Sau 180 (187) [AIR V 40 C 89].
1953 Trav-Co 115 (117) [AIR V 40 C 39]. (Gift deed—Donor transferring all his rights to donee with absolute powers to deal with the property—Subsequent clause that on death of donee property will revert to donor is repugnant.)
1939 Mad 509 (510) [AIR V 26] (DB). (Absolute estate created—Words repugnant to it must be ignored.)
1937 Nag 106 (107) [AIR V 24] : ILR (1937) Nag 436.
1933 Lah 201 (202, 203) [AIR V 20] : 14 Lah 353 (DB).
1933 Mad 80 (81) [AIR V 20].
('30) 121 Ind Cas 298 (299) (DB) (Lah).
1929 Pat 349 (350) [AIR V 16] (DB). (Restriction repugnant to interests created by a transfer may be wholly ignored.)
1921 Cal 408 (409) [AIR V 8] (DB). (Once an estate conferred by a will is held to be an absolute, the conditions as to mode of enjoyment are void.)
†('11) 11 Ind Cas 301 (303) (DB) (Cal). (The condition restricting enjoyment is arbitrary and unenforceable in a Court of law.)
(1820) 1820 Jac 381 (400, 401) : 37 E R 894 : 23 R R 92, Attorney-General v. Catherine Hall, Cambridge. (Devise of an estate for charitable purposes with a direction that the rents should not be raised — Held, the direction is void and inoperative.)
[*See also* 1941 Cal 92 (94) [AIR V 28] (DB). (Estate of general inheritance created—Prohibition against alienation is void in law.)]

2a. 1960 Ker 183 (186) [AIR V 47 C 84] : ILR (1959) Ker 1040.
1958 Mad 431 (432, 433) [AIR V 45 C 144]. (Where the testator in his will says that each of the daughters will take the property allotted to her absolutely and with full powers of alienation, but in a subsequent portion of the will, he says that, if any of the daughters has no issue she shall enjoy the property during her lifetime without subjecting it to any encumbrance and that the property shall on her death pass over to her sister or sisters who have heirs, the later part should be read as a proviso to the earlier part.)
1957 Ker 119 (121) [AIR V 44 C 69] (DB).
('57) ILR (1957) Ker 822 (828) (DB).
('57) 1957 Ker L T 1119 (1121). (18 Suth W R 359, Rel. on.)
('56) 1956 Andh W R 582 (585).
1951 Mad 798 (799) [AIR V 38 C 271]. (Gift to society for certain purpose executed by Manager of joint family — Property to revert to donor if not required for the purpose—Reverter clause held not one of repugnancy to absolute estate but was if at all one of defeasance.)

3. 1931 P C 179 (182) [AIR V 18] : 59 Cal 142 : 58 Ind App 270.
†1929 PC 283 (285, 286) [AIR V 16] : 56 Ind App 372 : 4 Luck 483. (Words 'the estate shall vest in P and he shall be testator's heir and successor' held created an absolute estate.)
('01) 28 Cal 720 (733) : 28 Ind App 152 (PC).
('97) 24 Cal 834 (849) : 24 Ind App 76 (PC).
('88) 15 Cal 409 (415, 421) : 15 Ind App 37 (PC).
('85) 11 Cal 684 (692) : 12 Ind App 103 (110) (PC). (Affirming 7 Cal 269.)
('80) 5 Cal 438 (444) : 6 Ind App 182 (PC). (Case before the Transfer of Property Act.)
1960 Ker 183 (186) [AIR V 47 C 84] : ILR (1959) Ker 1040.
1955 Punj 49 (50) [AIR V 42 C 18].
('50) 1950-2 Mad L Jour 496 (498). (Will—Daughter of testator to take property with absolute rights—Subsequent clause restricting her from selling property for any purpose other than debts of testator is repugnant and invalid—So also provision that after her death her grandson should get property cannot limit absolute character of the estate given.)
1933 Lah 201 (202) [AIR V 20] : 14 Lah 353 (DB). (Even though the restriction is for a limited period only.)
('30) 121 Ind Cas 298 (299) (DB) (Lah).
1929 Mad 64 (66) [AIR V 16].
1928 Oudh 344 (346) [AIR V 15] : 3 Luck 636 (DB).
1927 Lah 404 (406) [AIR V 14] : 8 Lah 181 (DB).
1925 Mad 64 (65) [AIR V 12].
1922 All 293 (294) [AIR V 9].
1937 Nag 106 (107) [AIR V 24] : ILR (1937) Nag 436. (Will creating absolute estate — Clause directing payment out of income of certain sum

v. *Ajudhia*,(4) Mr. Justice Mahmood observed as follows :

> "There are two ways of dealing with a question of this kind. The first is to regard it as a question of construction and to ask what the parties mean by first saying that ownership is to be transferred, and then saying that what is transferred is not ownership in the proper sense. Of course, in such a case every attempt to reconcile these statements should be made, but where no reconciliation is possible, the Courts say that, under these circumstances, the main object of the parties must be kept in view, and that provisions inconsistent therewith must be treated as void."

In *Tagore* v. *Tagore*,(5) their Lordships of the Privy Council expressed a similar view in the following words :

> "If, again, the gift were in terms of an estate inheritable according to law, with superadded words, restricting the power of transfer which the law annexes to that estate, the restriction would be rejected, as being repugnant, or, rather, as being an attempt to take away the power of transfer which the law attaches to the estate *which the giver has sufficiently shown his intention to create*, though he adds a qualification which the law does not recognise."

The section embodies principles of universal application which are not peculiar to the Transfer of Property Act. The principles are applicable even in States and in cases to which this Act may not be applicable.(6)

It has been held that the conferment of a life estate in a particular property with the right to alienate the property or any portion of it permanently is not invalid.(7)

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annually to an institution—Clause held to be void as being repugnant.)
1921 Cal 408 (409) [AIR V 8] (DB).
1918 Mad 81 (81) [AIR V 5] (DB).
1916 Lah 257 (258) [AIR V 3]. (The duty of Court in interpreting a testament is to ascertain the intention of the testator from all the clauses of the document.)
1914 Oudh 213 (215, 216) [AIR V 1] (DB). (Even if the condition is inserted in a settlement decree on a compromise transferring property.)
('11) 9 Ind Cas 951 (953) (DB) (Bom).
('06) 28 All 400 (401) (DB). (Perpetual lease with restraint on alienation.)
('05) 28 Mad 363 (374) (DB).
† ('04) 31 Cal 111 (126) (DB). (Estate of inheritance bequeathed—Clause against alienation is inoperative as being repugnant to the character of the estate created.)
('02) 4 Bom L R 508 (510, 511).
('02) 29 Cal 260 (277) (Overruled on another point in 37 Cal 128 (FB).)
(1900) 10 Mad L Jour 203 (204) (DB).
('97) 24 Cal 406 (411, 412) (DB) (The expression 'maliks' ordinarily implies an absolute gift.)
✠ ('86) 8 All 452 (459) (DB).
('85) 7 All 516 (523) (DB).
('72) 18 Suth W R 359 (365) : Ind App (Supp Vol) 47 (PC). (Case before Transfer of Property Act.)
('70) 4 Beng L R O C 265n (266n). (Do.)
(1896) 2 Ch 353 (356, 357) : 65 L J Ch 753 (754) : 75 L T 138 : 44 W R (Eng) 632, In re Elliot, Kelly v. Elliot.
(1797) 4 R R 7 (9) : 30 E R 1034 : 3 Ves 324, Bradley v. Peixoto. (Absolute gift—Subsequent condition repugnant and inconsistent to it is void.)
(1870) 19 W R (Eng) Dig 125 (125) : 23 L T 211, Re Jones's will.
(1865) 145 R R 639 (645) : 34 Beav 513 (522) : 12 L T (NS) 621 : 34 L J Ch 528 : 13 W R (Eng) 705 : 55 E R 733, Hood v. Oglander. (To A absolutely, and if he should alien then to B.)
(1876) 24 W R (Eng) 756 (756) : 3 Ch D 285, Hunt-Foulston v. Furber. (Absolute gift of annuity with attempt to make the fund fall into residue.)
(1889) 38 W R (Eng) 397 (399) : 43 Ch D 633 (639) : 59 L J Ch 159 : 61 L T 767, Metcalfe v. Metcalfe. (To A absolutely, and if he should alien then to B.)
(1888) 37 W R (Eng) 30 (31) : 13 P D 136, Corbett v. Corbett.
(1916) 85 L J Ch 473 (475) : 32 T L R 43 : 114 L T 680 : (1916) 1 Ch 369, Smith v. Smith.
[*See also* 1928 Oudh 49 (51) [AIR V 15] : 3 Luck 19 (FB). (Condition in will conferring absolute estate that if recipient died without making a will estate is to devolve not on recipient's heirs but on donor's heirs—Condition must be rejected.)]

4. ('86) 8 All 452 (459) (DB).
[*See* 1926 Oudh 431 (440, 442) [AIR V 13] : 2 Luck 507 : 26 Oudh Cas 176 (DB).

5. ('72) 9 Beng L R 377 (395) : Ind App Supp Vol. 47 (PC).

6. 1938 Lah 479 (480) [AIR V 25]. (Punjab).
1929 Lah 648 (651) [AIR V 16] (DB). (Do.)

7. 1947 Oudh 71 (73) [A I R 34 C 21] : 22 Luck 19 (DB). (12 Cal W N 412 and 5 Cal W N 300, Rel. on.).

3. Muhammadan law.—This section does not affect any rule of Muhammadan law. (See S. 2, last paragraph.) But even under the Muhammadan law (Hanafi), as a general rule any derogation from the completeness of the gift is null and void. If the intention to give to the donee the entire subject-matter be clear, subsequent conditions derogating from or limiting the extent of the right are null and void.(1)

4. Hindu law.—Before the amendment of S. 2 in 1929, this chapter, and consequently this section, did not affect any rule of Hindu law. But the rules of Hindu law were not, in any way, opposed to the provisions of this section.(1) Even under that law, where an absolute transfer was made, conditions repugnant to the estate created would have been void.(2) The amendment of S. 2 now makes this section directly applicable even to cases formerly governed only by the rules of Hindu law.

5. Government Grants Act.—Under the Government Grants Act (XV of 1895) the Government can, in grants by it, impose any restrictions it thinks fit and such restrictions are valid and unaffected by the provisions of the Transfer of Property Act. This section will not, therefore, render void any restrictions placed by the Government in the case even of absolute transfers.(1)

6. "On a transfer of property."—It has been seen in Note 4 on S. 5 that a family arrangement which acknowledges and defines the pre-existing titles of the parties to the arrangement, is not a "transfer of property." An agreement between the parties to such arrangement as to the enjoyment of the properties allotted to their respective shares would not be governed by this section, firstly, because, the restriction is not made on any "transfer of property" and secondly, because, there is no "direction" within the meaning of this section. But on general principles the enforcement of such an agreement would depend upon its validity under the law of contracts.

7. "Created absolutely."—As has been seen in Note 1 on S. 10, a transfer will be *absolute* where it is made without imposing any restrictions or conditions in respect of the legal incidents of the property transferred. An interest which is *transferred absolutely* is not the same thing as the *transfer of absolute estate* in property. *Any* interest, e. g., a life estate may be created absolutely by not imposing any conditions or restrictions qualifying its legal incidents. But the transfer of an absolute estate passes to the transferee an interest which is *unlimited in estate* and unfettered in respect of any condition or trust.(1) In other words, the transferee gets *full ownership* of the property and not merely a limited interest in it. It has been held in the undermentioned case(2) that where A who is the full owner of certain property

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Section 11 — Note 3

1. ('54) ILR (1954) Mys 212 (215) : A I R 1955 N U C 705.
1953 Sau 180 (187) [A I R V 40 C 89] (DB). (Reversed on a different point in 1959 S C 1383) [AIR V 46].
† 1928 Nag 44 (47) [AIR V 15] (DB).
1919 Cal 1075 (1076) [AIR V 6] (DB). (Heba-bil-ewaz laying down condition as to mode of enjoyment—Gift is absolute and is not controlled by the conditions.)
1918 Oudh 356 (363) [AIR V 5] (DB).
('12) 34 All 478 (481) (DB). (11 Ind Cas 702, Affirmed.)

Section 11 — Note 4

1. 1915 Mad 1035 (1035) [AIR V 2] (DB).

2. 1920 Bom 73 (76) [AIR V 7] : 44 Bom 304 (DB). (Absolute gift to Brahmin with condition restricting residence.)
('84) 7 Mad 315 (317) (DB). (Absolute estate with restraint on partition.)

Section 11 — Note 5

1. 1918 P C 25 (27) [AIR V 5] : 40 All 470 : 45 Ind App 134 : 21 Oudh Cas 106. (Restriction as to descent of property valid.)

Section 11 — Note 7

1. † 1934 Cal 379 (383, 384) [A I R V 21] 61 Cal 106 (DB).
(1869) 17 W R (Eng) 1083 (1085) : 8 Eq 673 : 38 L J Ch 635, Irvine v. Sullivan.
2. 1930 Cal 731 (732, 734) [AIR V 17] (DB).

transfers a life estate therein to B, it cannot be an absolute transfer within the meaning of this section. It is submitted that this view does not seem to be correct. In *Mahram Das* v. *Ajudhia*,(3) Mr. Justice Mahmood observed :

> "As to the nature of the rule formulated by the Legislature in S. 11 of the Transfer of Property Act, I need only say that while at one time it might have been doubtful whether the rule was applicable to transfer by way of sale, or was limited to grants short of absolute transfer, the mode in which the doctrine has been dealt with by the Legislature is applicable alike to transactions of both kinds. In other words, the principle of S. 11 applies as much to mortgages or leases as to gifts or sales."

In the undermentioned case(3a) under a deed of partition between A and B it was provided that A should only enjoy the income of the property allotted to him without any powers of alienation and that after his death, his sons should take it absolutely. It was held that the document conferred only a life estate on A and the clause restricting alienation was not in derogation of an absolute grant but was a condition of the grant itself.

In another case(3aa) one of the clauses of a partition arrangement provided in the first instance for the allotment of the disputed property in favour of one R's wife C and the reasons therefor were mentioned, as that she was childless and besides, had exerted herself considerably in protecting the properties covered by the document. Another clause then said that in respect of the property allotted as above to C, she should not deal with it by sale or otherwise during R's lifetime and that after her the property should devolve on her four brothers particularly named.

Another clause finally wound up by saying that the various allottees under the document were to take the respective properties free of other persons' claims and absolutely with right to get patta and enjoy for all time and further that the properties would descend as Makkavazhi properties and not in the Marumakkavazhi line. It was held that construing the various clauses together, the interest intended to be conveyed in favour of C was in the nature of a mere life-interest and not an estate of inheritance.

It has been held that, the reservation of subordinate or tenancy right by the transferor is not repugnant to the transfer of the proprietary interest entitling the transferee to receive only the rent from the transferor.(4)

See also the undermentioned cases.(5)

(See also note 2.)

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3. ('86) 8 All 452 (458, 459) (DB).

3a. 1952 Mad 166 (167) [AIR V 39].

3aa. 1957 Ker 119 (121) [A I R V 44 C 69] (DB).

4 1954 Cal 400 (402) [A I R V 41 C 136]: I L R. (1956) 1 Cal 15 (DB).

5. 1965 Ker 27 (27) [AIR V 52 C 9]. (Reservation by the transferor of a lease-hold right to recover an annuity in perpetuity and creation of a charge on the property sold for the purpose is not a restriction repugnant to the nature of the grant.)

1960 Andh Pra 509 (511, 512) [AIR V 47 C 168] (DB). (Bequest to daughter for 'Pasupu Kumkum'—Properties to revert to the parent estate on failure of male issue — Male issue not born at time of testator's death—Held, it was an absolute transfer and provision as to surviving of male issue was one of defeasance.]

1960 Ker 183 (186) [AIR V 47 C 84]: ILR (1959) Ker 1040, (Words "Sampoorna Avakasa" associated with 'anubhava' held indicated grant of absolute interest.)

1960 Mad 391 (391) [AIR V 47 C 136] (DB). (Will providing that testator's wife C, should enjoy immovable properties and carry on her livelihood from income thereof, pay kist and debts of testator and purchase other lands if possible—No mention that C was entitled to alienate properties—After C's lifetime testator's grandchildren then alive were to take all properties absolutely — Will held conferred life estate on C).

1958 Andh Pra 720 (722) [AIR V 45 C 211] (DB). (Will — Daughters to enjoy property from generation to generation or from sons to grandsons—Daughters get absolute estate.)

1958 Andh Pra 447 (449) [AIR V 45 C 131]. (Will bequeathing land to G to be enjoyed by her for her life time and after her life time land to pass to step-daughters of G — Held, will created absolute interest in favour of S.)

8. **"But the terms of the transfer direct."**—The direction referred to in the section may be by way of imposing conditions or otherwise. In other words the word "direction" would include the imposition of a *condition*. Thus where a grantor has shown his intention to make an absolute transfer, but adds a restriction by way of a condition as to the enjoyment of the property, the condition would be a direction repugnant to the absolute estate created and would have no effect.(1)

9. **"Shall be applied or enjoyed by him in a particular manner."**—The enjoyment of property will include several rights and it may be useful to deal with restrictions on some of the most important rights of enjoyment.

Alienation.

The right of alienation of property is an important form of enjoyment of property. A restriction on such right therefore is a restriction on the enjoyment of property.

An absolute restraint added by way of a direction in a transfer which is absolute is thus repugnant to the estate created and should be disregarded.(1) In *Anantha Thirtha Chariar* v. *Nagamuthu Ambalagaren*,(1a) Mr. Justice Muthusami Iyer observed as follows :

> "It appears to us to be a general rule of jurisprudence that where an estate *in fee* is given, a condition in restraint of alienation is a condition repugnant to the nature of the grant, and, *as such*, inoperative. We think there can be no doubt on general principles that, when property is *transferred absolutely*, it must be transferred with all its legal incidents ; and that it is not competent to the grantor to sever from the right of property incidents which the law inseparably annexes to it, and thereby to abrogate the law by private agreement. The introduction of a condition against alienation in a grant *absolute* in its terms has been declared to be equivalent to introducing an exception of the very thing which is of the essence of the grant."

In *Bradley* v. *Peixoto*,(2) a testator made an absolute gift of a certain fund but at the same time added a condition that if the donee attempted to dispose of the principal of the fund, then the fund should go over to another person. The Master of the Rolls said :

('57) ILR (1957) Ker 822 (828) (DB). (Settlement by mother in favour of her daughter—Encumbrances prohibited and direction that devolution should be in the line of her male children—Daughter does not obtain absolute estate.)

1916 Mad 807 (808) [AIR V 3] (DB). (Property delivered to wife for enjoyment from generation to generation—Wife gets absolute interest.)

Section 11 — Note 8

1. 1965 Punj 110 (111) (Pr 6) [A I R V 52 C 34] (DB). (1963 Cur L J (Punj) 556, Reversed).

(1958) 1 Mad L J 335 (337).

[*See also* 1953 Sau 180 (187) [A I R V 40 C 89] (DB). (Gift of immovable property under Muhammadan Law — Donee gets title to it—Condition against alienation being repugnant to gift, is void—Donee acquires saleable title and his transferee also acquires equally good title. Reversed on a different point in A I R 1959 S C 1383)].

1926 Oudh 431 (440) [A I R V 13] : 2 Luck 507 : 26 Oudh Cas 176 (DB).

See also the cases cited in Note 9.

Section 11 — Note 9

1. 1960 Ker 226 (227) [AIR V 47 C 106]. (Settlement deeds — Father conveying property absolutely in favour of his sons A and B—Expression of intention that A should not convey any property during minority of B — Amounts only to a pious wish which could not put any restriction on disposing power of A).

1955 Punj 49 (50) [AIR V 42 C 18].

1953 Sau 180 (187) [AIR V 40 C 89] (DB). (Gift under Muhammadan Law—Condition against alienation. (Reversed on a different point in AIR 1959 S C 1383).

('50) 1950-2 Mad L Jour 496 (498).

1939 Mad 509 (510) [AIR V 26] (DB).

1918 Oudh 300 (301) [AIR V 5]. (Grant of land on hereditary and perpetual tenancy — Condition restraining alienation not inconsistent with right granted—Is not void.)

1888) 38 Ch D 176 (182) : 51 L J Ch 634 : 58 L T 581 : 36 W R (Eng) 462, In re Dugdale. (Absolute gift followed by a gift over on alienation or bankruptcy —Gift over is void for repugnancy.)

1a. ('82) 4 Mad 200 (202) (DB).

2. (1797) 30 E R 1034 (1035) : 4 R R 7 : 3 Ves 324.

"The first clause is an absolute gift of the principal and dividends. But then comes this clause, with which the plaintiff does not comply ;. . . . . .I have looked into the cases, that have been mentioned ; and I find it laid down as a rule long ago established, that where there is a gift with a condition inconsistent with and repugnant to such gift, the condition is wholly void. A condition, that a tenant in fee shall not alien, is repugnant ;. . . . . .In all these cases the gift stands, and the condition or exception is rejected. In this case then I am under the necessity of declaring, that this is a gift with a qualification inconsistent with the gift, and the qualification must therefore be rejected."

There is a difference of opinion, however, on the question whether a *partial* restraint on alienation is repugnant to the absolute estate created, but the preponderance of authority is in favour of the view that it is not repugnant.(2a) In *Doe* v. *Pearson*,(3) it was held that a *partial* restraint on alienation was not repugnant to the absolute interest created and was therefore valid. That case was followed in *In re Macleay*,(4) and the view expressed in the last mentioned case has been approved by the Privy Council in *Mohammad Raza* v. *Mt. Abbas Bandi*,(5) where their Lordships observed as follows :

"The question therefore is whether such a *partial* restriction on alienation is so inconsistent with an otherwise absolute estate that it must be regarded as repugnant and merely void. . . . . It seems clear that after the passing of the Transfer of Property Act in 1882, a partial restriction upon the power of disposition would not, in the case of a transfer *inter vivos*, be regarded as repugnant : see Section 10 of the Act."

Residence.

A condition that the donee of property and his heirs should reside in the property on pain of forfeiture of the gift, is a restraint on the enjoyment of the property, and would be void for repugnancy, if the main intention of the donor was to make an absolute gift.(6)

Partition.

A direction in an absolute transfer to several persons jointly that they shall not divide the property at any time or for a limited period, would be repugnant and void under this section.(7) The right to partition is one of the incidents of joint ownership of property and one important form of enjoying such property is to claim a partition of that property.(8)

Stipulation for payment.

A makes an absolute conveyance of his property to *B* by sale for a cash consideration but stipulates for the payment by the vendee of a certain amount per annum from the profits of the property. The direction is a restriction on the enjoyment of the right created absolutely in the vendee and is unenforceable.(9) Under the rules of Muhammadan law, however, such a restriction would appear to be valid.(10)

2a. 1955 Mad 350(357) (Pr 26) [AIR V 42 C 94]. See the cases cited in foot-notes (3) to (5). See also Notes on S. 10.

3. (1805) 8 R R 447 (453) : 102 E R 1253 : 6 East 173 : 2 Smith 295.

4. (1875) 23 W R (Eng) 718 (719) : 44 L J Ch 441 : 20 Eq 186 : 32 L T 682. (This case was criticised in Rosher v. Rosher. (1884) 32 W R (Eng) 821, and not followed.)

5. 1932 PC 158 (160, 161) [A I R V 19] : 7 Luck 257 : 59 Ind App 236.

6. 1920 Bom 73 (76) [A I R V 7] : 44 Bom 304 (DB).

7. ('75) 1 Cal 104 (107) : 2 Ind App 256 (PC) (Case before T. P. Act.)
1933 Lah 201 (203) [A I R V 20] : 14 Lah 353. (DB). (Clause restricting partition till youngest son attained majority.)
1929 Lah 648 (650) [AIR V 16] (DB).
('82) 8 Cal 378 (387) (DB). (Enjoyment postponed for five years of the present gift..)

8. 1929 Lah 648 (650) [AIR V 16] (DB).

9. 1938 Oudh 17 (18) [A I R V 25] : 13 Luck 662.

10. ('11) 11 Ind Cas 702 (703) (All). (Affirmed in 34 All 478.)

10. "As if there were no such direction." — The effect of a direction which is invalid under this section is merely that it is inoperative. It does not cut down or defeat the estate created.(1)

10a. Directions in decrees and awards. — Property obtained under a decree of Court cannot be said to have been obtained on a "transfer of property." (See Section 5.) A direction restraining alienation made in a decree creating an interest absolutely would not therefore be within this section. But the principle on which this section is based would be applicable, and the repugnant direction in the decree would be void. In *Lal Sripat Singh* v. *Lal Basant Singh*(1) absolute under-proprietary rights were conferred on a party by a compromise decree, which, however, inserted a condition restraining alienation of such property. The Oudh Judicial Commissioner's Court held that the restraint was void on the ground of repugnancy. This decision was affirmed by their Lordships of the Privy Council.(2) See also the undermentioned cases.(3)

The same principles will apply to awards which create an absolute interest in property, but add a restriction as to the enjoyment thereof.(4)

11. Second paragraph. — *A* transfers property *X* absolutely to *B* with a *direction* that *B* shall enjoy *X* in a particular manner. The general rule stated in the first paragraph of the section is that such directions should be disregarded as being repugnant to the main provision.(1) The second paragraph makes an exception to the general rule and recognises the validity of such a direction *if it has been made for the purpose of securing the beneficial enjoyment of other property belonging to A*. The ground of the exception is that the said circumstance raises an *equity* between the parties. The same principle also applies where *A* transfers property *X* to *B* and the latter *agrees or covenants* that he will enjoy *X* in a particular manner.(2) There must be a mention in the deed of transfer that the transferor had reserved any rights for the

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Section 11 — Note 10

1.†1935 P C 187 (190) [AIR V 22].
1925 Mad 1013 (1014) [AIR V 12].
('95) 18 Mad 252 (254) (DB).

Section 11 — Note 10a

1. 1914 Oudh 213 (215, 216) [AIR V 1] (DB).
2. 1918 P C 77 (81) [AIR V 5] (DB).
3. 1937 Oudh 473 (475, 476) [A I R V 24] : 13 Luck 409 (DB).
1928 Oudh 344 (345) [A I R V 15] : 3 Luck 636 (DB). (Principle has been applied to grants also.)
4. 1958 Madh Pra 246 (252) [A I R V 45 C 92] (DB). (Family arrangement contained in an award — One of the members binding himself not to alienate certain property — Family arrangement though binding on parties inalienability clause would not bind successor of party.)

Section 11 — Note 11

1.† 1929 Pat 349 (350) [AIR V 16] (DB).
2. 1932 All 78 (80) [AIR V 19] : 54 All 17 (DB). (Contract between a vendor and purchaser for the removal of a Chhatta in a common lane at any time the vendor required, intended for the more beneficial enjoyment of the property by the vendor — *Held*, that the contract was enforceable by the vendor.)
(1873) 21 W R (Eng) 798 (800) : L R 5 P C 327 : 29 L T 352, Maclean v. McKey. (An agreement between owners of two adjacent lands to keep a piece of land vacant and not to build on it for the advantage of both proprietors is valid in law.)
(1895) 67 L J Ch 205 (205) : (1898) 1 Ch 424 : 78 L T 224 : 46 W R (Eng) 331, Hobson v. Tulloch. (Two adjoining houses of the same owner—One sold on condition that it is not to be used in any other manner than a dwelling house—*Held*, that the covenant was valid.)

beneficial enjoyment of his other property.(2a)

It is clear that the direction or the covenant, as the case may be, can be enforced against *B himself*. But can it be enforced against transferees from *B* of property *X*? The answer depends upon a further question whether the direction or the covenant is *affirmative*, *i. e.*, one which *compels B* to enjoy the property in a particular manner, or *negative*, *i. e.*, which *restrains B* from enjoying the property in a particular manner. Under S. 40 as it stood prior to the amendment in 1929, obligations of *either kind* could be enforced not only against B, but also against transferees from him with notice of such right, or gratuitous transferees.(3) This was in accordance with the decision of *Tulk* v. *Moxhay*,(4) decided in 1848 in England. But that decision was not followed in later cases in England so far as *affirmative* obligations were concerned.(5) Section 40 has now been amended so as to bring the law in this country into line with the present English law, by providing that only rights to *restrain* the enjoyment of property (i. e., *negative* obligations) can be enforced against transferees with notice or gratuitous transferees.

The second paragraph as it stood before the amendment in 1929 ran as follows :

> "Nothing in this section shall be deemed to affect the right to restrain, for the beneficial enjoyment of one piece of immovable property, the enjoyment of another piece of such property, or to compel the enjoyment thereof in a particular manner."

The present second paragraph does not effect any change in the law. Instead of the words "the right to *restrain*.....or to *compel*.....," the words "any right..... to enforce such direction" have been used. But these would include the right to enforce both an *affirmative* and a *negative* direction, and thus have the same effect as the substituted paragraph. In the Notes on Clauses the Special Committee state as follows :

> "We propose that the second paragraph of S. 11 and the first paragraph of S. 40 should be so amended as to make it clear that, although an affirmative covenant is not by itself invalid as between a transferor and transferee (S. 11) negative or restrictive covenants only can be specifically enforced against a third person."

It must be observed that the Special Committee assume in the above passage, that S. 11 and the first paragraph of S. 40 deal with *covenants* only. Some decisions also proceed on the assumption that S. 11 applies to covenants.(6) This, however, does not seem to be correct. Section 11 speaks of *directions* by the transferor, and the first paragraph of S. 40 speaks of a *right to restrain the enjoyment of property*. Section 138 of the Indian Succession Act corresponding to this section, also speaks of a *direction* in a will, and this will not obviously include an *agreement or covenant*. The word "direction" must have the same meaning in this section also and cannot mean the same thing as a *covenant*. Again a "right to restrain" cannot necessarily mean a right arising under an agreement or covenant. It will certainly include a right under a valid direction made by virtue of the second paragraph of this section.

The second paragreph applies only to directions made in respect of *immovable* property. It does not apply to restraints in respect of an incorporeal right.(6a) In the undermentioned case(7) there was a decree for maintenance and the decree gave a

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2a. 1951 Ajmer 74 (75) [AIR V 38 C 70].

3. 1929 Pat 349 (350) [AIR V 16] (DB).

4. (1848) 78 R R 289 (292) : 11 Beav 571.

5. (1881) 51 L J Q B 73 (76) : 8 Q B D 403 : 45 L T 699 : 30 W R (Eng) 299, Haywood v. Brunswick Permanent Benefit Building Society. (1885) 55 L J Ch 633 (640, 641) : 29 Ch D 750, Austerberry v. Corporation of Oldham.

6. 1932 All 78 (80) [A I R V 19] : 54 All 17 (DB).

6a. 1956 Cal 480 (484) [AIR V 43 C 141] (DB).

7. 1939 Mad 431 (431) [AIR V 26] (DB).

charge upon certain immovable property for the payment of the amount of maintenance. Upon some arrears falling due, the decree-holder transferred a portion of such arrears to *X*, but in order to safeguard his rights in regard to the realisation of the rest of the arrears, he stipulated in the transfer that the transferee shall not have the right to bring the charged properties to sale. The Court observed; "if S. 11 were to apply the restriction imposed would be covered by the proviso to the section and would therefore be valid."

In *Duke of Bedford* v. *Trustees of the British Museum*.(8) *A* sold a part of his land to *B* and covenanted not to use the land in a particular manner, with a view to secure the beneficial enjoyment of other property of *A*. By reason of subsequent acts of *A*, however, the character and condition of the adjoining lands were so altered, that the restriction in the covenant ceased to be applicable with reference to the land conveyed. It was held that a Court of Equity would not under such circumstances enforce the contract. There does not seem to be any reason why, in this country also, the same principle should not apply in the matter of enforcement of directions and covenants, which, by reason of subsequent events, no longer secure the beneficial enjoyment by the transferor of his property.

In the undermentioned case(9) one *S* had sold a portion of the land to *A* reserving a passage in the portion sold, this passage was to be treated in joint ownership of *S* and *A*. Subsequently *S* sold the remaining portion of the land to *R* without specifically selling his rights in the passage, by specifically mentioning the fact in the sale deed. It was held that *R* could not enforce the agreement between *S* and *A*.

12. Direction restricting enjoyment in the case of transfers which are not absolute. — This section does not apply to transfers which are not absolute. A direction in such cases restricting the enjoyment of the property by the transferee would seem to be valid and binding on the transferee.(1) In *Kedar Nath* v. *Gaya Nath*(2) the question arose whether a direction against alienation made in a will bequeathing a life estate on the donee was valid under S. 138 of the Indian Succession Act which is on all fours with this section. Graham J., observed:

> "Restraint upon alienation would arise only where the property is absolutely bequeathed and by implication there would be no such restraint where there is a demise not of an absolute interest but merely of a temporary or life interest. Some English cases were referred to by the learned advocate for the appellant some of which certainly lend some support to the contrary view, and I am bound to say that there is a good deal to be said in favour of the view that conditions restraining alienation by a tenant for life ought also to be deemed to be void inasmuch as the power of alienation may be said to be as much incident to that kind of interest as it is to an absolute interest: *Brandon* v. *Robinson*.(3) Whatever the English authorities may be on the point, however, in this country we have the statute and are to be guided by it."

In so far as the above decision holds that where the bequest is of a life estate it cannot be said that it is "bequeathed absolutely" it is, as has been seen in Note 7, not correct.

13. Contracts restricting enjoyment. — A *direction* in an absolute transfer that the interest transferred shall be applied or enjoyed by the transferee in a particular manner, is under this section not binding on the transferee. The position would be different where the *transferee agrees* for consideration, to restrict his enjoyment of

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8. (1822) 39 E R 1055 (1064): 2 My & K 552.
9. 1951 Ajmer 74 (75) [AIR V 38 C 70].

See also Note 1 on Section 10.

Section 11 — Note 12

1. 1930 Cal 731 (734) [AIR V 17] (DB).
2. 1930 Cal 731 (732, 733) [AIR V 17] (DB).
3. (1811) 34 E R 379: 18 Ves Jun 429.

the property transferred to him absolutely. The enforcement of such an agreement depends upon the validity thereof under the law of contracts. Where the agreement in effect tends to create perpetuity in property, it would be opposed to public policy and as such void. Thus, a covenant in a sale deed, the effect of which is to disable the vendee *for ever* from alienating the interest conveyed to him or from enjoying it by claiming partition would be opposed to public policy and therefore unenforceable.(1) On the same principle an agreement between co-owners of property that they should not partition the property *for ever* or for an *indefinite period* would be opposed to the policy of the law and as such unenforceable.(2) But an agreement between co-owners not to partition the property *during their lifetime*, or for a *limited period*, would not be opposed to public policy; would be valid and enforceable.(3)

There is a difference of opinion as to whether an agreement restricting a person's enjoyment of property *for ever* or for an *indefinite* period would be binding on the *actual parties* to the agreement. In the undermentioned cases(4) it has been held that it would be binding on the actual parties to the agreement, while a contrary view, namely, that it would not be binding even on the actual parties to the agreement, has been held in other cases.(5)

14. Enforceability of restrictive covenants against third parties.—See Note 11 and Notes on Section 40.

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12. Condition making interest determinable on insolvency or attempted alienation.

Where property is transferred subject to a condition or limitation making any interest therein, reserved or given to or for the benefit of any person, to cease on his becoming insolvent or endeavouring to transfer or dispose of the same, such condition or limitation is void.

Nothing in this section applies to a condition in a lease for the benefit of the lessor or those claiming under him.

Synopsis

1. Scope of the section.
2. English law.
3. Indian Succession Act.
4. "Is transferred."
5. "Subject to a condition or limitation." See Notes 4 and 5 on S. 10.
6. Condition of forfeiture on insolvency in a deed of partnership.
7. "Endeavouring."
8. Transfer by operation of law.
9. "Condition in a lease for the benefit of the lessor."
10. Covenants against alienation in a lease. See Note 17 on S. 10.
11. A clause of forfeiture should be construed strictly.
12. Effect of annulment of insolvency on the clause of forfeiture.

Section 11 — Note 13

1. ('86) 8 All 452 (455, 459) (DB).

2. ('09) 31 All 3 (4) (DB).
('06) 28 All 185 (186) (DB). (Not to be divided for ever.)
('01) 28 Cal 769 (786) (DB).
†('99) 3 Cal W N 126 (128).
†('83) 7 Bom 538 (539, 540) (DB).

3. 1920 All 341 (344)[AIR V 7] : 42 All 30 (DB). (Award precluding parties from claiming partition during their lifetime.)
('01) 28 Cal 769 (786) (DB). (Such agreement must however be for sufficient consideration.)
('99) 3 Cal W N 126 (128). (Do.)
('72) 8 Beng L R 60 (71, 72). (Agreement not to partition for 20 years.)

4. ('08) 12 Cal W N 793 (798, 799) (DB).
('81) 6 Cal 106 (115, 116).
[*See* 1915 Mad 1191 (1192, 1193) [A I R V 2] (DB).]

5. 1928 Oudh 365 (368) [AIR V 15] (DB).
1915 Mad 1035 (1035)[A I R V 2] (DB). (25 Mad 585, *Foll.*)
('83) 7 Bom 538 (539, 540) (DB). (Agreement never to divide property.)

1. Scope of the section. — This section provides that where property is transferred subject to a condition or limitation making any interest created therein to cease —

(1) on the transferee's becoming insolvent, or

(2) on the transferee's endeavouring to transfer or dispose of the same, such condition or limitation is void.(1aa) Both these conditions are *conditions subsequent*, that is, conditions intended by the transferor to have the effect of defeating the interest created.

The section has been enacted to encourage free alienation and circulation of property.(1a) The object of the section in invalidating a condition of defeasance on the insolvency of the transferee is to protect the creditors of the transferee who would otherwise be prevented from having recourse to the property transferred for the satisfaction of their debts.(1) This section has also been held to apply to a condition of defeasance on an involuntary alienation.(2)

The section invalidates only those conditions which are in derogation of the rights of the transferee and not those which are in derogation of the rights of the transferor.(3)

The section differs in some respects from the English law in such cases. Under that law, as will be seen in Note 2, such conditions or limitations as are referred to in this section can be validly imposed on transfers creating limited interests. The section also differs from the Indian Succession Act under which a bequest may validly be made subject to a condition that, in the event of insolvency of the donee the interest shall pass over to another person. (See Note 3.)

2. English law. — The English law does not differ from this section in cases where conditions such as those referred to in this section are imposed in transfers of *absolute interest* in property. Thus, if an estate in fee simple is transferred by a will or other instrument with a proviso which amounts in law to a condition subsequent defeating the estate granted, on alienation or on bankruptcy, such a proviso is void for repugnancy.(1) As observed by Kay, J., in *In re Dugdale*:(2)

> "An incident of the estate given which cannot be directly taken away or prevented by the donor, cannot be taken away indirectly by a condition which would cause the estate to revert to the donor, or by a conditional limitation or executory devise which would cause it to shift to another person."

But an interest other than an absolute interest can, under the English law, be validly limited until the donee should attempt to alienate it or should become bankrupt.(3) Thus, a transfer to *A* for life and in case he attempts to alienate the interest

Section 12 — Note 1

1aa. *See* 1955 Mad 350 (357, 358) [AIR V 42 C 94]. (Entire transfer not vitiated—Restrictive clauses to be treated as void.)

1a. 1955 Mad 350 (357, 358) (Pr 26) [AIR V 42 C 94].

1. 1945 Pat 162 (169) [AIR V 32] : 23 Pat 871 (DB). (Mulla's commentary on T. P. Act S. 12, approved.)

2. 1945 Pat 162 (169) [A I R V 32] : 23 Pat 871 (DB). (Per Manohar Lall J.—Kharposh grant—Condition restraining involuntary alienation is void under S. 12.)

3. 1951 Pat 488 (492) [AIR V 38 C 136] : 29 Pat 713 (DB). (Reversed on another ground in 1956 S C 336 [AIR V 43].)

Section 12 — Note 2

1. (1882) 30 W R (Eng) 887 (888) : 21 Ch D 838, In re Machu.
(1890) 59 L J Ch 159 (162) : 43 Ch D 633, Metcalfe v. Metcalfe.
(1888) 38 Ch D 176 (182) : 57 L J Ch 634, In re Dugdale.

2. (1888) 38 Ch D 176 (182) : 57 L J Ch 634.

3. (1882) 30 W R (Eng) 887 (888) : 21 Ch D 838, In re Machu.
(1890) 59 L J Ch 159 (162) : 43 Ch D 633, (Metcalfe v. Metcalfe.

or becomes bankrupt the estate to go over to *B* is a perfectly valid transfer.(4) In *Brandon* v. *Robinson*,(5) it was held that there was a distinction between a gift of life estate '*until* the donee becomes bankrupt' and a gift of life estate '*subject to proviso* that it shall cease on donee's bankruptcy,' that the limitation in the former case was valid, but that the condition in the latter case was void. This distinction has, however, been considered by later cases as being too fine and technical and it has been held that the life estate determined in the event of alienation or bankruptcy, no matter which of the two forms of transfer was adopted.(6) As was observed by Sir Thomas Plumer, M. R., in *Wilkinson* v. *Wilkinson*:(7)

> ". . . . . yet this (distinction) is answered by considering that, in a will, any condition or modification may be annexed which does not offend against any rule of law; and it is immaterial by what form of words the intention is executed, whether by a devise until the devisee shall have charged or encumbered it, or by a proviso with a limitation over upon such an event. Each mode is equally valid, and of the same effect."

It is not, however, essential that there should be a *gift over* for the cesser of a life interest. A life estate can be determined by a valid proviso for cesser without any gift over. The question is of the intention of the donor and though a gift over can serve as a piece of evidence of the donor's intention to determine the life estate, it can cease without a gift over when the intention to that effect is clearly expressed by the donor.(8)

A person can even limit his own property upon himself until he shall become bankrupt or until he shall attempt to alienate it. Such a settlement is valid and the interest will cease or, if there is a gift over, will go over to the ulterior transferee, on the happening of the event of bankruptcy or alienation.(9) But such a settlement will generally be void against the trustee in bankruptcy as a fraud on bankruptcy laws and the interest will vest in the trustee for the benefit of his creditors.(10)

3. Indian Succession Act, — Contrary to the rule laid down by this section the Indian Succession Act, 1925, treats a clause of defeasance in the event of bankruptcy of the legatee as valid. Illustration (vii) to S. 120 of the Act runs as follows :

> "(vii) An estate is bequeathed to *A* until he shall take advantage of any law for the relief of insolvent debtor, and after that event to *B*, *B's* interest in the bequest is contingent until *A* takes advantage of such a law."

(1857) 3 K & J 458 (498) : 69 E R 1189 (1196), Joel v. Mills.

4. ('95) 20 Bom 310 (313, 314). (Deed of settlement—Life-estate with a proviso for cesser on bankruptcy is valid—Case before T. P. Act was applied to Bombay.)
(1876) 3 Ch D 148 (155) : 24 W R (Eng) 754, Hatton v. May.
(1842) 11 L J (N S) Ch 145 (148) : 51 R R 332, Godden v. Crowhurst.
(1892) 61 L J Ch 1 (2) : (1892) 1 Ch 11, Re Sartoris Estate.
(1807) 33 E R 346 (347) : 9 R R 198, Shee v. Hale.
(1796) 30 E R 941 (942) : 3 Ves 149, Dommett v. Bedford.
(1811) 34 E R 379 (381) : 11 R R 226, Brandon v. Robinson.

5. (1811) 34 E R 379 (381) : 11 R R 226.

6. ('95) 20 Bom 310 (314). (Case before T. P. Act was applied to Bombay.)
(1876) 3 Ch D 148 (155) : 24 W R (Eng) 754, Hatton v. May.

7. (1819) 36 E R 958 (961) : 19 R R 266.

8. (1852) 68 E R 597 (600) : 89 R R 539, Rochford v. Hackman.
(1811) 34 E R 379 (381) : 11 R R 226: Brandon v Robinson.
(1826) 57 E R 503 (504) : 27 R R 166, Graves v. Dolphin.

9. (1861) 30 L J Ch 649 (650) : 126 R R 832, Knight v. Browne.
(1859) 54 E R 70 (72) : 122 R R 364, Brooke v. Pearson.

10. (1861) 30 L J Ch 649 (650) : 126 R R 832, Knight v. Browne.
(1882) 58 L J Ch 495 (497) : 40 Ch D 585, Detmold v. Detmold.
(1827) 19 Ves 88 (92) : 34 E R 451, Higginbotham v. Holme.
(1876) 3 Ch D 807 (810) : 46 L J Ch 46, In re Pearson; Ex parte Stephens.

4. "Is transferred." — This section has no application where there is no *transfer of property* subject to a condition or limitation. In *Official Assignee of Bombay* v. *K. R. P. Shroff*,(1) *X* was, on his own application, admitted a member of the Bombay Native Share and Stock Brokers' Association and was given a card certifying that, as such member, he was entitled to enjoy all the rights and privileges and was subject to all liabilities of members according to the rules and regulations of the Association. One of these rules provided that if any member ceased to be such on account of default or misconduct all his interest in the property of the Association should come to an end. By a resolution of the Association *X* was expelled from the Association and subsequently became bankrupt. The Official Assignee claimed that *X*'s rights vested in him and that the rule of the Association above referred to was invalid under this section. Their Lordships of the Privy Council negatived this plea and stated that the assumption by *X* of the membership of the Association did not involve any transfer of property on any condition and that S. 12 had no application.

5. "Subject to a condition or limitation." — See Notes 4 and 5 on S. 10.

6. Condition of forfeiture on insolvency in a deed of partnership. — A deed of partnership does not convey one partner's share to another and is not a "transfer of property." This section in terms cannot apply to conditions in such deed. But the principle underlying the section will apply and condition in such a deed that in case any of the partners becomes insolvent, his share in the partnership property would cease and go over to other partners is void as being a fraud on the bankruptcy laws. 1) No man possessed of property can reserve that property to himself until he shall become bankrupt and then provide that in the event of his being bankrupt, it shall pass to another and not to his creditors.(2)

7. "Endeavouring." — What exactly amounts to an endeavour or an attempt to transfer depends upon the facts of each case. "To constitute such an attempt", observed Sir John Romilly in *Graham* v. *Lee*,(1) "there must be some act which, but for the clause of forfeiture, would have the effect of 'assigning, mortgaging or otherwise anticipating' the legacy." Thus, where a legacy was subject to a condition of forfeiture on an attempt by the legatee "to assign, mortgage or otherwise anticipate the legacy," it was held that an offer by the legatee to give a security on the legacy did not amount to an attempt to assign.(2) Similarly, making inquiries and taking advice as to whether a legacy subject to a condition of forfeiture as above could be sold without forfeiting the same does not amount to an endeavour to transfer.(3)

8. Transfer by operation of law. - A condition in a lease that the interest should cease on lessee's endeavour to transfer or dispose of the same has been saved

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[See also (1856) 3 K & J 90 (100, 101) : 69 E R 1035, Holmes v. Penny.]

[But see (1902) 71 L J Ch 518 (526) : (1902) 2 Ch 360, In re Holland; Gregg v. Holland. (A post-nuptial settlement with no intention to defraud the creditors, held valid against trustees in bankruptcy.)]

Section 12 — Note 4

1. 1932 P C 186 (191) [AIR V 19] : 59 Ind App 318 : 56 Bom 374.

Section 12 — Note 6

1. (1861) 70 E R 1031 (1034) : 31 L J Ch 433, Whitmore v. Mason.

(1818) 36 E R 469 (474) : 1 Sw 471, Wilson v. Greenwood.

2. (1862) 31 L J Ch 433 (435) : 70 E R 1031, Whitmore v. Mason.

Section 12 — Note 7

1. (1857) 53 E R 152 (153) : 113 R R 193.

2. (1857) 53 E R 152 (153) : 113 R R 193, Graham v. Lee.

3. (1838) 48 E R 638 (641) : 44 R R 260, Jones v. Wyse.

from the operation of this section where the conditian is for the benefit of the lessor or those claiming under him. But as has been seen in Note 12 on S. 10, a general restriction on alienatian does not cover the case of a transfer by *operation of law*.(1) "We take it to be clear law in India as in England," said their Lordships of the Calcutta High Court in *Golak Nath Roy* v. *Mathura Nath*,(2) "that a general restriction on assignment does not apply to an assignment by operation of law taking effect *in invitum* as a sale . . . . . under an execution." Moreover, the present section does not deal with transfers by operation of law. It comes within a group of sections which deals with transfers by act of parties and is also headed by a portion of the Act which indicates that these sections relates to transfers by act of parties only.(3)

There is, however, a distinction between an alienation effected involuntarily by process of execution and a voluntary procuring of execution by the defaulting tenant against himself in order to bring about the alienation desired. In the latter case, an alienation so procured is not to be considered an involuntary one and hence constitutes a breach of the condition against alienation.(4) Thus, in *Doe* v. *Carter*,(5) where a tenant covenanted not to "let, set, assign, transfer or make over" his interest, but afterwards gave a warrant of attorney to confess judgment to a creditor with the express purpose of enabling the creditor to take the lease in execution under the judgment, Lord Kenyon observed :

> "It would be ridiculous to suppose that a Court of justice could not see through such flimsy pretext as this. Here the maxim applies, that that which cannot be done *per directum* shall not be done *per obliquum*. The tenant could not, by any assignment, under-lease or mortgage, have conveyed his interest to a creditor; and consequently he cannot convey it by an attempt of this kind."

Similarly, in *Dwarka Nath* v. *Mathura Nath Roy*,(6) *A* took a lease from *B* with covenant not to transfer the land and not to allow the same to be sold for his debts, and that in case he transferred the land or it was sold in execution, *B* would be entitled to *khas possession*. *A* in contravention of the covenant, mortgaged the land to *C*, who obtained a decree on its basis and purchased the land himself in execution of the decree. *B*, thereupon, sued *A* and *C* for ejectment. It was held by Sanderson C. J., that inasmuch as the execution sale was directly due to the voluntary acts of the lessees, viz., the execution of the mortgage and omission to pay the mortgage debt, the assignment by sale in execution could not be said to be *ad invitum*.

The *insolvency* of the lessee is not a breach of a condition against *alienation*.(7) It has been, however, held in the undermentioned cases(8) that where a lessee is declared insolvent on a petition made by him, the effect of his petition is to transfer or assign immediately his property to the Official Assignee and that, therefore, the debtor's petition amounts to or is equivalent to a voluntary transfer in favour of the

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Section 12 — Note 8

1. ('91) 20 Cal 273 (278) (DB).
('90) 17 Cal 826 (828) (DB).
('83) 7 Bom 262 (265) (DB). (Clause against alienation in a permanent lease does not affect a transfer by operation of law.)
('82) 6 Mad 159 (164) (DB). (Covenant in lease.)
(1798) 101 E R 1264 (1267) : 4 R R 586, Doe v. Carter.

2. ('91) 20 Cal 273 (278) (DB). (Covenant in lease.)

3. ('90) 12 All 192 (197) (DB).

4. ('82) 6 Mad 159 (164) (DB).

5. (1799) 101 E R 1400 (1401) : 4 R R 586.

6. 1917 Cal 236 (238) [AIR V 4] (DB).

7. (1857) 53 E R 152 (153) : 113 R R 193, Graham v. Lee.

8. 1933 Cal 701 (702, 703) [AIR V 20] : 60 Cal 926.
(1852) 68 E R 597 (601) : 89 R R 539, Rochford v. Hackman.

Official Assignee and as such constitutes a breach of condition against alienation. It would be otherwise where the debtor is adjudged insolvent otherwise than on his own petition, because the transfer in such a case can hardly be deemed to be due to the voluntary act of the party.(9)

9. **"Condition in a lease for the benefit of the lessor."**—A condition in a lease that the lessee's interest in the lease shall cease on his endeavour to transfer or dispose of the same or on his insolvency is saved from the operation of this section where it is inserted in the lease for the benefit of the lessor or those claiming under him. The reason of this exception has been stated by Ashhurst J., in *Roe* v. *Galliers*,(1) as follows :

"The general principle is clear, that the landlord, having the *jus disponendi*, may annex whatever conditions he pleases to his grant, provided they be not illegal or unreasonable. Then is this proviso contrary to any express law; or so unreasonable as that the law will pronounce it to be void ? That it is not against any positive law is admitted; and no case has decided it to be illegal ..... This proviso then not being against any express authority of law, it remains to be considered whether it be void or unlawful as against reason or public policy; now it does not appear to me to be against either. First, it is reasonable that a landlord should exercise his judgment with respect to the person to whom he trusts the management of his estate; a covenant therefore not to assign is legal; covenants to that effect are frequently inserted in leases;(2) ejectments are every day brought on a breach of such covenants. The landlord may very well provide that the tenant shall not make him liable to any risk by a voluntary assignment, or by any act which obliges him to relinquish the possession. If it be reasonable for him to restrain the tenant from assigning, it is equally reasonable for him to guard against such an event as the present, because the consequence of the bankruptcy is an assignment of the property into other hands. Perhaps it may be more necessary for the landlord to guard against this latter event, as there is greater danger to be apprehended by him in this than in the former case. Persons who are put into possession under a commission are still less likely to take proper care of the land than a private assignee of the first tenant. Neither is there any reason of public policy to be urged against allowing such a proviso. It conduces to the security of landlords, which can never be urged as a ground of objection of that head."

As to when such conditions are for the benefit of the lessor, see Note 13 on Section 10.

10. **Covenants against alienation in a lease.**—See Note 17 on Section 10.

11. **A clause of forfeiture should be construed strictly.** — A clause for forfeiture must be construed strictly against the person who is trying to take advantage of it and effect should be given to it only so far as it is rendered absolutely necessary to do so by the wording of the clause.(1) *A* took a lease from *B* who knew that *A* was merely a *benamidar* for *C*, a limited company. The lease contained a clause for forfeiture on the lessee's bankruptcy. *C*, the limited company, went into liquidation, upon which *B* contended that the lease was forfeited. It was held that no forfeiture was incurred as the clause provided for a forfeiture only on the insolvency of *A* and

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9. 1933 Cal 701 (703) [AIR V 20] : 60 Cal 926.

Section 12 — Note 9

1. (1787) 100 E R 72 (75) : 2 T R 133.

2. (1798) 101 E R 1264 (1267) : 4 R R 586, Doe v. Carter.

(1884) 13 Q B D 454 (462, 465) : 51 L T 368, Ex parte Gould; Re. Walker.

Section 12 — Note 11

1. 1963 S C 1182 (1184) (Pr 5) [AIR V 50 C 179] : (1962) Supp 3 S C R 476. (Sale deed and deed of reconveyance on same dates — Transaction held not mortgage by conditional sale—Reconveyance on original vendor's performing certain conditions—One of conditjons not performed—Court will not relieve against forfeiture. [AIR 1950 F C 38, Rel. on.])

1935 Mad 163 (165) [A I R V 22] : 58 Mad 378 (DB).

1925 Mad 57 (58) [AIR V 12].

not on the liquidation of *C*, though the latter was admittedly the real lessee.(2) In *Smith* v. *Gronow*,(3) a lease contained a clause of forfeiture on the lessee's bankruptcy and a permission to assign the lease with the consent of the lessor. The lessee assigned the lease with the lessor's consent and then became bankrupt. It was held that there was no forfeiture of the lease as it provided for forfeiture and re-entry only on the insolvency of the person *for the time being in actual possession* and that it was not affected by the bankruptcy of the first tenant :

A clause of forfeiture on *alienation* by a lessee does not come into operation by the lessee's becoming bankrupt(4) or by the transfer of only a *part* of the lease land.(5)

12. Effect of annulment of insolvency on the clause of forfeiture. — See the undermentioned case.(1)

13.[A] **Where, on a transfer of property, an interest therein is created for the benefit of a person not in existence at the date of the transfer, subject to a prior interest created by the same transfer, the interest created for the benefit of such person shall not take effect, unless it extends to the whole of the remainiug interest of the transferor in the property.**

Transfer for benefit of unborn person.

Illustration.

A transfers property of which he is the owner to *B* in trust for *A* and his intended wife successively for their lives, and, after the death of the survivor, for the eldest son of the intended marriage for life, and after his death for *A's* second son. The interest so created for the benefit of the eldest son does not take effect, because it does not extend to the whole of *A's* remaining interest in the property.

(A) For non-application to certain dispositions in the Pre-reorgnisation State of Bombay excluding the transferred territories, *see* Bom. Act LIV of 1947, Ss. 2, 3, [16-1-1948] as amended by Bom. A. L. O. 1956.

Synopsis

1. Analogous law.
2. Scope of the section.
3. "For the benefit of."
4. "Person not in existence."
5. Hindu law.
6. Muhammadan law.
7. English law.

1. Analogous law. — This section corresponds to S. 113, Indian Succession Act, 1925, which runs as follows :

Bequest to person not in existence at testator's death Subject to prior bequest.

"113. Where a bequest is made to a person not in existence at the time of the testator's death, subject to a prior bequest contained in the will, the later bequest shall be void, unless it comprises the whole of the remaining interest of the testator in the thing bequeathed.

Illustrations.

(i) Property is bequethed to *A* for his life, and after his death to his eldest son for life, and after the death of the latter to his eldest son. At the time of the testator's death *A* has no

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2. 1935 Mad 163 (165) [AIR V 22] : 58 Mad 378 (DB).

3. (1891) 60 L J Q B 776 (778) : (1891) 2 Q B 394.

4. (1857) 53 E R 152 (153) : 113 R R 193, Graham v. Lee.

5 1925 Mad 57 (58) [AIR V 12]. ((1902) 1 Ch 727 followed.)

Section 12 — Note 12

1. ('95) 20 Bom 310 (316).

son. Here the bequest to *A's* eldest son is a bequest to a person not in existence at the testator's death. It is not a bequest of the whole interest that remains to the testator. The bequest to *A's* eldest son for his life is void.

(ii) *A* fund is bequeated to *A* for his life, and after his death to his daughters. *A* survives the testator. *A* has daughters some of whom were not in existence at the testator's death. The bequest to *A's* daughters' comprises the whole interest that remains to the testater in the thing bequeathed. The bequest to *A's* daughters is valid.

(iii) *A* fund is bequeathed to *A* for his life, and after his death to his daughters, with a direction that, if any of them marries under the age of eighteen, her portion shall be settled so that it may belong to herself for life and may be divisible among her children after her death. *A* has no daughters living at the time of the testater's death, but has daughters born afterwards who survive him. Here the direction for a settlement has the effect in the case of each daughter who marries under eighteen of substituting for the absolute bequest to her a bequest to her merely for her life, that is to say, a bequest to a person not in existence at the time of the testator's death of something which is less than the whole interest that remains to the testator in the thing bequeathed. The direction to settle the fund is void.

(iv) *A* bequeaths a sum of money to *B* for life, and directs that upon the death of *B* the fund shall be settled upon his daughters, so that the portion of each daughter may belong to herself for life, and may be divided among her children after her death. *B* has no daughter living at the time of the testator's death. In this case the only bequest to the daughters of *B* is contained in the direction to settle the fund, and this direction amounts to a bequest to persons not yet born, of a life interest in the fund, that is to say, of something which is less than the whole interest that remains to the testator in the thing bequeated. The direction to settle the fund upon tho daughters of *B* is void."

2. Scope of the section.—A person not in existence can neither be a transferee of property, nor a beneficiary under a trust until he comes into existence. There can, therefore, be no *immediate* transfer of property or trust in favour of a person not in existence. The principle is recognised, both by this Act and by the Indian Trusts Act. Section 5 of this Act provides that "transfer of property" means a transfer in favour of a *living* person; and the expression 'living person', it is clear, will not include a person not in existence. Similarly, S. 9 of the Indian Trusts Act, 1882, provides that a beneficiary under a trust must be a person "capable of holding property" which expression, again, will exclude a person not in existence.

But where a transfer is made or a trust is created *immediately* in favour of a living person there is no legal impediment for the creation, as part of the same transfer, of a subsequent interest for the benefit of a person not in existence at the date of the transfer or trust, but who may come into existence before the prior interest ceases. The reason is that the subsequent interest takes effect only where the prior interest ceases and, at that time, the person for whose benefit it was created would have come into existence.

It is, however, necessary that such subsequent interest should extend to the *whole of the interest* remaining in the transferor, after the prior interest is created.(1) Otherwise, the subsequent interest does not under this section take effect.(2) The principle on which this section rests is that the liberty of alienation shall not be exercised to its own destruction, and that all contrivances shall be void which tend to

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Section 13 — Note 2

1. 1957 Cal 118 (119) [AIR V 44 C 36].
('49) 1LR (1949) 1 Cal 498 (505).
1928 P C 33 (35) [AIR V 15] : 55 Ind App 74 : 52 Bom 176.
1944 Mad 22 (23) [AIR V 31].
1931 Mad 374 (374) [AIR V 18].
1934 Oudh 35 (39) [AIR V 21] : 9 Luck 329 (FB). (Case under S. 16.)

2. 1923 P C 122 (126) [AIR V 10]. (Case under S. 100, Succession Act, 1865).
1957 Cal 118 (119) [AIR V 44 C 36].
('49) ILR (1949) 1 Cal 498 (505).
1934 Oudh 35 (39) [AIR V 21]: 9 Luck 329 (FB).

create a perpetuity or tend to place the property for ever out of reach of the power of alienation(3). This principle is recognised in S. 10, providing that *absolute* restraint upon alienatien is void, and in S. 14 which is directed against attempts to tie up properties for an indefinite period by creation of successive life.interests.] Where under a deed of gift the donees, whose names were mentioned in the deed and their descendants, who were unborn at that date were to enjoy the properties in equal shares it was held that the provision did not offend this section and the donees and their descendants took the properties as tenants.in common.(3aa) But in a recent Mysore decision,(3aaa) where the donor transferred the property to his daughter's son A and by the very transfer he directed that the property was to be enjoyed not only by *A* but also by other sons of the daughter who might be born to her before *A* attained majority, it was held that such a case was covered not by S. 13 but by S. 20 and as soon as another son was born to the daughter he became entitled to a moiety of the property under S. 20. It will be seen that in the above cases there is no creation of a prior interest to a living person first and then a transfer of the rest of the interest of the transferor to an unborn person but a simultaneous transfer of equal interest to living and unborn persons. In the Mysore case it has been observed that the interest created in favour of an unborn person under S. 13 is dissimilar to the interest envisaged by S. 20 and S. 20 is not controlled by S. 13.

Section 20 declares that where interest is validly created for the benefit of an unborn person, it becomes vested in the unborn person upon his birth, *unless a contrary intention appears from the terms of the transfer*. A contrary intention may appear from the terms of the transfer as where the transferor states that the unborn person is to take the property on his attaining a particular age. In such cases S. 14 lays down a *limit* of time beyond which the vesting cannot be postponed. (See Notes on S. 14). It enacts that no transfer can create an interest which is to take effect after a life or lives in being and the minority of an unborn person. In other words the *vesting* of interest created for the benefit of an unborn person *may* be postponed till he attains majority but no further.

In *Sopher* v. *The Administrator-General of Bengal*,(3a) which is a decision of the Privy Council upon the trusts of a will, arising under S. 113 of the Indian Succession Act corresponding to this section, it has been held that if under a bequest to an unborn person there is a possibility of the interest given to such beneficiary being defeated either by a contingency or by a clause of defeasance, the beneficiary does not receive the interests bequeathed in the same unfettered form as that in which the testator had it and the bequest to him does not therefore comprise the whole of the remaining interest of the testator in the thing bequeathed, and hence such a bequest is void under S. 113 of the Succession Act. This decision has led to some doubts whether a gift *inter vivos* in favour of an unborn person which is subject to a contingency is valid under this section. The principle in *Sopher's case* was applied by Blagden J. of the Bombay High Court in *Ardeshir Dadabhoy* v. *Dadabhoy*

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3. Williams and Eastwood, Principles of the Law of Real Property, 1933 Edn., Page 255.

[*See also* (1945) Bom 395 (396) [AIR V 32] : ILR (1945) Bom 493. (S. 13 is an attempt to import into and adapt for use in India what was known in England as the "rule against double possibilities." The principle is clear that a person disposing of property to another shall not fetter the free disposition of that property in the hands of more generations than one. This rule is quite distinct from the rule against perpetuities though their effects sometimes overlap.)]

3aa. 1953 Trav-Co 89 (90) [A I R V 40 C 29] (DB).

3aaa. 1962 Mys 98 (100) [AIR V 49 C 35].

3a. 1944 P C 67 (69, 70) [AIR V 31] : 71 Ind App 93 : ILR (1944) Kar (PC) 238.

Rustomji(3b) to a case of trust of a settlement *inter vivos* and it was held on the construction of the settlement in that case that as what was given to the unborn person (grandson of the settlor) was not a vested interest in the trust property, the gift to him was invalid. The point whether the principle laid down in *Sophers' case* applied to the trust of a settlement *inter vivos* was neither taken nor argued. In *Framroze Dadabhoy* v. *Tehmina*(3c) the question whether a gift to an unborn person, which is subject to a contingency, does or does not comprise the whole of the remaining interest of the giver, again came up for consideration before a Division Bench of the Bombay High Court. It was a case of a trust of a settlement *inter vivos*. Their Lordships (Stone C. J. and Coyajee J.) after considering *Sopher's case* and *Ardeshir's case*, referred to above, held that the former has been wrongly applied to the trust of a settlement, for it did not lay down any general principle which could be applied to the Transfer of Property Act or for the construction of any other than the Indian Succession Act, 1925. It was held that in S. 13 of the Transfer of Property Act, the word "extends," contained in the expression "extends to the whole of the remaining interest of the transferor in the property", is directed to the extent of the subject-matter and to the absolute nature of the estate conferred and not to the certainty of its vesting. It was pointed out that the vesting must, however, take place within the limits prescribed by S. 14. The view expressed in *Framrose Dadabhoy's* case fully accords with what has been stated above in this Note.

In this connection it may be noted that by the Disposition of Property (Bombay) Validation Act (54 (LIV) of 1947), it has been declared that all trusts, wills or testamentary dispositions made in the State of Bombay by persons who have died before the 1st January 1945, which would otherwise be within the purview of this Section or S. 113 of the Succession Act would not be so.

(So long as the persons intended to be benefited by a transfer are living at the date of transfer, there is no limit to the number of successive interests which may be created in their favour. Such successive interests in favour of living persons may be followed by an interest created in favour of an unborn person. If the interest created in favour of the unborn person extends to the whole of the remaining interest of the transferor in the property, such interest will take effect notwithstanding that more than one prior interest are created by the transfer. The section does not mean that only one prior interest can be created before transferring any property to an unborn person. This is shown clearly by the illustration to the section.(4)

3. "For the benefit of."—The words "for the benefit of" appear to have been used to cover not only cases where interests are created, directly in favour of unborn persons, but also cases where property is transferred in *trust* for unborn persons.

4. "Person not in existence." — A child *en ventre sa mere*, that is a child in the womb, cannot be said to be a "person in existence" within the natural meaning of the words. But such a child has been regarded by the Hindu law(1) as well as by the English law(2) as a person in existence. As observed by Lord Russell of Killowen in

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3b. 1945 Bom 395 (399) [AIR V 32] : ILR (1945) Bom 493.

3c. 1948 Bom 188 (193) [AIR V 35 C] (DB).

4. 1944 Mad 22 (23) [AIR V 31].

Section 13 — Note 4

1. ('72) 18 Suth W R 359 (365) : Ind App Supp Vol 47 (PC).

2. (1935) 104 L J Ch 111 (115) : 1935 App Cas 209, Elliot v. Joicey.
(1903) 72 L J Ch 670 (671, 672) : (1903) 2 Ch 411 (420), In re Wilmer's Trusts.
(1823) 57 E R 72 : 1 L J (O S) Ch 115 : 24 R R 164, Trower v. Butts.
(1864) 11 L T (N S) 353 (354) : 13 W R (Eng) 113, Blasson v. Blasson.

Elliot v. *Joicey*.(3)

> "There are many cases decided by the Courts in England in which posthumous children have been held to be included in gifts to children born in a father's lifetime, or to children living at a father's death. The foundation of these decisions, however, as has now been clearly and definitely settled, is not that the natural or ordinary meaning of the words used is such that they include a posthumous child, but that an artificial meaning must be placed upon the words, because 'the potential existence of such a child places it plainly within the motive and reason of the gift'."

Such a construction, however, is applied only in cases where it is necessary *for the benefit of the child*.(4) The construction was in fact, not applied in *Elliot's case*, referred to above, on the ground that it only resulted in the enrichment of the parent's estate. Lord Tomlin observed :

> "I do not think the enrichment of the parent's estate is a benefit to the child within the meaning of the rule. In my opinion the rule contemplates a benefit taken by the child under the instrument as a result of the application of the rule. To give to the rule any other operation would be to make it a rule of great uncertainty and difficult of application."

Under the Hindu law property may be transferred by a testator to a child to be adopted by his widow after his death. In contemplation of law such a child is begotten by the father to whom it is adopted and is recognised to be in existence at the death of the testator. Such a transfer, therefore, does not transgress the Hindu law principle which invalidates a bequest other than to a person in existence at the testator's death.(5) (Now see also Hindu Disposition of Property Act, 1916, S. 2). See also Notes on Section 5.

5. Hindu law.—Under the Hindu law, a transfer could not be made in favour of a person not in existence.(1) This was, however, modified by the passing of the Hindu Transfers and Bequests Act, (Madras Act 1 of 1914), the Hindu Disposition of Property Act (XV of 1916), and the Hindu Transfers and Bequests (City of Madras) Act (VIII of 1921). These anactments enabled transfers by way of gifts to be made by Hindus in favour of unborn persons, provided they did not violate any rule contained in Chap. II of this Act.(2) The Hindu law was thus brought into line with the rule

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Williams & Eastood, Principles of the Law of Real Property, 1933 Edn., Page 222.

3. (1935) 104 L J Ch 111 (115) : 1935 App Cas 209.

4. (1907) 1907 App Cas 139 (145) : 96 L T 511, Villar v. Gilbey.

5. ('72) 18 Suth W R 359 (365, 366) : Ind App Supp Vol 47 (PC).

Section 13 — Note 5

1. 1953 S C 7 (10) [AIR V 40 C 3] : 1953 S C R 232 : ILR (1953) 1 All 896. (Case of will.)
1928 P C 156 (158) [AIR V 15] : 55 Ind App 180 : 50 All 375. (Modified law being not retrospective, Hindu law was applied.)
('01) 28 Cal 720 (732) : 28 Ind App 152 (PC).
('97) 21 Bom 709 (721) : 24 Ind App 93 (PC).
('89) 16 Cal 383 (392) : 16 Ind App 29 (PC).
('89) 16 Cal 71 (80) : 15 Ind App 149 (PC).
('72) 18 Suth W R 359 (367) : Ind App Supp Vol 47 (PC).
('05) 32 Cal 992 (1009) (FB).
1952 Cal 427 (427, 429) [AIR V 39].
1938 Cal 34 (36) [AIR V 25] : ILR (1937) 1 Cal 400 (DB).
1937 All 197 (203) [AIR V 24] (DB). (Hindu Disposition of Property Act, 15 of 1916, is not retrospective.)
1925 Lah 648 (649) [AIR V 12] (DB).
1915 Mad 639 (641) [AIR V 2] (DB).
1915 Mad 603 (605) [AIR V 2].
('08) 31 Mad 310 (315) (DB).
('92) 16 Bom 492 (497) (DB). (On appeal from 15 Bom 326.)
('90) 15 Bom 443 (450).
('90) 15 Bom 326 (332, 333).
('86) 12 Cal 663 (669) (DB).
('85) 9 Bom 158 (164).
('82) 8 Cal 637 (643) (DB).
('82) 8 Cal 378 (388) (DB).
('73) 20 Suth W R 472 (474) (DB).
('69) 4 Beng L R (O C) 231 (277) (DB).
[*See also* 1960 Ker 196 (197) [AIR V 47 C 90]. (Bequest to unborn person is not permitted under Hindu law.)
('95) 19 Bom 647 (653, 654) (DB).]
Also see S. 2 Note 10 and S. 122 Note 4.

2. 1928 P C 156 (158) [AIR V 15] : 55 Ind App 180 : 50 All 375. (Hindu Disposition of Property Act, 1916, is not retrospective.)
1937 All 197 (203) [AIR V 24] (DB). (Do.)
1931 Mad 374 (374) [AIR V 18].

laid down in this section. After the said enactments, the saving of Hindu law from the operation of this chapter was thus rendered unnecessary and consequently the word "Hindu" was omitted from S. 2 by S. 3 of the Transfer of Property (Amendment) Act, XX of 1929.

This section now directly applies to Hindus and a Hindu may dispose of his property by transfer *inter vivos* in favour of an unborn person, in accordance with this section.

6. Muhammadan Law.— Section 2 provides that nothing in Chap. II shall be deemed to affect any rule of Muhammadan law. This section therefore does not affect any rule of Muhammadan law. As will be seen in Note 2 on S. 21 [the Muhammadan law does not recognise contingent interest. An interest created for the benefit of a person not in existence is a contingent interest. Therefore property cannot be transferred to unborn persons under that law.(1)]

As to the creation of waqfs under the Muhammadan law, see the under-mentioned cases.(2)

7. English law.—The rule enacted in this section differs from the English law. Under that law as it stood before the Law of Property Act, 1925, a transfer to A (then unmarried) for life and then to his son for life was valid, but no remainder could be limited to the child of that unborn son. The last remainder was invalid as infringing what was known as the rule against double possibilities.(1) After the passing of the Law of Property Act, 1925, the rule against double possibilities stated above has been abolished and now a transfer may be limited to A (a bachelor) for life, then to his son for life and then to that son's son for life and so on, provided there is no infringement of the rule against perpetuities.

1927 Mad 458 (459) [AIR V 14].
1915 Mad 603 (605) [AIR V 2].

Section 13 — Note 6

1. 1947 Bom 185 (187) [AIR V 34] : ILR (1947) Bom 636. (Under Shia Law, a Shia (Muhammedan) can create a vested remainder in favour of an unborn person provided life estates are created in favour of persons in existence. 1927 Rang 242 [AIR V 14], Dissent. from.)
1925 Mad 997 (998) [AIR V 12] (DB).
1927 Rang 242 (246) [AIR V 14] : 5 Rang 252 : (Gift, even through a trustee, to an unborn person is invalid.)
('09) 36 Cal 431 (432).
('84) 9 Bom 158 (163). (Bequest to person not in existence at testator's death.)

2. ('95) 22 Cal 619 (631) : 22 Ind App 76 (PC). (Do.)
1928 Cal 130 (132) [AIR V 15] : 55 Cal 448. (Wakf before the Wakf Validating Act of 1913.)

Section 13 — Note 7

1. Topham, New Law of Property, 4th Edn. 1932, Pages 202 (203).
Williams & Eastwood, Principles of the Law of Real Property, 1933 End., Page 262.
(1889) 38 W R (Eng) 5 (6), Whitby v. Mitchell. (Affirmed in (1882) 38 W R (Eng) 337).
(1759) 28 E R 741 (745) : 1 Eden 404, Marlborough (Duke) v. Gadolphin (Earl).
(1804) 5 East 198 (205) : 102 E R 1046, Seaward v. Willock.
(1852) 42 E R 826 (836) : 2 Deg M & G 145, Monypenny v. Dering.
(1789) 100 E R 468 (469) : 3 T R 83, Hay v. Earl of Coventry.
(1910) 1 Ch 1 (9) : 79 L J Ch 1, In re Nash.
(1877) 46 L J Ch 248 (250) : 5 Ch D 183, Hampton v. Halman.
(1890) 38 W R (Eng) 264 (265) : 59 L J Ch 118, In re Frost.
(1794) 30 E R 671 (675, 676) : 2 R R 250, Routledge v. Dorril.
[*See* (1828) 38 E R 822 (824) : 4 Russ 311, Hayes v. Hayes. (A limitation to unborn person for life held not good.)]

14. No transfer of property can operate to create an interest which is to take effect after the life-time of one or more persons living at the date of such transfer, and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the interest created is to belong.

Rule against perpetuity.

Synopsis

1. Analogous law.
2. Scope.
3. "No transfer of property"—Charge.
4. "Property."
5. "Which is to take effect."
6. "One or more persons living."
7. "Who shall be in existence."
8. Minority.
9. Alternative limitations one of which is void under this section.
10. Contracts if governed by rule against perpetuities.
11. Covenant running with the land.
12. Power of appointment.
13. Hindu law.
14. Muhammadan law.

1. Analogous law. — Section 114 of the Indian Succession Act (XXXIX of 1925) runs as follows :

"114. No bequest is valid whereby the vesting of the thing bequeathed may be delayed beyond the lifetime of one or more persons living at the testator's death and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the thing bequeathed is to belong.

Illustrations.

(i) *A* fund is bequeathed to *A* for his life and after his death to *B* for his life ; and after *B's* death to such of the sons of *B* as shall first attain the age of 25. *A* and *B* survive the testator. Here the son of *B* who shall first attain the age of 25 may be a son born after the death of the testator ; such son may not attain 25 until more than 18 years have elapsed from the death of the longer liver of *A* and *B* ; and the vesting of the fund may thus be delayed beyond the lifetime of *A* and *B* and the minority of the sons of *B*. The bequest after *B's* death is void.

(ii) *A* fund is bequeathed to *A* for his life, and after his death, to *B* for his life, and after *B's* death to such of *B's* sons as shall first attain the age of 25. *B* dies in the lifetime of the testator, leaving one or more sons. In this case the sons of *B* are persons living at the time of the testator's decease, and the time when either of them will attain 25 necessarily falls within his own lifetime. The bequest is valid.

(iii) *A* fund is bequeathed to *A* for his life, and after his death to *B* for his life, with a direction that after *B's* death it shall be divided amongst such of *B's* children as shall attain the age of 18, but that, if no child of *B* shall attain that age, the fund shall go to *C*. Here the time for the division of the fund must arrive at the latest at the expiration of 18 years from the death of *B*, a person living at the testator's decease. All the bequests are valid.

(iv) *A* fund is bequeathed to trustees for the benefit of the testator's daughters, with a direction that, if any of them marry under age, her share of the fund shall be settled so as to devolve after her death upon such of her children as shall attain the age of 18. Any daughter of the testator to whom the direction applies must be in existence at his decease, and any portion of the fund which may eventually be settled as directed must vest not later than 18 years from the death of the daughters whose share it was. All these provisions are valid."

2. Scope. — The law has always regarded, as being against *public policy*, the creation of perpetuity.(1) Every attempt to create a perpetuity is therefore held void and

Section 14 — Note 2

1.† ('36) 63 Cal 209 (213) (DB). (It is against public policy that property should be settled on special trust for an indefinite period, so as to prevent its being freely dealt with.)

('92) 15 Mad 424 (443, 444) (DB). (Gift in perpetuity to the people in general for the soul of the donor—No charity—Gift void.)

[*See also* (1910) 1 Ch D 1 (7): 79 L J Ch 1. In re, Nash.]

of no effect.(2) Perpetuity may arise in two ways: *first*, by taking away from the owner of property the power of *alienation thereof*(3) which is an inseparable incident of property,(4) and *secondly*, by the creation of future remote interests.(5) The former gives rise to the rule in S. 10, forbidding restraints on alienation; and the latter gives rise to the rule enacted in the present section which in England is technically known as the "rule against perpetuities."(6) The English rule against perpetuities is really a development of the rule against restraints on alienation.(7) and may be stated thus:

14/2 "Every attempted disposition of land or goods is void, unless, *at the time when the event creating it takes effect*, one can say, that it *must* take effect (if it takes effect at all) within a life or lives *then* in being and *21 years* after the termination of such life or lives, with possible addition of the period of gestation."(8)

The difference between this section and the English rule is that under the latter, property could be tied up during a life or lives of any existing person or persons and for 21 years after the death of the survivor, *irrespective of the minority* of any particular person, while under the present section property can only be tied up during a life or lives of any existing person or persons and the *minority* of the person to whom the interest created is to belong.

The reason of the rule against perpetuity is:

"the mischief that would arise to the public from estates remaining for ever, or for a long time unalienable, or untransferable from one hand to another, being a damp on industry and prejudice to trade, to which may be added the inconvenience and distress that would be brought on families whose estates are so fettered."(9)

In determining the validity or otherwise of dispositions of property under this section regard must be had to the *possible* events and not to events as they have actually happened. And if it is *possible* that the vesting may be postponed beyond the limits fixed by the section, the disposition will be bad, although, the events on which the vesting depended actually happened within the prescribed limits.(10)

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2. ('92) 15 Mad 448 (468, 470). (A direction in a will that a certain fund shall be enjoyed by legatee's children from generation to generation was held to be void.)

3. ('36) 63 Cal 209 (213) (DB).

4.† (1905) 74 L J Ch 62 (65): 1905 1 Ch 191, In re Oliver's Settlement. (By will property given to daughters and after them to their children.)

5. ('36) 63 Cal 209 (213) (DB).

6. *See* ('36) 63 Cal 209 (213) (DB).

7. (1905) 74 L J Ch 62 (65): (1905) 1 Ch 191 (196), In re Oliver's Settlement.

8. Topham, New Law of Property, 4th Edn., 1922, page 178.

9.‡ 1732) 24 E R 917 (918): 2 P Wms 686, Stanley v. Leigh.

[*See also* (1765) 28 E R 741 (746): 1 Eden 404, Spencer v. Duke of Marlborough. ("Common law seemed wisely to consider that the real property of this state ought, to a degree, to be put in commerce, to be left free to answer to exigencies of the possessors and their families and therefore admitted no perpetuities.)

(1805) 32 E R 1030 (1040): 11 Ves 112, Thellusson v. Woadford. (The principle is the avoiding of a public evil by placing property for too great a length of time out of commerce.)]

10. 1916 Cal 396 400, 401) [AIR V 53 C 50] (DB). (Case of a will.)

1927 Pat 412 (412) [AIR V 14] (DB).

1926 All 283 (283) [AIR V 13] (DB). (Transfer to take effect on the extinction of transferor's lineal descendants.)

† 1921 Cal 162 (164) [AIR V 8] (DB). (Covenant to allow pre-emption.)

('11) 38 Cal 603 (619): 38 Ind App 112 (PC). (Provision for permanent devolution of the properties in direct male line')

('06) 29 Mad 412 (419) (DB).

(1845) 60 E R 474 (481): 65 R R 642, Hedsen v. Ball.

(1855) 65 E R 572 (578): 197 R R 26, Lett v. Randall.

(1839) 59 E R 531 (534): 51 R R 206, Newman v. Newman.

(1845) 8 E R 1523 (1550): 69 R R 137, Dungannon v. Smith.

(1787) 29 E R 1186 (1187): 1 R R 46, Jee v. Audley.

(1911) 80 L J Ch 47 (48): (1911) 1 Ch 116 (118, 119), Re Bewick; Ryle v. Ryle.

(1903) 72 L J Ch 670 (672): (1903) 2 Ch 411 (420), In re Wilmer's Trusts.

(1828) 38 E R 857 (859): 6 L J (O S) Ch 104, Palmer v. Holfork.

(1888) 57 L J Ch 1061 (1063): 39 Ch D 155 (158), In re Dawson.

Where certain property was allotted in full proprietorship to a sharer with a direction to use income from that property for supporting charity with further direction to other sharers to take the property in case the duty by first sharer was neglected, it was held that the further direction did not offend the rule against perpetuity. But the provision was added in terrorem so that duty to support charity should be carried out and not neglected.(10a)

Gift to Association :

Even when an interest *in praesenti* is created, it may be said to offend the rule against perpetuity, when the term 'perpetuity' is taken in the sense of an interest created for the purpose of tying up the property in perpetuity, without the possibility of its being alienated. A bequest to certain organizations was attacked on this ground in *M. A. F. Halflyde* v. *C. A. Saldanha.*(11) In that case, the testator had made a residuary bequest in favour of a certain limited company and a registered Society for their general purposes which were partly political and partly educational. It was held that the gifts were absolute gifts to the organizations, that the existing members of the two Associations were entitled to the immediate use of both the capital and the income of the bequest and that therefore the bequest was not hit by the rule against perpetuities. Similarly, *In re Price*(12) the testatrix directed her trustees to pay one of her residuary estate "to the Anthroposophical Society in Great Britain to be used, at the discretion of the Chairman and Executive Council of the Society, for carrying on the teachings of the founder, Rudolf Steiner." It was held that the legacy did not tend to a perpetuity, as the Society was free to apply the capital of the bequest for the purpose laid down by the testatrix.

[(For a fuller consideration of the subject of "Perpetuity" in this sense of tying up of property in perpetuity, see Halsbury's Laws of England, (Hailsham Ed.) Vol. 25, P. 81.)]

3. "No transfer of property" — Charge. — The rule against perpetuity would not apply to a charge, since a charge does not involve any transfer of property.

4. "Property." — The word "property" in this chapter will include both movable and immovable property(1) and the rule against perpetuity will therefore

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(1867) 36 L J Ch 350 (351) : L R 6 Eq 319, Re Sayer's Trust.

(1894) 63 L J Ch 872 (873) : (1894) 3 Ch 265 (267), Alt v. Lord Stratheden & Campbell.

(1858) 9 E R 815 (826) : 73 R R 116, Boughton v. James.

[*See also* ('10) 5 Ind Cas 487 (488) (Cal).]

10a. 1958 Madh Pra 246 (252) (Pr 32) [AIR V 45 C 92].

11. 1949 Cal 533 (537) [AIR V 36 C 144] : I L R (1945) 1 Cal 532.

12. (1943) 1 Ch 422 : (1943) 2 All E R 505. (Nor was there such uncertainty as to the purposes for which the bequest could be expended as to make it impossible for the Court to decide as to the property of any item of expenditure. Accordingly, the bequest was valid.)

Section 14 — Note 3

1. 1918 PC 156 (157) [AIR V 5] : 42 Mad 581: 46 Ind App 64. (Appeal from AIR 1915 Mad 664.)

1928 Mad 713 (721, 722) [AIR V 15] (FB). (Direction to the holder of an estate to pay from time to time certain definite sums to the plaintiff and his "puthra pouthra parampariyam" does not offend the rule against perpetuity.)

1965 Ker 27 (27) [AIR V 52 C 9]. (Creation of an annuity in petpetuity with a charge on property would not offend S. 14.)

('48) I L R (1948) 1 Cal 492 (499).

1933 All 934 (937) [AIR V 20]. (Agreement to pay maintenance allowance to a Muhammadan daughter-in-law and her descendants from generation to generation. Such allowance made a charge on certain village — Held. rule against perpetuity would not apply to a charge of this kind.)

[See however 1941 All 345 (349) [AIR V 28] : I L R (1941) All 691 (FB).]

Section 14 — Note 4

1. ('09) 32 All 88 (91) (DB).

apply to all dispositions of property whether movable or immovable.(2)

5. **"Which is to take effect."** — These words show that the rule applies only to the creations of *future* interests, i.e., interests intended to vest or to come into existence in the future, and the rule prescribes a time beyond which such interest shall not vest.(1) Thus, where property is transferred in trust for the settlor for life, and then for the son or sons of the settlor, if more than one, in equal shares upon the attainment by him or them of the age of 21 years, the rule is infringed inasmuch as the vesting of the interests in the sons is attempted to be postponed beyond the life-time of a life in being and the *minority* of the person to whom the interest is to belong.(2)

See also the undermentioned cases.(3)

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2. ('05) 7 Bom L R (Jour) 73 (74). (Promissory notes.)

† ('96) 20 Bom 511 (515). (Cash.)

Section 14 — Note 5

1.† 1928 Mad 28 (33) [AIR V 15] (DB). (Equity of redemption is a present interest.)

(1910) 1 Ch 12 (24, 25) : 79 L J Ch 150, South Eastern Railway v. Associated Portland Cement Manufacturers. (A case of conveyance reserving an immediate right or easement of tunnelling.)

1916 Pat 226 (228, 230) [A I R V 3] : 1 Pat L J 238 (DB). (Covenant to grant land whenever required for building mandir or dharamshala— It was construed as creating an interest in land and running with the land it is hit by the rule as it then creates an interest in future which may possibly vest after an indefinite period.)

(1909) 36 Cal 675 (698) (DB).

2. 1931 Cal 651 (656) [AIR V 18] : 58 Cal 768.

3. 1956 Punj 145 (146) [AIR V 43 C 52] : I L R (1956) Punj 157. (Bequest to testator's widow for life and after her death to two of his grandsons — Held, will did not create an estate in perpetuity—Testator's widow could gift property to her next two heirs who were the grandsons because the gift was not more than acceleration of succession.)

1953 Trav-Co 89 (90) [AIR V 40 C 29] (DB).

1946 Cal 396 (404) (Pr 39) [AIR V 33 C 90] (DB). (Will — Construction — Testator's will after reciting some maintenance allowance providing in Cl. (9) that legitimate sons, natural or adopted of his son A would be entitled to residuary estate, actual vesting taking place after only son or youngest son, completes 21 years — No son born to or adopted by *A* till testator's death — *A* adopting son after testator's death — In suit by *A* claiming residuary estate to exclusion of his son held that bequest in Cl. (9) did not offend against provision of Ss. 113 and 114 — Bequest in Cl. (9) was not contingent upon attainment of 21 years by the only son or youngest son of *A* — Payment over at a later date was merely postponement of possession of accumulated income and the corpus — *A*'s son held became entitled to residuary estate on his adoption.)

1926 All 283 (283) [AIR V 13] (DB). (A transfer of property in favour of another, to take effect on the extinction of the transferor's line of male descendants, is against the law of perpetuities and cannot be given effect to.)

1921 Cal 389 (392) [A I R V 8] : 32 Cal L J 453 (DB). (Trust in favour of charity not vesting immediately — Vesting made conditional upon liquidation of debts out of income which might not be fulfilled within period prescribed by law — Trust is affected by rule of remoteness.)

('95) 20 Bom 450 (463) (DB). ("My remaining movable property shall be dealt with by my son *G* according as he may think proper, and when the sons of my son *G* shall attain the age of 21 the same shall be divided and duly received by *G* and his sons in equal shares" — Held, gift to *G*'s sons was void.)

('71) 8 Beng L R 208 (223). (A Hindu testator bequeathed his property in trust for his great-grandsons on attaining their majority, and in the event of his having no great-grandsons, to his daughter's sons when they came of age — Held, that the bequest was void for remoteness.)

(1826) 38 E R 83 (85) : 25 R R 27, Bull v. Pritchard. (Interest which might vest 23 years after a life is being — Such creation of interest is void.)

(1848) 9 E R 815 (826) : 73 R R 116, Boughton v. James. (Interest to vest 25 years after a life in being—Too remote.)

(1950) 1950-2 All E R 191 (192). (A direction by a testatrix to the trustees to invest such a sum in trustee securities as should be "sufficient to train a candidate for the priesthood until such time as a candidate should come forward from St. Saviour's Church, St. Albans," held failed ab initio even as a charitable gift, the gift being limited to future event so remote and indefinite, that it transgressed the rule against perpetuities.)

(1949) 1949-1 All E R 459 (460). (The testatrix gave a legacy of £5000 to trustees on trust to pay the income to a Mrs. H for life and directed : ". . . . . , and after her death (they) shall stand possessed of both the income and capital thereof in trust for such of her grandchildren living at my death or born within five years therefrom who shall attain the age of 21 years or being a female marry under that age in equal shares." She also bequeathed a share of

Where there is no question of any new interest to be created at a *future* time the rule has no application.(3a) Thus, where a mortgage is executed reserving a right of redemption, the right of redemption is not a *future* interest such as would be governed by the rule against perpetuities.(4) In *Mann, Crossman & Paulin Ltd.* v. *Land Registrar*(5) where A had leased out his property for the period of 50 years and, while more than 21 years of the period had still to run executed a lease of his *reversion* to B, it was held that the grant of the reversionary lease to commence at a period more than 21 years from the date of the grant conferred a *vested* interest which was not void for remoteness. Neville J., cited with approval the following observations of the Court in *Redington* v. *Browne*,(6) which was a similar case :

> "The object of the rule is to restrict the inalienability of property, and limit the period for which its absolute vesting may be postponed. If the future limitation is vested in interest in an ascertained living person at the time of the execution of the instrument by which it is created, or must necessarily vest within the period fixed by law . . . . . it is not open to the objection of remoteness; and it is immaterial that the actual enjoyment in possession may be deferred for a much longer period."

Again, the remoteness against which the rule is directed, is the remoteness in the commencement or first *taking effect* of limitations, and not in the *cesser* or *determination* thereof. An estate that is to arise within the prescribed period may be so limited as to determine on the happening of an event however remote.(7)

Where the will takes effect immediately on the death of the testator and the property bequeathed vests in the legatee (a corporate body), forthwith, no question of offending against the rule of perpetuity arises and the fact that a corporate body may hold the property for ever is no infringment of the rule.(8)

6. "One or more persons living"—A transferor can create as many interests as he desires, in favour of persons *living at the time of the transfer*.(1) The transfer in

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residue in trust : ". . . . . for such of the grandchildren of Mrs. H as shall be living at my death or born within five years therefrom who shall attain the age of 21 years or being female marry under that age in equal shares :" —Held, that since under S. 1 (1) of the Age of Marriage Act (Eng) (1929) a child under age of 16 could not lawfully be married, a child of Mrs. H born after death of testatrix could not be lawfully married and have lawful children within five years of testatrix's death; that therefore, the bequest did not infringe the rule against perpetuities.)

3a. 1942 All 254 (256) [AIR V 29] (DB). (Partition — Agreement by parties to pay maintenance allowance to *M* and to his widow and children — Property partitioned charged with allowance—Held, that if charge was transfer of property, transfer took effect when partition deed was executed — Charge was created immediately in favour of *M* and was to be inherited by his widow and children—Section 14 therefore could not apply.)

1941 Rang 305 (308) [A I R V 28] : 1941 Rang L R 410 (DB). (Case under Succession Act — Provided there is no remainder over, a bequest in perpetuity for charitable objects does not offend against S. 114, Succession Act, (corresponding to S. 14, Transfer of Property Act).)

4. 1928 Mad 28 (32) [AIR V 15] (DB). (Suit for possession on redemption of an alleged conditional mortgage — The plea in defence was that the document sued on was a sale with an agreement to resell the property in future and as such the agreement to resell offended the rule of perpetuity — Held, overruling the plea that the document evidenced a conditional mortgage and could be redeemed.)

(1913) 17 C W N 1053 (1057) (DB).

5. (1918) 87 L J Ch 81 :(84) : (1918) 1 Ch 202 208 (209).

6. (1893) 32 L R Ir 347.

7. 1922 Cal 474 (475) [A I R V 9] : 26 Cal W N 874 (DB). (Clause forbidding transfer without lessor's permission except in case of transfer to a co-sharer of lessee—Covenant held is void.)

(1897) 66 L J Ch 616 (619) : (1897) 2 Ch 255, Wainwright v. Miller.

8. 1948 Oudh 160 (162) (Pr 4) [AIR V 35 C 60] : 23 Luck 111.

[*See also* 1916 Mad 391 (399) [A I R V 3] : 29 M L J 481 : 1915 Mad W N 740 : 39 Mad 317 (FB). (Gift to all persons who can naturally form a joint Hindu family or persons following Marumakkathayam law forming a natural tavazi — Gifted property to be held as joint family property—Rule does not apply.)]

Section 14 — Note 6

1. 1944 Oudh 65 (75) [AIR V 31] : 19 Luck 3 2

such cases is really, in effect, one which takes effect during the life of *one* living person namely that of the survivor.(2) A life in being would include a child in the womb.(3)

7. "Who shall be in existence." — As observed in Note 6 a child *en ventre sa mere* is a life in existence for the purposes of this section. A child *adopted* after a man's death in pursuance of a power given by him, is in contemplation of law begotten by that man.(1) See also the undermentioned case.(2)

8. Minority. — Under S. 3 of the Indian Majority Act (IX of 1875) every person domciled in India is to be deemed to have attained his majority when he shall have completed the age of 18 years and not before. But every minor of whose person or property a guardian has been or shall be appointed by any Court of Justice and every minor under the jurisdiction of any Court of Wards, should notwithstanding anything contained in the Indian Succession Act or in any other enactment be deemed, to have attained his majority when he shall have completed the age of 21 years and not before.

Where, by a deed of transfer an interest therein was created in favour of certain lives in being with remainder to an unborn person upon his attaining age of 21 years it was held that the interest was void, inasmuch as it could not be ascertained at the date of the creation of interest that such unborn person would ever have a guardian appointed for him.(1)

9. Alternative limitations one of which is void under this section. — If there be two *alternative* limitations, one of which is bad as being too remote and the other valid, the Court will disregard the invalid limitation and give effect to that which is legal.(1) This is equally true where there are several limitations some of which are bad.(2) But if one limitation is ulterior to or expectant upon another limitation which is void for remoteness the former is also void although made to a person in existence.(3) (See Note 4 on section 16.)

(DB). (Rule against perpetuities applies even to family arrangement—Rule is not disregarded by the creation of successive life estates, provided the beneficiaries are living persons.)

2. (1799) 31 E R 117 (163, 169) : 4 R R 205, Thelluson v. Woodford.

3. (1797) 101 E R 875 (877) : 7 T R 100, Long v. Blackall.
(1903) 51 W R (Eng) 609 (609) : 72 L J Ch 670, Moore v. Wingfield.
(1907) 76 L J Ch 339 (345) : (1907) App Cas 139 Villar v. Gilbey.
(1864) 46 E R 534 (536) : 34 L J Ch 18, Blascon v. Blasoon. (But such a child though deemed as living for its own benefit is not ordinarily regarded as living for the benefit of third persons.)
(1799) 31 E R 117 (163, 169) : 4 R R 205, Thellusson v. Woodford.
[*See also* (1905) 74 L J Ch 529 (530) : (1905) 2 Ch 301 (305), Villar v. Gilbey. (But not so when the estate tail is to be cut into a life estate.)]

Section 14 — Note 7

1. † ('72) Ind App Supp Vol 47 (67) (PC).
1946 Cal 396 (404) [AIR V 33 C 90] (DB).

2. 1942 All 254 (256) [AIR V 29] (DB). (Transfer of life interest to a person followed by a transfer to his wife and children does not offend the rule against perpetuities because the latter would obviously be alive at his death or within a few months thereafter.)

Section 14 — Note 8

1. ‡ 1925 PC 244 (248) [AIR V 12] : 48 Mad 906 : 52 Ind App 310. (Interest was created by will in this case.)

Section 14 — Note 9

1. ('09) 36 Cal 431 (432). (Parties governed by Muhammadan law—Deed creating life interest with remainder to certain other persons held void under Muhammadan law and so the person taking life interest under the deed declared the absolute owner.)
(1900) 4 Cal W N 671n (677n). (Part of the trust for accumulating only that part bad.)
(1938) 107 L J Ch 417 (418) : (1938) 1 Ch 952, In re, Curryer's Will Trusts.

2. † 1937 P C 4 (7) [AIR V 24] : ILR (1937) All 3 : 64 Ind App 5.

3. 1937 P C 4 (8) [AIR V 24] : 64 Ind App 5 : ILR (1937) All 3. (One of the dispositions contrary to law; other dispositions will fail if they are dependent on and inseparable from

10. Contracts if governed by rule against perpetuities.—The rule against perpetuities is a branch of the law of *property* and not of *contract*(1) and consequently has no application to *personal contracts* which do not create any interest in property.(2) Thus, a contract to pay money to a person, his heirs or legal representatives upon a future contingency, which may happen beyond a life or lives in being and 18 years thereafter, would be perfectly valid.(2a)

Under the English law, a *contract for the sale of land* has been held to create an *equitable interest* in land and as such subject to the rule against perpetuties.(3) The leading case on the point is *London and South Western Railway* v. *Gomm.*(4) It was held in that case that a covenant for repurchase of land sold, created an equitable interest in the land, and was, as such, governed by the rule against perpetuities. Sir George Jessel, M. R., observed:

> "The right to call for a conveyance is an equitable interest or equitable estate. In the ordinary case of a contract for purchase there is no doubt about this, and an option to repurchase is not different in its nature . . . . . It appears to me therefore that this covenant plainly gives the company an interest in the land, and as regards remoteness, there is no distinction, that I know of, (unless the case falls within one of the exceptions, such as charities) between one kind of equitable interest and another. In all cases they must take effect as against the owners of the land, within a prescribed period."

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the disposition which is invalid.)
('71) 8 Beng L R 208 (224) (A gift made on the failure of, and postponed to, a gift which is void for remoteness is itself void.)
(1852) 42 E R 826 (841): 2 De G M & G 145, Moneypenny v. Dering.
†(1881) 51 L J Ch 369 (371): 18 Ch D 441, Goodier v. Johnson.
(1915) 84 L J Ch 715 (718): (1915) 1 Ch 810 (818), In re Hewett's settlement. ((1859) 26 Beav 365, Followed.)
(1859) 53 E R 939 (940): 122 R R 141, In re Thatcher's Trusts.

Section 14—Note 10

1. ✠1967 S C 744 (747) [AIR V 54 C 156]: (1967) 1 S C R 293.
✠ 1943 Cal 417 (424) [AIR V 30]: I L R (1943) 2 Cal 605 (FB).
(1882) 20 Ch D 562 (575): 51 L J Ch 193 (197), London and South Western Railway Company v. Gomm. (Reversed on another point in (1882) 30 W R (Eng) 621.)

2. 1967 S C 744 (747) [AIR V 54 C 156]: (1967) 1 S C R 293.
✠ 1943 Cal 417 (424, 425) [AIR V 30]: ILR (1943) 2 Cal 605 (FB).
1962 Pat 201 (202) [AIR V 49 C 49]: 41 Pat 709. (Covenant in lease giving option to lessor to to terminate lease under specified conditions is a personal covenant—No breach of rule against perpetuities.)
1926 Cal 745 (747) [AIR V 13]: 30 Cal W N 440 (DB). (Partnership—Covenant between surviving partners—Condition as to payment of share to heirs of deceased partner — Not void as offending rule of perpetuity.)
1916 Pat 226 (228, 230) [AIR V 3]: 1 Pat L J 238 (DB).
1921 Cal 328 (329) [AIR V 8] (DB).
(1910) 1 Ch 12 (25): 79 L J Ch 150, South Eastern Railway v. Associated Portland Cement Manufacturers. ((1882) 20 Ch D 562, London and South Western Railway v. Gomm, Distinguished.)
(1882) 20 Ch D 562 (575, 576, 580): 51 L J Ch 193 (197), London and South Western Railway v. Gomm. (Reversed on another point in (1882) 30 W R (Eng) 620.)
(1901) 70 L J Ch 51 (56): (1901) 1 Ch 279 (289). Borlands Trustee v. Steel Bros. (Provision in the Articles of Association of a company for compulsory transfer of shares.)

2a. 1967 SC 744 (747) [AIR V 54 C 156]: (1967) 1 S C R 293.
✠1943 Cal 417 (424) [AIR V 30]: ILR (1943) 2 Cal 605 (FB). ((1863) 10 H L C 367: 11 E R 1068, Walsh v. Secretary of State, Relied on.)

3. 1967 S C 744 (748) [AIR V 54 C 156): (1967) 1 S C R 293.
✠(1882) 20 Ch D 562 (581): 30 W R (Eng) 620 (620), London and South Western Railway Co. v. Gomm.
(1909) 78 L J Ch 504 (506): (1909) App Cas 275, Edwards v. Edwards. ((1882) 30 W R (Eng.) 620, followed.)
†(1906) 75 L J Ch 761 (765): (1906) 2 Ch 532 (537), Worthing Corporation v. Heather. (Option to purchase the leased property contained in a lease deed was held to be void on the ground of remoteness.)
(1852) 51 E R 739 (740): 96 R R 75, Stocker v. Dean.
✠(1905) 74 L J Ch 555 (557): (1905) 2 Ch 257 (278), Woodall v. Clifton. (Option to purchase contained in a lease unless proviso giving option runs with the land by statute.)

4. (1882) 20 Ch D 562 (580, 581): 30 W R (Eng) 620 (620).

This view was followed in this country also in a case arising before before this Act.(5)

Section 54 of the Act, however, now expressly provides that a contract for the sale of immovable property does not of itself create any interest in, or charge upon, immovable property. In view of this provision, there has arisen a conflict of opinions as to whether such contracts are nevertheless subject to the rule against perpetuities especially in view of the decision of the Privy Council in *Maharaj Bahadur Singh* v. *Balchand Chowdhury*(6) where their Lordships held that a covenant for transfer of land at a future uncertain date was bad as offending the rule against perpetuities. The contract in that case was, however, made in the year 1872 before the Transfer of Property Act.

Bombay.

In *Dinkerrao* v. *Narayan*,(7) Macleod, C. J., was of the view that agreements for pre-emption of land do not create any interest in the land, equitable or executory, but that they do create rights which are capable of being enforced with regard to the land in circumstances against third parties, and to that extent they are not ordinary personal contracts but stand in a category by themselves. The principle which underlies S. 14 should therefore be applied to this class of contracts. Mr. Justice Kanga was of the opinion that such a contract may be void under S. 23 of the Contract Act as being against public policy. This case was followed in the undermentioned case of the same Court.(8) The contracts in these cases were made before the Act was applied to the Presidency of Bombay, though the decisions are not based on this fact. In a Full Bench case,(9) the referring Judges expressed dissent from the view taken in *Dinkerrao's case* and expressed an opinion that S. 14 will not apply to such contracts, but observed that though S. 14 may not apply, the contract *may* be void under S. 23 of the Contract Act. In *Gurunath* v. *Yamanava*(9a) a covenant for the repurchase of land was held to be a purely personal one but it was observed that if it were not so, it would be bad for remoteness. Following the view taken by the referring Judges in the Full Bench case, a recent division bench has held that an agreement to sell immovable property does not offend the rule against perpetuity.(9aa)

Allahabad.

In the two cases noted below(10) the Allahabad High Court followed the view of the Bombay High Court in *Dinkerrao's case*.(10a) But in two later cases(11) the Court held that the rule against perpetuities did not apply to contracts for the sale of land. But the learned Juges in *Mirza Mahomed* v. *Sheik Fazluddin*(11a) differed as to whether a contract for sale of land would be void for *uncertainty* where the contract is

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5. ('75) 24 Suth W R 321 (322) (DB). (Partition deed providing for right of pre-emption amongst co-sharer's widow selling her husband's share to third person—Suit by co-sharer for pre-emption —Held, dismissing plaintiff's claim, that if the covenant for pre-emption could at all be held to be binding on the widow who was not a party to it, it was still unenforceable as it created perpetuity.)

6. 1922 P C 165 (167) [AIR V 9] : 6 Pat L Jour 163 : 48 Ind App 376.

7. 1947 Bom 191 (193) [AIR V 34 C 61] : I L R (1946) Bom 997 (DB).
✠1922 Bom 84 (88, 89, 94) [AIR V 9] : 47 Bom 191 (DB).

8. 1931 Bom 578 (580) [AIR V 18].

9. 1926 Bom 497 (501, 504) [AIR V 13] : 50 Bom 566 (FB).

9a. ('11) 35 Bom 258 (260) (DB).

9aa. 1960 Bom 105 (106) [AIR V 47 C 29] : ILR (1959) Bom 1705.

10. 1923 All 514 (516) [AIR V 10] : 45 All 478 (DB).
1923 All 511 (512) [AIR V 10] : 45 All 492 (DB).

10a. 1922 Bom 84 [AIR V 9] : 47 Bom 191 (DB).

11. 1924 All 657 (658, 661) [AIR V 11] : 46 All 514 (DB).
1924 All 400 (402, 404) [AIR V 11] : 46 All 333 (DB).

11a. 1924 All 657 (658, 661) [AIR V 11] : 46 All 514 (DB).

unlimited in point of time, Sulaiman, J., holding that it would be void and Lindsay, J., holding the contrary view. The whole question came up for decision before a Full Bench in *Aulad Ali* v. *Syed Ali Athar*,(12) and it was definitely held that a contract for sale of land was neither subject to the rule against perpetuities, nor void on the ground of uncertainty.

See also the case noted below.(13)

Gujarat.

The High Court of Gujarat(13a) following the view of the Bombay High Court has held that a bare agreement to sell immovable property in future by a party to the agreement cannot infringe the rule against perpetuity embodied in this section.

Madras.

In *Kurri Veerareddi* v. *Kurri Bapireddi*(14) it was held that a contract of sale did not create any interest in the property agreed to be sold. Sir Arnold White, C. J., in delivering the judgment of the Bench observed with reference to S. 54 of this Act: "The object of the provision, as it seems to me, was to prevent the question being raised as to whether the law of England as to the legal effects of a contract of sale ..... applied in this country."

Notwithstanding the Full Bench decision in *Kurri Veerareddi's case*, it was held in *Kolathu Aiyar* v. *Rangavadhyar*(14a) following *London and South Western Railway* v. *Gomm*(14b) and other English cases that a contract for sale of land creates a substantial interest in the land and if no time is fixed for performance, it is void as infringing the rule against perpetuities.

Kolathu Aiyar's case was dissented from in *Charamudi* v. *Raghavalu*(15) and it was held that a contract for sale of land did not create any interest in the land, merely because it had reference to land, and that such contracts, even though for indefinite periods, were not subject to the rule against perpetuities. Their Lordships observed in the course of the judgment :

> "A contract which is binding only personally would, in strictness and according to literal import, be enforceable only so long as both the contracting parties are alive; for if one of them is dead, then there is either no person to enforce it, or no person against whom it can be enforced. It would have been meaningless for the law to apply the rule against perpetuities to such a transaction; for the transaction can (in its strictness) prevail for only a fragment of the period mentioned in the rule against perpetuities. Far from limiting the period during which such a transaction is to operate, the law has enlarged the scope of its operation from its strict limit (viz., during the lifetime of both contracting parties) so as to bind the representative of the promisors. (Indian Contract Act, Section 37)."

The view taken in *Charamudi's case* has been followed in subsequent cases of the same Court.(16)

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12. ✠ 1927 All 170 (172 [AIR V 14] : 49 All 527 (FB). (A contract which a party alleges to be void must be void ab initio.)

13. 1929 All 667 (667) [AIR V 16] (DB).

13a. 1967 Guj 81 (85) [AIR V 54 C 16] : (1965) 6 Guj L R 915. (AIR 1960 Bom 105, Foll.)

14. ✠('06) 29 Mad 336 (345) (FB). (24 Mad 449, Approved. Note.—Overruled on a different point in 1924 Mad 271 [AIR V 11].)

14a. 1916 Mad 856 (857) [AIR V 3] : 38 Mad 114 (DB).

14b. (1882) 20 Ch D 562 (580, 581) : 51 L J Ch 193 (197).

15. 1916 Mad 298 (300, 301) [AIR V 3] : 39 Mad 461 (DB).

16. 1951 Mad 798 (799) [AIR V 38 C 271].
1951 Mad 767 (768, 769) [AIR V 38 C 256.]
1949 Mad 265 (267) [AIR V 36 C 122] (DB). (Agreement to reconvey does not offend against rule of perpetuities.)
1934 Mad 703 (705) [AIR V 21].
† 1926 Mad 699 (704) [AIR V 13] : 49 Mad 337. (DB). (Option to re-purchase the property does not offend the rule against perpetuity.)
('16) 1916 Mad 385 (386) [AIR V 3] (DB).

Calcutta.

The decisions of this Court fall into three groups. According to one class of cases(17) the rule of perpetuities applies to contracts for the sale of land on the principles of English law as enunciated in *London and South Western Railway* v. *Gomm.*(17a) In the undermentioned case(18) the view expressed in *Dinkerrao's case*(18a) was adopted and it was held that a contract for sale of land creates a *substantial* interest in the property, though equitable interests are not recognised in India, and as such is governed by the rule against perpetuities. In a third class of cases it has been held that a contract reserving a right of purchase of property is not subject to the rule against perpetuities, as such a contract does not create any interest in the property.(19) In the undermentioned case(19a) it was held that a contract for pre-emption, though it did not create any interest in the property stood in a class by itself and that the rule against perpetuities would be applicable thereto. In a recent Full Bench case(19b) the whole question came up for decision. It was held that a covenant for pre-emption or a contract for sale made after the Transfer of Property Act, in respect of land unrestricted in point of time and expressed to be binding on the parties, their heirs and successors, does not create any interest in land and therefore does not offend the rule against perpetuities. In view of this clear pronouncement, the conflict must be considered as settled as far as the Calcutta High Court is concerned.

Patna.

In *Maharaj Rajaramji* v. *Ramnath*(20) the Court followed the second mentioned view of the Calcutta High Court. In the cases noted below(21) it was held that a covenant for pre-emption of land, to operate only as between the parties thereto, was not void for remoteness.

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17. 1921 Cal 162 (163) [AIR V 8]. (It would seem that the rule against perpetuities is not applicable in cases where right of pre-emption is conferred by statute.)

('21) 64 Ind Cas 1001 (1002) (DB) (Cal). (Covenant for pre-emption which is unlimited in point of time is void as being obnoxious to the rule against perpetuities.)

† ('01) 5 Cal W N 343 (346, 347) (DB).

[*See also* ('06) 33 Cal 1065 (1078) (DB). (Contract for lease of land.)]

17a. (1882) 20 Ch D 562 (580, 581) : 30 W R (Eng) 620 (620).

18. † 1929 Cal 263 (265, 268) [AIR V 16] : 56 Cal 487 (DB). (The covenant which is affected by remoteness is void and ineffectual even as between immediate parties thereto.)

18a. 1922 Bom 84 (90) [AIR V 9] : 47 Bom 191 (DB).

19. 1935 Cal 779 (783) [AIR V 22]. (1927 Cal 41 [AIR V 14], followed—A clause in a partition deed merely reserved the rights to the quondam co-sharer to disregard the purchase of ryoti and under-ryoti holdings in his allotment by other co-sharers — Held, clause did not transfer any interest and hence it did not offend the rule against perpetuities.)

1927 Cal 41 (42) [AIR V 14) (DB). (Covenant in putni lease that putnidar would give back to proprietor such portions of land as he required.)

('96) 2 Cal W N 575 (576) (DB) (Covenant for pre-emption.)

19a. ('42) 46 Cal W N 147 (149).

19b * 1943 Cal 417 (426) [AIR V 30] : I L R (1943) 2 Cal 605 (FB). (Section 27 (b), Specific Relief Act, cannot be invoked for supporting the argument that an interest in property is created by a contract for sale — Nor does S. 91, Trusts Act, indicate that a purchaser under a contract for sale has an interest in the land.)

1961 Cal 152 (154) (Pr 8) [AIR V 48 C 30] : ILR (1960) 2 Cal 852. (AIR 1943 Cal 417, Foll.)

20. 1927 Pat 412 (412) [AIR V 14] (DB). (A covenant for pre-emption which is unlimited in point of time is obnoxious to the rule against perpetuities.)

[But see 1916 Pat 226 (228, 231) [AIR V 3] : 1 P L J 238 (DB). (Personal covenant to convey land in future whenever required creates no interest in the property and is not hit by the rule against perpetuties.)]

21. 1945 Pat 162 (170) [AIR V 32] : 23 Pat 871 (DB). (Khorposh grant for maintenance—Condition pending for cancellation of grant if property was sold by auction for the debts of the grantee during life time of grantor—Condition operates inter vivos and the rule of perpetuity is not

Sind.

In a suit between the parties to a sale, a covenant by the vendee to give the right of first refusal to the vendor and his heirs, if he wished to sell the land was held not void on the ground of perpetuity.(22)

Nagpur.

In a recent case(22a) the High Court of Nagpur has held that an agreement at a partition between two coparceners forming a Hindu joint family, that if any of them wished to sell his share, the other coparcener would be entitled to buy it at a certain sum, does not offend the rule against perpetuities as contained in this section. Following the Full Bench decision of the Calcutta High Court the undermentioned decision(22aa) has held that the rule against perpetuities does not apply to contracts for pre-emption.

Assam.

The High Court of Assam has also held that a contract which embodies a right of pre-emption or a stipulation for reconveyance does not come within the purview of S. 14.(22aaa)

It is submitted with respect that the view expressed in *Charamudi's case*(22b) by the Madras High Court and in the Full Bench decision(22c) of the Calcutta High Court is correct.

A covenant to indemnify a transferee for the loss of the land transferred by securing him equivalent land, was, in the undermentioned case,(23) held unenforceable as violating the rule against perpetuities. There was no reference to the earlier authorities except *Gomm's case*(23a) and no discussion of the principles involved. It is submitted that this view is not correct.

It is now settled by the decision of the Supreme Court in *Ram Baran* v. *Ram Mohit* that the combined effect of Ss. 14 and 54 is that a mere contract for sale of immovable property does not create any interest in the immovable property and therefore the rule of perpetuity cannot be applied to a covenant of pre-emption even though there is no time limit within which the option has to be exercised and the contrary view expressed in cases and decided according to the law before this Act cannot be considered good law.(24)

11. Covenant running with the land. — A covenant which runs with the land is free from any taint of perpetuity. The reason is that it is *annexed* to the land and passes with it in much the same way as the title deeds of the

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therefore, offended : 1928 Pat 637 [A I R V 15], **22**aaa. 1960 Assam 178 (181) [AIR V 47 C 43]: Foll.)

1928 Pat 637 (640) [AIR V 15] : 8 Pat 243.

22. 1921 Sind 118 (120) [A I R V 8] : 17 Sind L R 1 (DB).

22a. 1944 Nag 187 (187, 188) [AIR V 31] : ILR (1945) Nag 174. (By S. 37 of the Contract Act the representatives of the promisors are bound and hence the agreement can be enforced against the son of the promisor. 1927 All 170 [A I R V 14] (FB), Rel. on.)

22aa. 1956 Nag 243 (244, 245) [AIR V 43 C 83]: ILR (1956) Nag 116 (DB). (The rule against perpetuities has no application to special contracts for pre-emption which are akin to contracts to buy or sell land and are personal contract and create no interest in land.)

ILR (1959) 11 Assam 423.

1954 Assam 95 (96) [AIR V 41 C 35].

22b. 1916 Mad 298 [A I R V 3] : 39 Mad 462 (DB).

22c. 1943 Cal 417 [AIR V 30] : I L R (1943) 2 Cal 605 (FB).

23. 1928 Mad 894 (896) [AIR V 15] : 51 Mad 688. (Surety bond executed undertaking to compensate with equivalent value — Held, that security bond was not a covenant running with the property.)

23a. (1882) 20 Ch D 562 : 51 L J Ch 193, London and South Western Railway v. Gomm.

24. 1967 S C 744 (749) [AIR V 54 C 156] : (1967) 1 S C R 293.

property.(1) As to what are covenants running with the land, see Notes on Section 40.

12. Power of appointment. — Whatever estates may be created by a person seized in fee may equally be created under a *general power of appointment*, because in effect the donee of the power is the owner of the estate, and the period for commencement of the limitation in point of perpetuity is the time of the *execution* of the power and not the creation of it.(1) But in the case of a *special* power of appointment, the question whether an estate or interest created by appointment under a special power, is too remote depends upon its distance from the creation and not from the exercise of the power.(2) Again if the interest is to be had under a power of appointment and if the exercise of the power is made contingent upon an event which may by possibility happen beyond the limits of the rule under this section, the mere fact that the contingency has happened earlier, and has rendered the exercise of the power practicable within the prescribed limits, does not validate the interest created under the power.(3)

13. Hindu law. — Irrespective of any statutory provision, the Hindu law does not allow property to be tied up in perpetuity except in the case of a religious or charitable endowment.(1) Before the passing of the Hindu Disposition of Property Act, 1916; a Hindu could not even make a gift to an unborn person.(2) The Hindu

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Section 14 — Note 11

1. 1925 Mad 732 (733) [AIR V 12]. (A clause for surrender of leased land whenever the landlord required.)
1921 Mad 541 (541) [AIR V 8] : 44 Mad 230 (DB) (A covenant to renew a lease at the option of the lessee.)
† (1901) 70 L J Ch 76 (76) : (1901) 1 Ch 54 (61), Muller v. Trafford. (A covenant for renewal of a lease.)

Section 14 — Note 12

1. (1885) 54 L J 732 (734) : 29 Ch D 521 (526), Rous v. Jackson. (A general power of appointment is outside the rule against perpetuities.)
2.† (1906) 75 L J Ch 599 (602) : (1906) 2 Ch 199 (201), In re Thompson.
(1913) 29 T L R 306 (307): (1913) 1 Ch 404 (413), In re Fane. (A special or particular power of appointment is a power to appoint among a named class of persons ; a general power on the other hand is a power under which the donee of the power has power of unrestricted alienation.)
(1920) 90 L J Ch 111 (112) : 124 L T 466, In re Staveley.
(1897) 2 Ch 255 (259) : 66 L J Ch 616 (619), Wainwright v. Miller.
[*See* (1938) 107 L J Ch 6 (9, 11) : (1938) 1 Ch 39, In re Legh's Settlement Trusts.]
3. ('08) 31 Mad 517 (521) (DB).

Section 14 — Note 13

1. ('67) 71 Cal W N 362 (376).
1923 Cal 708 (713) [AIR V 10] (DB).
(1900) 23 Mad 271 (281) : 27 Ind App 69 (PC).
('89) 16 Cal 71 (80) : 15 Ind App 149 (PC). (Creation of interest in the property, taking effect upon happening of uncertain event in future.)
('85) 11 Cal 684 (692) : 12 Ind App 103 (P C). (Direction in a will about the property remaining intact and profits only to be enjoyed by heirs in succession.)
1935 Sind 235 (242) [AIR V 22]. (Certain property to remain trust property from generation to generation and its income to be enjoyed by the parties — Void.)
†1930 Pat 137 (140) [AIR V 17] : 8 Pat 932.
1920 Cal 986 (987) [AIR V 7] (DB). (A series of life estates in tail male is repugnant to Hindu law.)
('13) 20 Ind Cas 429 (432) (DB) (Oudh). (Contention in the petition that the property should remain with the eldest son in perpetuity.)
('06) 30 Bom 477 (490, 491).
('96) 19 Mad 501 (502) (DB). (A deed attempting to create a new line of inheritance by excluding all heirs other than direct male heirs is invalid under Hindu law.)
('82) 4 Mad 200 (203) (DB).
✠('69) 4 Beng L R (O C) 231 (292) (DB). (4 Beng L R (O C) 103, Approved.)
✠('68) 2 Beng L R (O C) 11 (36, 37) (DB). (Trust created by will for the accumulation for 99 years for private purpose.)
2. 1915 Mad 639 (641) [AIR V 2] (DB).
('73) 20 Suth W R 472 (474) (DB). (9 Beng L R 400 (PC), followed.)
('71) 8 Beng L R 400 (407, 411) (DB). (Unborn at testator's death.)
('69) 4 Beng L R (O C) 103 (189, 190) (DB).
[*See also* ('80) 5 Cal L R 496 (500). (A testator bequeathed certain property to his daughter for life and if after her death there be any male issue of her living then to such issue— Held, the gift over to the children of the daughter was void.)]
[See however 1923 Cal 27 (30) [AIR V 10] : 50 Cal 266 (DB). (Annuity to daughter and to her son—Son not born till testator's death—Grant not invalid.)]

Disposition of Property Act, 1916, provided that thereafter no transfer should be invalid by reason only of the fact that the person for whose benefit it was made was not in existence at the date of the transfer. By the Transfer of Property (Amendment) Act, 20 of 1929, the whole of the second chapter has been made applicable to Hindus, and consequently, a transfer by a Hindu would be subject to the rule against perpetuity.(3)

14. Muhammadan law. — This section does not affect the rules of Muhammadan law (see section 2). But independently of this section the Muhammadan law does not favour a perpetuity, except in the case of *wakf*.(1) Even in the case of a *wakf*, a gift would be void if it was illusory.(2) The Mussalman Wakf Validating Act, 6 of 1913, now provides that a *wakf* is not invalid even if the gift is unsubstatial or illusory, provided there is an ultimate dedication to *wakf*.(3) The Oudh Estates Act (1 of 1869) is a special Act affecting special class of persons. Section 12 of the Act provides the rule against perpetuities in words similar to S. 14 of the Transfer of Property Act. Where a Muhammadan Talukdar executed a deed of *wakf-alal-aulad*, by which he created a *wakf* of his entire talukdari property for the benefit of himself, his family and descendants, generation after generation it was held by their Lordships of the Supreme Court that the *wakf* was hit by S. 12 of the Act and was invalid though it might be valid under the Mussalman Wakf Validating Act.(4)

Transfer to class some of whom come under sections 13 and 14.

[a]**15. If, on a transfer of property, an interest therein is created for the benefit of a class of persons with regard to some of whom such interest fails by reason of any of the rules contained in sections 13 and 14, such interest fails [b][in regard to those persons only and not in regard to the whole class.]**

a. For modification of this section in regard to certain dispositions in the pre-reorganisation State of Bombay excluding the transferred territories, *see* Bom. Act 54 of 1947, S. 3 (2) and Sch. [16-1-1948] as amended by Bom. A. L. O. 1956.

b. *Substituted* for "as regards the whole class" by the Transfer of Property (Amendment) Act, 1929 (20 of 1929), S. 9.

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3. 1934 Mad W N 332 (338).
[*See* 1946 Cal 396 (404) (Pr 39) [AIR V 33 C 90] (DB). (Rule in S. 114 of Succession Act to be applied in the light of Hindu Disposition of Property Act provisions of which are subject to the section—Bequest in favour of unborn person or class—Bequest is not void only because such person is not in existence at testator's death, provided it vests in such person or class within prescribed period.)

Section 14 — Note 14

1. 1939 P C 185 (189) [AIR V 26].
1938 Oudh 69 (77) [A I R V 25] 13 Luck 723 (DB). (Under Muhammadan law a life estate can be created only if it is followed by an absolute estate.)]
1930 All 837 (840) [AIR V 17] : 52 All 748
1929 Oudh 494 (506) [A I R V 16] 5 Luck 305 (DB).
('23) 73 Ind Cas 99 (104) (Pesh).
('11) 34 Mad 12 (20) (DB). (Provided wakf is meant for charitable purposes.)
('04) 6 Bom L R 1053 (1064, 1065).
('89) 13 Bom 264 (274) (DB). (A Mahomedan cannot settle his property in wakf on his own descendants in perpetuity without making an express provision for its ultimate devolution to a charitable or religious object.)
('73) 10 Bom H C R (A C) 7 (11).
[*See* 1934 All 983 (984) [AIR V 21]. (Section 14 was applied in this case.)

2. ('94) 22 Cal 619 (633) : 22 Ind App 76 (PC). (Property to remain in possession of the members in family and on extinguishing the family, for the benefit of the poor—Wakf illusory.)
('96) 1896 Pun Re No. 84, p. 263 (266).

3. See Ss. 3 and 4 of Mussalman Wakf Validating Act (Act VI of 1913.)

4. 1962 S C 1722 (1729) (Pr 13) [AIR V 49 C 241] : I L R (1962) 2 All 869 : (1963) 1 S C R 20. (Case under Oudh Estates Act (1 of 1869)—Wakf-alal-aulad of Talukdari property by Muhammadan talukdar—Wakf for benefit of wakif, his family and descendants, generation after generation—Validity—Wakf violates rule against perpetuity in S. 12 and is invalid.)

Synopsis

1. Analogous law.
2. Scope of the section.
3. "Class."
4. Ascertainment of members of the class.
5. Hindu law.

1. Analogous law. — Section 115 of the Indian Succession Act runs as follows :

"*115.* If a bequest is made to a class of persons with regard to some of whom it is inoperative by reason of the provisions of section 113 or section 114, such bequest shall be void in regard to those persons only and not in regard to the whole class.

Illustrations

(i) *A* fund is bequeathed to *A* for life, and after his death to all his children who shall attain the age of 25. *A* survives the testator, and has some children living at the testator's death. Each child of *A's* living at the testator's death must attain the age of 25 (if at all) within the limits allowed for a bequest. But *A* may have children after the testator's decease, some of whom may not attain the age of 25 until more than 18 years have elapsed after the decease of *A*. The bequest to *A's* children, therefore, is inoperative as to any child born after the testator's death, and in regard to those who do not attain the age of 25 within 18 years after *A's* death, but is operative in regard to the other children of *A*.

(ii) *A* fund is bequeathed to *A* for his life, and after his death to *B*, *C*, *D* and all other children of *A* who shall attain the age of 25. *B*, *C*, *D* are children of *A* living at the testator's decease. In all other respects the case is the same as that supposed in illustration (i). Although the mention of *B*, *C* and *D* does not prevent the bequest from being regarded as a bequest to a class, it is not wholly void. It is operative as regards any of the children *B*, *C* or *D*, who attains the age of 25 within 18 years after *A's* death."

2. Scope of the section. — This section as it stood before the amendment of 1929(1) was based on the principle laid down in *Leake* v. *Robinson*(2) decided in 1817 in England. In that case a testator bequeathed some property to a class of persons. The bequest was, however, void as regards some members of the class, as infringing the rule against perpetuities. The question before the Court was whether any members of the class could take under the bequest. The Master of the Rolls, Sir William Grant, observed :

> "I must make a new will for the testator, if I split into portions his general bequest to the class, and say, that because the rule of law forbids his intention from operating in favour of the whole class, I will make his bequests, what he never intended them to be, viz., a series of particular legacies to particular individuals, or what he had as little in his contemplation, distinct bequests, in each instance, to two different classes."

This rule was, however, subsequently found unsuited to this country and the section has accordingly been amended, by substituting the words "in regard to those persons only and not in regard to the whole class" for the words "as regards the whole class."

The circumstances which led to the amendment have been stated by the Special Committee as follows :

"Section 15 of the Transfer of Property Act deals with a gift to a class. It reproduces with slight verbal alterations the provisions of S. 102 of the Indian Succession Act, 1865, (now S. 115 of the Indian Succession Act, 1925), which was enacted on the principle of the decision

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Section 15 — Note 2

1. The old section ran as follows : —

"If on a transfer of property, an interest therein is created for the benfit of a class of persons with regard to some of whom such interest fails by reason of any of the rules contained in sections 13 and 14, such interest fails as regards the whole class."

2. (1817) 2 Mer 363 (390) : 35 E R 979.

in *Leake* v. *Robinson*.(3) The principle is thus stated in Theobald on *Wills* :

'Where there is a gift to a class, any members of which may have to be ascertained beyond the limits of perpetuity—for instance, to the children of a living person who shall attain twenty-five—the whole gift is void.'

"It will be observed that the rule applies only to gifts to a class which offend the rule against perpetuities.

"Section 102 of the Indian Succession Act, 1865, enacts that if a bequest is made to a class of persons with regard to some of whom it is inoperative—

(1) by reason of the rule contained in S. 100, as where a limited interest is given to an unborn person, or

(2) by reason of the rule contained in S. 101, being the rule against perpetuity, such bequest shall be wholly void.

"Prior to certain special Acts, to be presently noted, Hindu law did not permit a gift in favour of a person who was not in existence at the date of the gift, or a bequest in favour of a person who was not in existence at the death of the testator, *(Tagore* v. *Tagore)*(4)on the ground that a person capable of taking must be in existence at the material date. Difficulties, however, arose where a gift was made to a class of persons of whom some were and some were not in existence at the date of the gift. The leading case on the subject is that of *Rai Bishen Chand* v. *Mt. Asmaida Koer*,(5) wherein a Hindu made a gift of his property to his grandson S who was then in existence and his (S's) brothers who may be born thereafter. It was argued on the strength of the rule in *Leake* v. *Robinson*(6) and the analogy of S. 102 of the Indian Succession Act, 1865, that as the gift to the unborn grandsons was invalid according to the Hindu law, no benefit could be taken even by the grandson who was in existence at the date of the gift. But this contention was overruled by the Judicial Committee. As to S. 102, it was observed that it did not apply to the facts of the case because the gift to the unborn grandsons did not fail by reason of the rules contained in S. 100 or S. 101, but by reason of the *personal incapacity* of the unborn grandsons to take. In the course of the judgment their Lordships said :

'It may be that illustration (b) to S. 102 imports into India an English rule of construction which usually defeats the intention of the testator.'

and later on :

'But their Lordships conceive that it is not necessary to view this transaction as though it were to be determined by rules of construction drawn from English law and applicable to English deeds of gift'.

"The rule in *Leake* v. *Robinson*(7) was applied by the High Court of Calcutta in several cases,(8) but the tide turned after the decision of the Judicial Committee in *Rai Bishen Chand* v. *Mt. Asmaida Koer*,(9) and the principle of this decision has been followed in a large number of cases in India.(10)

"The true scope of the rule in *Leake* v. *Robinson*(11) was pointed out by Sir Lawrence Jenkins in *Radha Prasad* v. *Ranimoni Dasi*. (12) Dealing with that rule the learned Judge said at page 199 (of 38 Cal) :

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3. (1817) 2 Mer 363 (390) : 35 E R 979.
[*See also* (1834) 6 Sim 485 (492) : 58 E R 676, Porter v. Fox. ((1817) 2 Mer 363, followed.) (1870) 18 W R (Eng) 742 (742) : (1870) 5 App Cas 342. (Do.)]

4. ('72) Ind App Sup Vol 47 : 18 Suth W R 359 (367) (PC).

5. ('84) 6 All 560 (572, 573) : 11 Ind App 164 (PC).

6. (1817) 2 Mer 363 : 35 E R 979.

7. (1817) 2 Mer 363 : 35 E R 979.

8. ('78) 4 Cal 455 (475) (DB).
('77) 2 Cal 262 (269, 270).
('71) 8 Beng L R 400 (410) (DB).
[*See also* 1931 Cal 651 (657) [AIR V 18] : 58 Cal 768.
('01) 29 Cal 260 (276, 277). (Overruled in 37 Cal 128 (FB) on another point.)]

9. ('84) 6 All 560 (572, 573) : 11 Ind App 164 (PC).

10. *See the following cases :*
('05) 32 Cal 992 (1010) (FB). (Affirmed in 38 Cal 468 (PC).)
('06) 29 Mad 412 (418) (DB).
('03) 29 Bom 133 (150) (DB).
('01) 26 Bom 449 (468).
('97) 22 Bom 533 (539).
('97) 24 Cal 646 (660) (DB).
('95) 20 Bom 571 (592, 593) (DB).
('93) 18 Bom 7 (12). (Date of deed is date of gift.)
('91) 15 Bom 652 (656).
('89) 12 Mad 393 (400) (DB).
('86) 12 Cal 663 (685) (DB).

11. (1817) 2 Mer 363 : 35 E R 979.

12. ('11) 38 Cal 188 (199, 200) (DB). (Affirmed in 1914 P C 149 [AIR V 1].)

'On behalf of Ranimoni it is contended that as some of the class cannot take, the whole gift is void and in support of this *Leake* v. *Robinson*(13) has been cited. But this contention proceeds on a misapplication of this case and a misconception of the true nature of a gift to a class. In *Leake* v *Robinson*(14) the gift to the class failed because the class could not be ascertained within the period allowed by the rule against perpetuities. The gift herein nowhere offends that rule; its only fault is that the class of legatees includes some who were not in existence at the date of the testator's death and were thus under a *personal incapacity*. And the difference is obvious. In a gift to a class the testator looks to the body as a whole rather than to the members constituting that body (*Kingsbury* v. *Walter*,(15)) and the class is in a sense personified. But if that class cannot be ascertained until a time beyond that permitted by the rule against perpetuity, there is no class to which the gift can legally be made. But if, as here, the fault is not that a class cannot be ascertained within the period permitted by law, but that certain members of the class are incapable of taking, different considerations apply.'

"The whole question of gifts to a class was gone into at considerable length by Wilson, J., in *Ram Lal Sett* v. *Kanai Lal Sett*.(16) In that case the learned Judge disposed of the cases which had been treated in India as authority for introducing into the construction of Hindu wills the rule in *Leake* v. *Robinson*.(17) He showed that the rule was introduced into India owing to a mistaken analogy and observed as follows:

'It is no new doctrine that rules established in English Courts for construing English documents are not as such applicable to transactions between natives of this country. Rules of construction are rules designed to assist in ascertaining intention; and the applicability of many of such rules depends upon the habits of thought and modes of expression prevalent amongst those to whose language they are applied. English rules of construction have grown up side by side with a very special law of property and a very artificial system of conveyancing, and the success of those rules in giving effect to the real intention of those whose language they are used to interpret, depends not more upon their original fitness for that purpose than upon the fact that English documents of a formal kind are ordinarily framed with a knowledge of the very rules of construction which are afterwards applied to them. It is a very serious thing to use such rules in interpreting the instruments of Hindus, who view most transactions from a different point, think differently, and speak differently from Englishmen, and who have never heard of the rules in question.'

"At the end of the judgment the learned Judge stated that he should be

'prepared to hold as the general rule that where there is a gift to a class some of whom are or may be incapacitated from taking, because not born at the date of gift or the death of the testator, as the case may be, and where there is no other objection to the gift, it should enure for the benefit of those members of the class who are capable of taking.'

"The judgment of Wilson, J., was referred to by their Lordships of the Privy Council in *Bhagavati* v. *Kali Charan Singh*(18) at some length, and their Lordships expressed their 'entire concurrence in the judgment'.

"It must also be observed that the rule in *Leake* v. *Robinson*(19) has not escaped criticism even in England. In *Bhagvati* v. *Kali Charan*,(20) Maclean, C. J., said:

'But even in England the rule in *Leake* v. *Robinson*(21) has been followed not without expressions of reluctance. In *Leake* v. *Robinson*(22) itself Sir William Grant said: "Perhaps it might have been as well if the Courts had originally held an executory devise transgressing the allowed limits to be void only for the excess, where that excess could be clearly ascertained." In *In re Moseley's Trusts*,(23) the Lord Justices similarly expressed their non-concurrence with the reason of the rule though they were bound to follow it; and in *Pearks* v. *Mosley*,(24) which was an appeal from the decision of the Lord Justices in *In re Mosley's Trusts*,(25) Lord Selborne, Lord Penzance and Lord Blackburn sufficiently indicated their inclination

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13. (1817) 2 Mer 363 : 35 E R 979.
14. (1817) 2 Mer 363 : 35 E R 979.
15. (1901) 1901 App Cas 187 (191) : 70 L J Ch 546.
16. ('86) 12 Cal 663 (678, 685 (DB).
17. (1817) 2 Mer 363 : 35 E R 979.
18. ('11) 38 Cal 468 (473) : 38 Ind App 54 (PC).
19. (1817) 2 Mer 363 : 35 E R 979.
20. ('05) 32 Cal 992 (1009, 1010) (FB). (Affirmed in 38 Cal 468 (PC).)
21. (1817) 2 Mer 363 : 35 E R 979.
22. (1817) 2 Mer 363 : 35 E R 979.
23. (1879) 27 W R (Eng) 896 (897) : 11 Ch D 555.
24. (1880) 5 App Cas 714 (723) : 50 LJ Ch 57.
25. (1879) 27 W R (Eng) 896 : 11 Ch D 555.

against the rule, which, however, was settled in England by a long series of cases and could not be disturbed except by legislation.'

"The rule that a Hindu could not dispose of his property by gift or sale in favour of an unborn person fettered the free disposition of property. To remove this disability three Acts were passed, namely, (1) Madras Act I of 1914, (2) the Hindu Disposition of Property Act, XV of 1916, and (3) Madras Act VIII of 1921. The Madras Act I of 1914 applies to the Madras Presidency except the town of Madras; the Madras Act VIII of 1921 applies to the town of Madras; and the Hindu Disposition of Property Act extends to the whole of British India except the Province of Madras. The following is a synopsis of the three Acts :

(1) It is declared by all the three Acts that a transfer *inter vivos* or disposition by will of any property shall not be invalid by reason only that the transferee or legatee is an unborn person at the date of the transfer or the death of the testator, as the case may be. Since gifts and bequest to unborn persons were declared to be valid, it became necessary to fix a limit of time within which the gift or bequest should vest. This was effected by applying to such gifts and bequests the provisions respectively of S. 14 of the Transfer of Property Act and S. 101 of the Indian Succession Act, 1865, which contain the rule against perpetuities.

(2) Further by the Hindu Disposition of Property Act, the provisions of S. 13 of the Transfer of Property Act and S. 100 of the Indian Succession Act, 1865, were extended to gifts and bequests to unborn persons, but it was not so done by the Madras Acts.

(3) All the three Acts left S. 15 of the Transfer of Property Act and S. 102 of the Indian Succession Act, 1865, which relate to gifts and bequests to a class, severely alone.

"One important consequence of the above Acts must be noted here. Prior to the passing of the three Acts if a bequest was made by a Hindu in a case governed by the Hindu Wills Act, 1870, in favour, say, of his daughter for her life and after her death to 'such of her children who shall attain the age of 21 years,' and some of the children were born before and others after the death of the testator, the bequest, though it failed as to those that were not in existence at the death of the testator, did not fail in its entirety but enured for the benefit of those who were in existence at the death of the testator. The reason was that in such a case the bequest to the unborn persons failed not by reason of the rule against perpetuity contained in S. 101 of the Indian Succession Act, but by reason of their *personal capacity* to take. But the bar of personal disability was removed by the three Acts with the result that a bequest to the unborn children in the case put above would now fail by reason of the rule against perpetuities contained in S. 101, the gift being to such 'children who shall attain the age of 21 years' and the gift would, therefore, fail in regard to the whole class. Before the passing of the three Acts an unborn person could not take at all, and there would, therefore, be no scope for the operation of the rule against perpetuities. Since the enactment of the three Acts, an unborn person can take, but if he is to take on his attaining the age of 21 years, the bequest offends the rule against perpetuities and it, therefore, fails by reason of the rule contained in S. 101, with the result that S. 102 applies and renders the bequest void in regard to the whole class. And this is, in fact, what happened in *Soundara Rajan* v. *Natarajan*.(26) Thus, while before the three Acts were passed, a bequest to a class of persons some of whom were not in existence at the death of the testator did not fail in regard to the whole class, these Acts have brought about a result which, it is conceived, was hardly contemplated when the Acts were passed.

"In view of what is stated above, it is proposed to alter S. 15 of the Transfer of Property Act as follows :

Transfer to class some of whom come under Ss. 13 and 14.

'15. If, on a transfer of property, an interest is created for the benefit of a class of persons with regard to some of whom such interest fails by reason of any of the rules contained in Ss. 13 and 14, such interest fails *in regard to those persons only and not in regard to the whole class.*'

"It is also proposed to alter S. 115 of the Indian Succession Act as follows :

Bequest to a class some of whom may come under rules in Ss. 113 and 114.

'115. If a bequest is made to a class of persons with regard to some of whom it is inoperative by reason of the provisions of S. 113 or S. 114, such bequest shall be *void in regard to those persons only and not in regard to the whole class.*'

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26. 1925 P C 244 (248) [AIR V 12] : 48 Mad 906 : 52 Ind App 310.

"For the reasons stated above, we suggest that the three Acts, namely, Madras Act I of 1914, Hindu Disposition of Property Act XV of 1916, and Madras Act VIII of 1921, should be repealed."

This section shows that a gift to unborn persons may be made to a class of such persons since it contemplates the failure of some of the members of the class to take, by virtue of S. 13.(27) Formerly the failure of the disposition to some of the members of the class by virtue of Ss. 13 and 14 destroyed the transfer to all the members of the class,(27a) but the Transfer of Property (Amendment) Act, 1929, failure of the dispositions in favour of some of the members of a class, is limited to such persons only, and not in regard to the whole class.(27aa)

This section applies only when a whole class is sought to be benefited. This section, therefore, cannot be relied on where there is no provision with regard to the benefit of a class.(28) Nor will this section apply to a case where gift to a class fails not by reason of the rule contained in Ss. 13 and 14 but because the estate sought to be created is unknown to Hindu law.(29)

3. "Class." — In *Pearks* v. *Moseley*,(1) the Lord Chancellor, Lord Selborne, defined a gift to a class as follows :

"A gift is said to be a 'class' of persons, when it is to all those who shall come within a certain category or description defined by a general or collective formula, and who, if they take at all, are to take one divisible subject in certain proportionate shares."

The following observations from Jarman on *Wills*(2) may also be usefully referred to in this connexion :

"A number of persons are popularly said to form a class when they can be designated by some general name, as, "children," "grandchildren," "nephews"; but in legal language the question whether a gift is one to a class depends, not on those considerations, but upon the mode of gift itself, namely, that it is a gift of an aggregate sum to a body of persons *uncertain in number at the time of the gift*, to be ascertained at a future time, and who are all to take in equal or in some other definite proportions, the share of each being dependent for its amount upon the ultimate number of persons."

Thus, a transfer to the transferor's "son's sons" or "son's daughters"(3) or to the "widows" of *X*, a Hindu,(4) is a transfer to a class where the number is uncertain at the date of the transfer. A transfer to the "children of the grandchildren" is a transfer to several classes of persons, the children of each grandchild forming a separate class.(5) A transfer to all the grandchildren of the transferor "with the exception

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27. 1948 Bom 188 (193) [AIR V 35 C 55] (DB).

27a. 1948 Bom 188 (193) [AIR V 35 C 55](DB) 1945 Bom 395 (398) [AIR V 32] : ILR (1945) Bom 493. (Case under S. 15 prior to amendment in 1929.)

27aa. 1953 S C 7 (10) [AIR V 40 C 3] : 1953 S C R 232 : ILR (1953) 1 All 896. (Case of will.) 1952 Cal 427 (429) [AIR V 39]. 1948 Bom 188 (193) [AIR V 35 C 55] (DB). [*See also* 1951 Cal 426 (429) [AIR V 38 C 117] : ILR (1952) 1 Cal 333. (Case of will.)]

28 1948 Bom 415 (416) [AIR V 35 C 116] (DB). (Trust attempting to benefit charitable and non-charitable objects—Trustee not compellable to spend whole income upon charitable objects—Trust is void for uncertainty.)

1945 Pat 211 (229) [AIR V 32] : 23 Pat 763 (DB). (Per Meredith J. : In order to apply S. 15 it must first be held that there is an independent gift to a class of persons. But where there is no separable gift to any class of persons but only a gift to persons specifically named this section has no application.)

29. 1945 Pat 211 (229) [AIR V 32] : 23 Pat 763 (DB). (Per Chatterji J.)

Section 15 – Note 3

1. (1880) 5 App Cas 714 (723) : 50 L J Ch 57. (Cited in 3 Bom L R 785.)

2. Jarman on Wills (4th Edn.), Page 263 cited in 15 Bom 543.

3. 1949 FC 64(69,75) [AIR V 36 C 11]: 1948 FCR 239: ILR (1950) 1 Cal 17. (Gift to son's sons.) ('98) 22 Bom 533 (538). (1834) 6 Sim 485 (492): 58 ER 676, Porter v. Fox. [*See also* (1881) 51 L J Ch 369 (370) : 18 Ch D 441, Goodier v. Johnson.]

4. ('98) 22 Bom 533 (538).

5. (1865) 34 L J Ch 3 (4) : 146 R R 545, Knapping v. Tomlinson.

of one namely....." the exception not being mentioned, is a transfer to a class comprising all the grandchildren.(6) See also the undermentioned case.(6a)

Where the transferees are *specifically named* the transfer cannot be said to be a transfer to a class of persons.(7) So also is a transfer to an *ascertained number* of persons as a transfer to "my grandchildren by my *late* daughter *E. W.*"(8) Again, a transfer *to X with his wife* and his children(9) or "to my brother for life and his surviving children *and my niece*,"(10) is not a transfer to a class. The reason is that a class must be ascertained at one and the same time.(11) In the last two cases mentioned, some persons are ascertained at the date of the transfer and others to be ascertained only in future.

4. Ascertainment of members of the class. If a transfer provides that the members of the class of transferees should be ascertained at a specified time or on the happening of a particular event they will be ascertained at that time or on the happening of that event as the case may be,(1) and only those persons who fall within the description of the class at that time will take under the transfer to the exclusion of others. In the case of a bequest, where no such date is provided for, the members of the class are to be ascertained at the death of the testator.(2)

A transfer or bequest to a class does not operate in favour of such members of the class who have died before the time at which the class is to be ascertained,(3) or who have attested the will,(4) or who are incapable of taking otherwise by operation of law.(5) In such cases the transfer enures to the benefit of those members of the class who are capable of taking.(6)

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6. (1851) 9 Hare 37 (39) : 68 E R 404, Illingworth v. Cooke.

6a. (1862) 135 R R 415 (420) : 10 W R (Eng) 679, Barnet v. Tugwell. (Bequest to A for life then to "the children legitimate or illegitimate of my brother H" — *Held*, bequest valid in respect of such children legitimate and illegitimate, as were living at the date of the bequest.)

7. 1949 F C 64 (69) [AIR V 36 C 11] : 1948 F C R 239 : ILR (1950) 1 Cal 17. (Addition or diminution of members does not affect a class, the share of each being dependant upon the ultimate number of persons—Again in case of death of a member of the class the legacy does not lapse but passes by survivership to the other members.)
1936 Sind 158 (159) [AIR V 23] : 29 Sind L R 374.
('01) 3 Bom L R 785 (789) (DB).

8. ('92) 15 Mad 448 (466).

9. ('91) 15 Bom 543 (547, 548) (DB).

10 (1863) 33 Beav 43 (48) : 55 E R 282, Drakeford v. Drakeford.

11. (1863) 33 Reav 43 (48) : 55 E R 282, Drakeford v. Drakeford.

Section 15 Note 4

1. (1787) 1 Cox 324 (325) : 29 E R 1186, Jee v. Andley.
(1894) 63 L J Ch 544 (547) : (1894) 2 Ch 310, In re Wood; Tullett v. Colville.
(1787) 1 Cox 327 (329) : 29 E R 1188, Ayton v. Ayton.
(1863) 33 Beav 43 (48) : 55 E R 282, Drakeford v. Drakeford.
(1804) 10 Ves 152 (154) : 32 E R 802, Whitbread v. Lord St. John.
(1863) 2 Dr & Sm 167 (172) : 62 E R 585, Young v. Davies.

2 (1811) 13 East 526 (537) : 104 E R 457, Doe d Stewart v. Sheffield.
(1865) 34 L J Ch 3 (11) : 12 W R (Eng) 784, Knapping v Tomlinson.
(1761) 1 Dick 344 (345) : 21 E R 302, Sprackling v. Ranier.
(1854) 1854 Kay 638 (644, 645) : 69 E R 271, Mann v. Thompson.
(1878) 48 L J Ch 150 (152) : 10 Ch 264, Picken v. Matthews.

3. (1876) 46 L J Ch 33 (36) : 4 Ch D 165, In re, Coleman and Jarrom.
(1811) 13 East 526 (536, 537) : 104 E R 475, Deo d. Stewart v. Sheffield.

4. (1875) 44 L J C P 402 (406) : L R 10 C P 701, Fell v. Bidduph.
(1863) 2 Dr & S 167 (172) : 62 E R 585, Young v. Davies.
(1876) 46 L J Ch 33 (36) : 4 Ch D 165, In re Coleman and Jarrom.
See Indian Succession Act, XXXIX of 1925, S. 67.

5. (1876) 46 L J Ch 33 (36) : 4 Ch D 165, In re Coleman and Jarron.

6. 1934 Cal 379 (382) [AIR V 21] : 61 Cal 106 (DB).

5. Hindu law.— One *J* made a settlement in favour of his daughter *K* for life and then to *her male heirs* "share and share alike." It was held by their Lordships of the Privy Council that the settlement as regards the heirs was a gift to a class of persons, and that by Hindu law there would be excluded from that class, persons who were not living at the date of the settlement, for under the Hindu law a transfer cannot be made in favour of a person not in existence.(1) As has been seen in the Notes on S. 13 this particular disability has now been removed by the Legislature.

Transfer to take effect on failure of prior interest.b

[a]16. Where, by reason of any of the rules contained in sections 13 and 14, an interest created for the benefit of a person or of a class of persons fails in regard to such person or the whole of such class, any interest created in the same transaction and intended to take effect after or upon failure of such prior interest also fails.

a. New sections 16 to 18 were *substituted* for the original sections 16 to 18 by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), S. 10.

b. For modification of this section in regard to certain dispositions in the pre-reorganization State of Bombay excluding the transferred territories, *see* Bom Act LIV of 1947, S. 3 (2) and Sch. [16-1-1948] as amended by Bom. A. L. O. 1956.

Synopsis

1. Analogous law.
2. Legislative changes.
3. Scope of the section.
4. Ulterior gift dependent upon two contingencies one of which is too remote.

1 Analogous law.—This section corresponds to S. 116 of the Indian Succession Act, XXXIX of 1925, which runs as follows:

"*116.* Where by reason of any of the rules contained in Ss. 113 and 114, any bequest in favour of a person or of a class of persons is void in regard to such person or the whole of such class, any bequest contained in the same will and intended to take effect after or upon failure of such prior bequest is also void.

Illustrations

(i) *A* fund is bequeathed to *A* for his life, and after his death to such of his sons as shall first attain the age of 25, for his life, and after the decease of such son to *B*. *A* and *B* survive the testator. The bequest to *B* is intended to take effect after the bequest to such of the sons of *A* as shall first attain the age of 25, which bequest is void under S. 114. The bequest to *B* is void.

(ii) *A* fund is bequeathed to *A* for his life, and after his death to such of his sons as shall first attain the age of 25, and, if no son of *A* shall attain that age, to *B*. *A* and *B* survive the testator. The bequest to *B* is intended to take effect upon failure of the bequest to such of *A*'s sons as shall first attain the age of 25, which bequest is void under S. 114. The bequest to *B* is void."

2. Legislative changes.—The section as it stood before 1929 was as follows:

"Where an interest fails by reason of any of the rules contained in sections 13, 14 and 15, any interest created in the same transaction and intended to take effect after or upon failure of such prior interest fails."

Section 15 — Note 5

1. 1928 P C 33 (34) [A I R V 15] :55 Ind App 74 : 52 Bom 176.

By the amending Act XX of 1929, the section was recast, by omitting reference to S. 15 and by making consequential changes. The reason for the amendment has been stated by the Special Committee as follows:

> "As S. 15 of the Act when amended as above will no longer provide for the case of a failure of a transfer, reference to that section in S. 16 is unnecessary and should be omitted. It is, however, necessary to provide for a case when the transfer may fail as to all the members of the class by reason of the rules contained in Ss. 13 and 14. Such a case would arise where a gift over is intended to take effect after a prior gift in favour of a body or a class of persons but the prior gift fails. In such a case, if the prior gift in favour of the class of persons fails by reason of the provisions of Ss. 13 and 14, the gift over also fails. In order to make this point clear, S. 16 should be amended."

3. Scope of the section. — An interest taking effect after another interest is not the same thing as an interest taking effect *upon failure* of another interests, as will be clear from the following illustrations:

Illustrations

(1) *A* grants property to *B* for life, then to such of his sons as shall attain a particular age for life and then to *C*. *C's* interest takes effect *after* the prior interests.

(2) *A* transfers property to *B* on the happening of an uncertain event, and if such event does not happen, then to *C*. *C's* interest will take effect *on failure* of the prior interest to *B*.

(3) *A* transfers property to *B*, on condition that in case a certain uncertain event should happen, the property is to pass to *C*. *C's* interest takes effect *upon failure* of the prior interest to *B*.

Interest intended to take effect after a prior interest:

Where an interest is intended to take effect after a prior interest and the prior interest is void for any reason, the rule is that the subsequent interest also fails.(1) The reason is that the persons entitled under the subsequent limitation are not intended to take unless and until the prior limitation is exhausted; and as the prior limitation can never come into operation as being void, much less be exhausted, it is impossible to give effect to the intentions of the settlor in favour of the beneficiaries under the subsequent limitations.(2) This section merely gives effect to this general rule.

But the rule will not apply where the subsequent interest is not intended to take effect after the prior interest, but is *independent* thereof.

In *Lainson* v. *Lainson*,(3) a testator devised property to his son *A* for life and "from and immediately after his decease," to his first and other sons in tail. By a codicil, he subsequently revoked the gift in favour of *A* to whom he gave other property in substitution. Lord Justice Turner, after stating that the words "from and immediately after his decease" should *prima facie* be understood as denoting the order of succession of the limitations, observed:

> "It is the clear intention of the will to dispose of all the estate for the benefit of the testator's son, and his issue. The codicil does not at all alter this intention, but only changes the order of succession in which the devisees are to take. No doubt, a will might be drawn in such a way as to shew an intention that the remainder-man should not take till after the death of the first devisee; but there is nothing in this codicil to shew such an intention."

Section 16 — Note 3

1. 1942 Bom 155 (158) [AIR V 29]: ILR (1942) Bom 441.
(1788) 1 R R 467 (472, 473): 100 E R 131, Robinson v. Hardcastle.

2. (1893) 41 W R (Eng) 154 (155): (1893) 1 Ch 54 (57), In re, Abbott; Peacock v. Frigout. (1915) 84 L J Ch 715 (717): (1915) 1 Ch App 810, Hewett v. Eldridge.

3. (1854) 43 E R 1063 (1064): 24 L J Ch 46.

Lainson's case was followed by their Lordships of the Privy Council in *Ajudhia Baksh* v. *Ratekhman Kuar*.(4) In that case a taluqdar devised his estate to his wife for life and after her death to his younger son by her. The bequest to the wife failed by reason of its being void for want of registration of the will as required by the Oudh Estates Act, I of 1869. It was held that the gift to the son, nevertheless took effect, on the principle of *Lainson's case*.

Interest intended to take effect upon failure of prior interest.

Where an interest is intended to take effect *upon the failure* of a prior interest, the general rule is that the subsequent interest *will take effect* upon the failure of the prior interest in *any* manner, unless the intention was that the subsequent interest was to take effect unless the prior interest failed *in a particular manner* and the failure happened in some *other* manner. This rule is found enacted in S. 27. This section enacts an exception to this general rule by providing that the subsequent interest also will fail if the prior interest failed by *reason of the rules in sections 13 and 14*. Thus, where a fund is bequeathed to *A* for life and after his death to such of his sons as shall first attain the age of 25 and if no son of *A* shall attain that age, then to *B*, *B's* estate will fail as A's interest failed by reason of the rule against perpetuities.(5)

Similarly, in *Girish Dat* v. *Data Din*,(6) *S* gave away property to *R* for life and, after her death, if there be any male descendants, to them absolutely; if *R* would have only daughters they were to have it without any power of transfer. In the absence of any issue male or female the property was to go to *D*. It was held by the Full Bench that the gift to *R's* daughters was only of a limited interest and was as such void under S. 13 of the Act, and that the gift over to *D*, which was to take effect on the failure of the prior interest created in favour of the daughters, was also void under this section.

See also the undermentioned cases.(7)

The section presupposes that it is *intended* that the subsequent interest is to take effect *only in the event of* the failure of the prior interest. Where therefore a grant is made *alternatively* the failure of the one, even on the ground of Ss. 13 and 14 will not operate to nullify the other. The question whether the grant is alternative or is intended to take effect only upon the failure of the prior interest must be decided on the facts of each case. The leading case on the point is *Moneypenny* v. *Derring*.(8) In that case a testator devised property upon trust to PM for life and after his decease for the first son of PM for life and after his decease for the first son of such first son and the heirs male of his body and in default of such issue of the body of PM or in case of his not leaving any at his decease, for TM for life, etc. It was held that the remainders preceding the gift to TM were void on the rule against double possibilities

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4. ('83) 10 Cal 482 (488) : 11 Ind App 1 (PC.)

5. (1859) 122 E R 144 : 26 Beav 365, Re Thatcher's Trusts.

6. 1934 Oudh 35 (40) [AIR V 21] : 9 Luck 329 (FB).

7. 1942 Bom 155 (158) [AIR V 29] : ILR (1942) Bom 441. (The failure contemplated by S. 27, T. P. Act and S. 129, Succession Act, is the failure of the valid gift. When the gift is ab initio void, the subsequent gifts must also fail, as provided by S. 16, T. P. Act and S. 116, Succession Act.)

('72) 8 Beng L R 208 (224). (Prior gift bad for remoteness—Dependent gifts also void.)

(1828) 38 E R 857 (858) : 4 Russ 403, Palmer v. Holford.

('1794) 3 R R 417 (417, 418): 2 H Bl 358, Proctor v. Bishop of Bath. (Prior gift bad for remoteness—Subsequent gift also failed as it depended upon prior one.)

8. (1852) 42 E R 826 (840, 841): 20 L J Ch 153. (Beard v. Wescott, 24 R R 553, Referred to.)

but that the gift to TM was an independent or alternative gift and took effect. The Lord Chancellor (Lord St. Leonards) observed :

> "If this was a regular remainder, depending upon the previous limitations, it would, of course, be open to the same objections as those limitations, and those limitations being void, it could not take effect..... If the gift in question can be read as a gift in the alternative, that, in case there is no issue living at the death of the brother, the estate is to go over, then effect may be given to it .....because the estate over would not be carried under the limitation at the expense of any person whom the testator intended to take, and no objection on this ground could consequently be raised."

See also the undermentioned cases(9) to a similar effect.

4. Ulterior gift dependent upon two contingencies one of which is too remote. — Where an ulterior gift is to take effect on the happening of either of two contingencies one of which is void for remoteness and the other valid, the Court will separate the two contingencies if they are separable; though expressed in one clause and will give effect to the ulterior disposition on the happening of the valid contingency. Hence where property was given to *E* for her life and after her it was to go over to *J* in case *E* died without leaving a child behind or if she left a child, then in case such child died before attaining his or her 23rd year, and, *E* died without leaving a child, it was held that though the second contingency was void for remoteness yet the first was valid and as it had happened the gift over in favour of *J* did not fail but took effect.(1)

The present section being in consonance with the above rule of English law, the above decisions will hold good in India also.

17.[a] (*1*) Where the terms of a transfer of property direct that the income arising from the property shall be accumulated either wholly or in part during a period longer than—

Direction for accumulation.

(*a*) the life of the transferor, or

(*b*) a period of eithteen years from the date of the transfer,

such direction shall, save as hereinafter provided, be void to the extent to which the period during which the accumulation is directed exceeds the longer of the aforesaid periods, and at the end of such last mentioned period the property and the income thereof shall be disposed of as if the period during which the accumulation has been directed to be made had elapsed.

(2) This section shall not affect any direction for accumulation for the purpose of—

(*i*) the payment of the debts of the transferor or any other person taking any interest under the transfer, or

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9. ('92) 16 Bom 492 (497) (DB).
(1798) 101 E R 1129 (1130) : 7 Term Rep 555, Wilkinson v. South.
(1915) 84 L J Ch 505 (509) : (1915) 1 Ch 837, In re Davey; Prisk v. Mitchell.
(1848) 80 R R 97 (102) : 16 Sim 395, Goring v. Howard.

Section 16 — Note 4

1. (1891) 39 W R (Eng) Dig 263 (263) : (1891) 3 Ch 242 (251), In re Bence, Smith v. Bence.
(1885) 33 W R (Eng) 637 (639) : 28 Ch D 436 (444), Watson v. Young.
✠(1859) 115 R R 257 (264, 265) : 29 L J Q B 121, Evers v. Challis. (Difference between executory devise and a contingent remainder.)
(1842) 60 E R 21 (25) : 13 Sim 52, Minter v. Wraith.
[*See also* (1859) 122 R R 141 (144) : 26 Beav 365, In re Thatcher's Trusts.]

(*ii*) the provision of portions for children or remoter issue of the transferor or of any other person taking any interest under the transfer, or

(*iii*) the preservation or maintenance of the property transferred;

and such direction may be made accordingly.

a. *See* Foot-note (a) under section 16.

Synopsis

1. Analogous law.
2. Legislative changes.
3. Scope.
4. Hindu law.
5. Muhammadan law.
6. "A period of eighteen years from the date of the transfer."
7. Exception (i) — "The payment of the debts of the transferor or any other person taking any interest under the transfer."
8. Exception (ii) —"The provision of portions for children."
9. Exception (ii) —"Children . . . . . of any other person taking any interest under the transfer."
10. Exception (iii) — "Preservation or maintenance of the property transferred."

1. Analogous law. — This section is based on the provisions of the English law originally contained in the Thellusion Act (39 and 40 Geo. III, C. 98) and now incorporated in S. 164 of the English Law of Property Act, 1925, which runs as follows :

"164. (1) No person may by any instrument or otherwise settle or dispose of any property in such manner that the income thereof shall, save as hereinafter mentioned, be wholly or partially accumulated for any longer period than one of the following, namely :

(a) the life of the grantor or settlor ; or

(b) a term of twenty-one years from the death of the grantor, settlor or testator ; or

(c) the duration of the minority or respective minorites of any person or persons living or *en ventre sa mere* at the death of the grantor, settlor or testator ; or

(d) the duration of the minority or respective minorities only of any person or persons who under the limitations of the instrument directing the accumulations would, for the time being, if of full age, be entitled to the income directed to be accumulated.

"In every case where any accumulation is directed otherwise than as aforesaid, the direction shall (save as hereinafter mentioned) be void ; and the income of the property directed to be accumulated shall, so long as the same is directed to be accumulated contrary to this section, go to and be received by the person or persons who would have been entitled thereto if such accumulation had not been directed.

"(2) This section does not extend to any provision—

(i) for payment of the debts of any grantor, settlor, testator or other person ;

(ii) for raising portions for—

(a) any child, children or remoter issue of any grantor, settlor or testator ; or

(b) any child, children or remoter issue of a person taking any interest under any settlement or other disposition directing the accumulations or to whom any interest is thereby limited ;

(iii) respecting the accumulation of the produce of timber or wood;

and accordingly such provisions may be made as if no statutory restrictions on accumulation of income had been imposed.

"(3) The restrictions imposed by this section apply :to instruments made on or after the twenty-eighth day of July, eighteen hundred, but in the case of wills only where the testator was living and of testamentary capacity after the end of one year from that date."

The provisions of S. 117 of the Indian Succession Act of 1925 are also similar to the present section. That section runs as follows :

"117. (1) Where the terms of a will direct that the income arising from any property shall be accumulated either wholly or in part during any period longer than a period of eighteen years from the death of the testator, such direction shall, save as hereinafter provided, be void

to the extent to which the period during which the accumulation is directed exceeds the aforesaid period, and at the end of such period of eighteen years the property and the income thereof shall be disposed of as if the period during which the accumulation has been directed to be made had elapsed.:

"(2) This section shall not affect any direction for accumulation for the purpose of—

(i) the payment of the debts of the testator or any other person taking any interest under the will, or

(ii) the provision of portions for children or remoter issue of the testator or of any other person taking any interest under the will, or

(iii) the preservation or maintenance of any property bequeathed ;

and such direction may be made accordingly."

2. Legislative changes.—Section 18 of the Act as it stood before the passing of the Transfer of Property (Amendment) Act, XX of 1929, dealt with directions for accumulations and ran as follows:

Direction for accumulation.

"18. Where the terms of a transfer of property direct that the income arising from the property shall be accumulated, such direction shall be void, and the property shall be disposed of as if no accumulation had been directed.

Exception. — Where the property is immovable, or where accumulation is directed to be made from the date of the transfer, the direction shall be valid in respect only of the income arising from the property within one year next following such date; and, at the end of the year, such property and income shall be disposed of respectively as if the period during which the accumulation has been directed to be made had elapsed."

The English Acts (the Accumulation Act, 1800, called the Thellusion Act, the Accumulation Act, 1892 and the Law of Property Act, 1925) were more liberal and allowed accumulations for a much longer period and for various purposes. The second Indian Law Commission(1) had noted this fact in their Report of 1879 and clearly expressed themselves in favour of adopting those provisions in this country also. Further, in all Indian cases to which the old section did not apply a much longer period for accumulation was actually allowed.(2)

The present section has, therefore, been recast so as to lay down definitely on the lines of the English law, the periods and the objects for which a direction as to accumulation should be held valid.

3. Scope.—Where a person transfers property to another *absolutely*, but the terms of the transfer direct that the income arising from the property should be accumulated, the direction would be a repugnant one and would be void under the provisions of S. 11.(1) This section must be read so as not to conflict with S. 11 and hence must be construed as applying only to transfers *subject* to such restrictions and not to cases of *absolute* transfers with repugnant directions as to accumulation of the income.

The section prescribes the limits beyond which a direction for accumulation of the income arising out of the property transferred will be void. These limits are—

(1) the life of the transferor, or

(2) a period of 18 years from the date of the transfer.

Section 17 — Note 2

1. See this report printed elsewhere.

2. See cases in Note 4.

Section 17 — Note 3

1. ('82) 8 Cal 378 (387) (DB). (Case before the Transfer of Property Act.)

('75) 1 Cal 104 (107, 108). (Case before the Transfer of Property Act — Prohibition against receiving and enjoying the income for twenty years.)

[*See also* (1859) 70 E R 423 (427): John 265, Gosling v. Gosling.]

These limits are *alternative* as is shown by the word "or".(2) Where a direction for accumulation is made without specifying either of the periods referred to above, the question to what extent the direction will be void will depend upon what happens subsequent to the date of the transfer. If the transferor dies more than 18 years after the date of the transfer, the direction will be void beyond the life of the transferor. If, on the other hand, the transferor dies before the expiry of 18 years, the direction will be void beyond the period of 18 years from the date of the transfer. The same rule will apply where property is transferred with a direction for accumulation for a period exceeding 18 years from the date of the transfer. Thus, suppose *A* transfers property to *B* in 1940 with a direction for accumulation for a period of 30 years till 1970. If *A* dies in 1965, the period during which the transferor is alive, is more than 18 years from the date of the transfer and the direction will be valid till 1965 and void thereafter. If, however, the transferor dies in 1950, the period of 18 years from the date of the transfer will be longer than the lifetime of the transferor, and the direction will be valid till 1958 and void thereafter.

The direction for accumulation may be express or implied. If a person directs that to be done which as a result leads to an accumulation, it will amount to a direction for accumulation.(3)

4. Hindu law.—By the last clause of S. 2 as it stood before the amending Act of 1929, it was provided that the second chapter of the Act should not affect any rule of Hindu law.

Under that law a direction for accumulation was not considered *per se* illegal and if such direction was neither so unreasonable in its conditions as to be void as against public policy, nor given for the purpose of carrying out an illegal object nor in its effect inconsistent with Hindu law effect should be given to it.(1) The period beyond which accumulation could not be permitted was not, however, definitely settled. In *Watkins* v. *Administrator General of Bengal*,(2) Jenkins, C. J., after reviewing the case law on the point, observed as follows :

> "What then is the period during which an accumulation can be validly directed? On principle I think it must be for so long a time as the absolute vesting of the entire interest can be withheld or for so long a time as that during which the corpus of the property can be rendered inalienable or its course or its devolution can be directed and controlled by a testator."

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2. (1884) 32 W R (Eng) 284 (285) : 53 L J Ch 201, Jagger v. Jagger. (Accumulation during the lifetime of grantor held good.)

3. (1855) 24 L J Ch 716 (719) : 43 E R 1309, Tench v. Cheese.

Section 17 — Note 4

1. 1938 Cal 490 (496) [A I R V 25]. (Religious endowment — Direction to accumulate is not illegal if it does not benefit settlor or is not opposed to public policy.)

1920 Cal 969 (972) [A I R V 7] : 47 Cal 76. (Provision for accumulation of surplus income is not invalid.)

†('10) 7 Ind Cas 921 (923) (DB) (Cal). (Direction for accumulation, not being one for perpetual accumulation, held was good.)

('07) 34 Cal 5 (11, 12). (24 Cal 662, Foll.)

('02) 4 Bom L R 893 (901, 902).

†('98) 25 Cal 662 (690, 691) (SB). (A Hindu testator cannot direct the accumulation of the income for an indefinite period.)

†('97) 24 Cal 589 (614, 615). (It is not incompetent for a Hindu testator with proper limitation to direct an accumulation of the income of property which under his will vests in his executors.)

('85) 11 Cal 684 (692) : 12 Ind App 103 (PC). (Creation of perpetuity as regards the estate and limiting for an indefinite period the enjoyment of profits of it is not allowed by Hindu law.)

('69) 4 Beng L R (O C) 231 (277, 294) (DB). (Trust for accumulation from time to time held void.)

†('69) 2 Beng L R (O C) 11 (36, 37) (DB). (A trust made in a will for the accumulation for 99 years of the surplus income of the estate of the testator in the purchase of zamindari to be purchased was held void as being against public policy.)

2. 1920 Cal 951 (954) [A I R V 7] : 47 Cal 98n (DB).

The word "Hindu" was omitted from the last clause of S. 2 in 1929. The present section is, therefore, now applicable *ipso facto* to Hindus and the old rules of Hindu law are no longer in force.

5. Muhammadan law.—The section does not affect any rule of Muhammadan law. (See Section 2.) Under that law a gift always denotes an immediate and *absolute* transfer of the property and hence any condition or restriction added to the gift becomes void for repugnancy.(1) A direction for accumulation in a gift is, therefore, invalid under Muhammadan law.

6. "A period of eighteen years from the date of the transfer."—The period of eighteen years is to be computed from the date of the transfer. In cases, therefore, where a transferor transfers property and directs its income to be accumulated for a period of eighteen years which is to commence some time later, the accumulation will be allowed only during that portion of the period specified by the transferor which falls within the period of eighteen years from the date of the transfer; the direction will be void as to the rest of the specified period.

Illustration.

A transfers property in 1920 with a direction that its income should be accumulated for eighteen years from 1930. The income will be valid as to eight years up to 1938, and void beyond that year. The income from 1939 onwards will be disposed of as if the period for accumulation had expired.(1)

In computing the period of eighteen years from the date of the transfer, the date of the transfer should be excluded on the general principle of law that the day of an act done, or the event happening, ought, in all cases, to be excluded rather than to be included.(2)

7. Exception (i) – "The payment of the debts of the transferor or any other person taking any interest under the transfer."—The exceptions provided in sub-s. (2) are taken from English law.(1)

The word "debts" is not confined to *past* debts only. If a transferor makes a provision for the discharge of liabilities that are likely *to arise in the future* under a covenant or an agreement that has already been entered into, such a provision also will be good as one for the payment of "debts." Thus, where a transferor directed his trustees to accumulate the income of certain shares which he held in a newspaper concern, to meet the liability that the newspaper concern might incur in the future, it was held that the direction was good as a provision for the payment of "debts."(2) Similarly, where a person transferred his lease-hold property to trustees for *A* and directed them to accumulate a part of the income during the continuance of the

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Section 17 — Note 5

1. F. B. Tyabji, Principles of Muhammadan Law, 2nd Edn., Page 373.

Section 17 — Note 6

1. (1840) 48 E R 1273 (1274): 2 Beav 493, Webb v. Webb.
(1841) 49 E R 231 (235): 52 R R 235, Ellis v. Maxwell. (Accumulation is permitted only during minority of a person.)
(1849) 18 L J Ch 191 (193): 83 R R 360, Nettleton v. Stephenson.

2. (1808) 33 E R 748 (752): 10 R R 68, Lester v. Garland.
[*See also* (1841) 59 E R 940 (941): 11 Sim 434, Gorst v. Lawndes.]

Section 17 — Note 7

1. See sub-section (2) of Section 164 of the English Law of Property Act, 1925, reproduced in Note 1.
[*See also* (1822) 1822 Turn & R 31 (40): 37 E R 1005, Bacon v. Proctor.]

2.† (1859) 45 E R 339 (344): 125 R R 410, Varlo v. Faden. (Confirmed in (1859) 29 L J Ch 230 — The debts afterwards to accrue for which the transferor or devisor is liable are surely the debts of the transferor or devisor.)

lease in order to meet any claims that may arise under the contract of lease entered into by him, it was held that the provision of accumulation was for the payment of "debts."(3)

The debts for which a provision may be made need not necessarily be those of the *transferor*. A provision for the payment of debts of *any* person who takes an interest under the transfer will come within the exception. The English law is wider in this respect. Under that law a provision can validly be made for the payment of the debts of *any person whether he takes any interest under the transfer or not*.(4)

The provision for the payment of debt must, in order to be valid, be, however, *bona fide*.(5)

Where the debts are once paid and satisfied out of the *capital* fund; a provision for the accumulation of the income in order to recoup the capital that has been taken out from the fund is not a provision for payment of debts.(6)

8. Exception (ii) — "The provision of portions for children." — A "portion" means property settled or provided in favour of children or their issue.(1)

Where an accumulation is directed with the object of giving something to the children which does not constitute only a *part* of the estate, the direction will not come within the exception. Thus, where the income of the residue was directed to be accumulated and the accumulated fund was to go to the children *along with the residue*, it was held that it was not a direction for an accumulation for providing *portions* for children ; but that it was giving them everything.(2) Similarly, where £200 were to be separated from the income of the residue and the accumulated interest of this sum *along with the sum itself* was to be given to the children, Sir C. J. Turner, V. C., in *Jones* v. *Maggs*(3) observed :

> "Where there is a gift to children, both of capital and income, and there is nothing in the nature or context of the instrument to impress upon the gift the character of a portion, I do not think it would be called a portion in the ordinary sense of the word. . . . . .there is clearly nothing in the nature of the instrument by which the gift is made to impress upon it the character of a portion."

So also where a fixed annuity from an income was given to *A* for his life and the surplus was to be accumulated and added to the corpus during the lifetime of *A* after which the whole corpus along with the accumulated fund was to go to *A's* children, it was held that the accumulation was not a provision of portions for *A's* children ; it was increasing the capital itself for *A's* children by accumulating the interest during a longer period than that allowed by law.(4) See also the undermentioned cases where portions were validly created.(5)

3.† (1910) 80 L J Ch 29 (32) : (1910) 2 Ch 553, In re Hurlbatt.

4. (1859) 45 E R 339 (344) : 125 R R 416, Varlo v. Faden.
(1852) 42 E R 958 (965) : 22 L J Ch 1. (Viscount), Barrington v. Liddell.

5. (1860) 29 L J Ch 230 (236) : 45 E R 339. Varlo v. Faden.
(1910) 80 L J Ch 29 (32) : (1910) 2 Ch 553, In re Harlbatt.
(1868) 37 L J Ch 657 (660) : 16 W R (Eng) 1213, Mathews v. Keble. (Provision not bona fide.)

6.† (1904) 73 L J Ch 543 (544) : 1904 1 Ch 826, In re, Heathcote.

Section 17 — Note 8

1. Wharton, Law Lexicon, 14th Edn., 1938, p. 776.

2. (1853) 43 E R 17 (24) : 3 De G M & G 40, Edwards v. Tuck.
[*See also* (1868) 37 L J Ch 657 (660) : 16 W R (Eng) 1213, Mathews v. Keble.]

3. (1852) 68 E R 654 (655) : 22 L J Ch 90.

4. (1918) 87 L J Ch 449 (452) : (1918) 2 Ch 150, In re, Elliott.

5.† (1904) 73 L J Ch 3 (6) : (1904) 1 Ch 322 : 91 L T 167, In re Stephen. (Only accumulated fund to go to the children— Accumulation held for providing portions.)

9. Exception (ii) — "Children ..... of any other person taking any interest under the transfer." — The section makes it clear that in order that a direction for accumulation for providing portions for children should come within the exception, it is necessary that the father or the mother of such children should be given some interest under the transfer. It is not clear, however, whether the parent should be given an interest in the *very property* the income of which is directed to be accumulated. Must the parents get an interest in the same property, the income of which is to be accumulated and given to children, or will it be sufficient if they take an interest in any other property? This section is silent on this point. From the meaning of the term "portion" in legal language it seems that the parents must get an interest in the same property from the income of which provision is made. In *Barrington* v. *Liddle*,(1) decided in the year 1852, the Lord Chancellor (Lord St. Leonards) observed as follows :

> "The great question then at last comes to this, what is the interest which a person whose children are to be provided for is to take under such conveyance, settlement or devise. The Vice-Chancellor has held, as I understand, that it must be an interest in the very property which is directed to be accumulated : I can, however, collect no such intention in the Act ; and nothing could have been so easy as to have expressed the intention if it had actually existed .....Some definition was to be given of the parents of the children of strangers ; and the Legislature, not intending to permit the provision to be made for everybody, said that, if a testator, upon the face of his will, made a person the object of his bounty, he might by the same will accumulate a fund within the limit allowed by law for the children of that person. This does not exclude the case of a man having an estate for life, for example, in a property given to him by will, and the portions being directed to be raised out of that estate for his children : that is the highest case that can be put, but the clause is not confined to such a case only."

In a later case, *In re Stephens*,(2) Mr. Justice Bucklay observed :

> "I apprehend that the word 'portion' as generally understood, conveys the meaning of a sum of money secured to a child out of property either coming from or settled upon its parents."

It is not necessary that the interest given to the parents must be created by *the same clause* by which a provision for their children is made.(3)

It is sufficient under this exception, *if any interest* is created in favour of the parents. It need not necessarily be a substantial interest. In the undermentioned cases(4) it was argued that the Legislature could not have meant, that if the parent took a legacy of a house or £1 under the will, that was such an interest as would bring it within the exception of the Thellusion Act. Lord Lyndhurst held that "any interest is any interest, however minute."

10. Exception (iii) — "Preservation or maintenance of the property transferred."— The Thellusion Act in England did not make any exception in favour of directions for accumulation for the preservation or the maintenance of the property transferred. But it was held that provisions for accumulations for the repair of the property transferred were not governed by the Thellusion Act, and that directions for

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(1850) 19 L J Ch 130 (132, 133) : 84 R R 398, Beech v. Earl St. Vincent. (Do.)

Section 17 — Note 9

1. † (1852) 42 E R 958 (966, 967) : 22 L J Ch 1.

2. (1904) 73 L J Ch 3 (6) : (1904) 1 Ch 322.

3. (1852) 42 E R 958 (966) : 95 R R 179, Barrington v. Liddel.

4. (1837) 7 E R 347 : 5 Cl & Fin 114; Evans v. Hellier.
[*See also* (1852) 42 E R 958 (968) : 95 R R 179, Barrington v. Liddell.]

such accumulations were good.(1) The exception in this section in favour of such directions is in accordance with those decisions.

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18 [a] The restrictions in sections 14, 16 and 17 shall not apply in the case of a transfer of property for the benefit of the public in the advancement of religion, knowledge, commerce, health, safety, or any other object beneficial to mankind.

Transfer in perpetuity for benefit of public.

a. *See* Foot-note (a) under section 16.

Synopsis

1. Legislative changes.
2. Scope of the section.
3. "For the benefit of the public in the advancement of religion, knowledge, commerce, health, safety, or any other object beneficial to mankind."
4. Hindu law.
5. Muhammadan law.
6. Transfer to several objects some of which fail.

1. Legislative changes. — The present section was S. 17 before the amendment of 1929; and the present S. 17 was S. 18. The old S. 17 ran as follows :

> "The restrictions in sections 14, 15 and 16 shall not apply to property transferred for the benefit of the public in the advancement of religion, knowledge, commerce, health, safety or any other object beneficial to mankind."

The present section omits the reference to S. 15 but adds S. 17. Section 15 has been omitted for the reason that the new amended S. 15 does not now provide *for a total failure of transfer* as before. The present S. 17 which restricts accumulations beyond a certain period has been added because a direction for accumulation has been held valid in the case of Hindu and Muhammadan religious endowments though such a direction infringes the rule against perpetuities.(1) A renumbering of the old sections 17 and 18 was necessary for the reason that the section dealing with accumulations (i. e., old S. 18), which was now included in the section dealing with the exception to that section (i. e., old S. 17), should find a place before the latter section.

2. Scope of the section.—Transfers of property for charitable purposes have always been regarded by the law with great favour(1) and have formed an exception to the rules forbidding the tying up of property. The exception has been recognised not only by the Courts of Chancery in England,(2) but also by the Hindu and Muhammadan systems of jurisprudence.(3) Thus, gifts of land for charitable purposes are not void merely because they may go on for ever.(3a) The reason for the

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Section 17 — Note 10

1. (1831) 60 L J Ch 675 (679) : (1831) 2 Ch 13, Vine v. Raleigh.
(1901) 70 L J Ch 407 (409) : (1901) 1 Ch 697, In re Gardiner.

Section 18 — Note 1

1. See the Report of the Special Committee. See also the following cases :
†1916 Cal 70 (73) [AIR V 3] (SB). (Unconditional gift to charity — Direction for accumulation is invalid.)
('10) 34 Mad 12 (20) (DB). (Direction in wakf).
('06) 34 Cal 5 (11, 12). (Direction to accumulate up to Rs. 10,000 to be spent in feeding indigent Hindus.)

Section 18 — Note 2

1. (1891) 61 L J Q B 265 (289) : 1891 App Cas 531, The Commissioners for special purposes of the Income-tax v. John Frederick Pemsel.
2. Topham, New Law of Property, 4th Edn., 1932, pages 179 and 180.
3. 1921 Bom 328 (359) [AIR V 8] (Muhammadan Law).
('10) 34 Mad 12 (20) (DB) (Do.)
†('81) 6 Bom 42 (53) (Do.)
3a. Topham, New Law of Property, 4th Edn., 1932, page 180.
1941 Rang 305 (308) [AIR V 28] : 1941 Rang L R 410 (DB).

exception is the same as that on which the rules forbidding the tying up of property themselves are founded, namely, public policy.(4) As stated by their Lordships of the Judicial Committee in *Yeap Cheah Neo* v. *Ong Cheng Neo*,(5) the object of the rule (i. e., the rule forbidding the tying up of property) is to prevent the mischief of making property inalienable *unless for objects which are in some way useful or beneficial to the community*. Gifts and transfers to charities which are useful and beneficial to the public have, therefore, been excepted from the operation of the rule.

There is, however, a difference between the English law and the Indian law as to the *limits* of the exception. Under the English law, the exception is made only in respect of transfers to "charities"(6) and even in such cases a grant for charitable purposes to take effect beyond the period prescribed by the rule against perpetuities is valid only *if, in the meantime, the property is transferred to some other charity*.(7) An immediate gift to a *private individual* followed by an executory gift in favour of a charity to take effect beyond the period prescribed by the rule, is invalid. In other words, even a gift to a charity must *commence* within the period allowed unless the property has been given, in the meantime, to some other charity.(8)

In this country a *bequest* cannot be made to a charity to take effect beyond the period allowed by the rule against perpetuities.(8a) There is no section in the Indian Succession Act, 1925, corresponding to this section, and not even the exception recognised by English law appears to be recognised by that Act. In *Administrator General of Bengal* v. *Hughes*,(9) a single Judge of the High Court of Calcutta, however, followed the English law, and held that a bequest to charity to take effect beyond the period allowed by the rule against perpetuities was valid where the property had been given in the meantime to another charity. This view was dissented from by a bench of the same High Court in *Joseph Henry Jones* v. *Administrator General of Bengal*,(10) relating to the same bequest as that which formed the subject-matter of the decision in *Administrator General of Bengal* v. *Hughes*,(10a) and it was held that the positive language of the Succession Act was sufficient to preclude the application of English law.

(1882) 52 L J Q B 193 (197): 7 App Cas 633, Goodman v. Saltash Corporation.

4. Tudor, Charities and Mortmain, 4th Edition, page 131.

✠('09) 33 Bom 122 (188, 189, 211). (Trusts and bequests of land or money for the purpose of devoting income in perpetuity for performance of muktad, etc. Parsi ceremonies held to be valid charitable bequests.)

†('87) 11 Bom 441 (447). (Parsi making a will bequeathing to charity —Held, neither consolation of the dead nor propitiation of frohars was a general public use.)
[*See also* ('92) 15 Mad 424 (444) (DB).

5. (1876) 6 L R P C 381 (394): 24 W R (Eng) Dig 174.

6. Tudor, Charities and Mortmain, 4th Edition, page 131.

7. See cases cited in foot-note (8).

8. Topham, New Law of Property, 4th Edn., 1932, page 180.
(1894) 63 L J Ch 872 (872): (1894) 3 Ch 265, In re Stratheden.
(1872) 42 L J Ch 368 (370): 21 W R (Eng) 299, Chamberlayne v. Brockett.
†(1905) 74 L J Ch 354 (357): (1905) 1 Ch 669, In re Swain.
(1891) 60 L J Ch 686 (688): (1891) 3 Ch 252, In re Tyler.
(1849) 41 E R 1343 (1344): 1 Mac & G 460, Christs Hospital v. Grainger.
(1906) 75 L J Ch 761 (764): (1906) 2 Ch 532, Worthing Corporation v. Heather.
Gift to charity with executory gift in favour of individual to take effect beyond allowed period —Latter executory gift is void, see (1893) 62 L J Ch 681 (683): (1893) 2 Ch 491, In re Bowen.
[*See also* ('75) 14 Beng L R 442 (447). (Law applicable before the T. P. Act was English law.)]

8a. *See* 1941 Rang 305 (308, 310) [A I R V 28]: 1941 Rang L R 410 (DB).

9. ('13) 40 Cal 192 (214).

10. 1919 Cal 809 (812) [AIR V 6]: 46 Cal 485 (DB).

10a. ('13) 40 Cal 192 (214).

As regards transfers of property *inter vivos* the Indian law, in regard to the exception, seems to be much wider than the English law. The exception provided by this section extends to all transfers for the benefit of the public "in the advancement of religion,(10b) knowledge, commerce, health, safety or any other object beneficial to mankind" and it seems to be quite clear that such transfers can be made to *commence* beyond the period allowed by the rule against perpetuities without there being any transfer of the property in favour of any other charity in the meantime, as is required by the English law. In *Sreemutty Santona Roy* v. *Advocate General of Bengal*,(11) the Calcutta High Court observed, without deciding the question :

> "We need only say that there is considerable force in the contention that as the trust in favour of the charity did not vest immediately, but was subject to a condition, namely, liquidation of the debts from the income, which might not be fulfilled within the period prescribed by the law, the gift though charitable, would be affected by the rule against remoteness."

This section was not referred to. It is submitted that the observations are not correct.

The provisions of this section are a useful guide in considering questions arising in places where the Transfer of Property Act does not apply as the provisions of the section are the reproduction of the law as it existed before the Transfer of Property Act was framed and passed.(12)

3. "For the benefit of the public in the advancement of religion, knowledge, commerce, health, safety, or any other object beneficial to mankind." — As has been seen in Note 2, the exception in English law is in favour of the transfers to "charities". But the word "charity" has under that law, acquired a technical meaning, which is much wider than its popular meaning of relief against poverty.(1) In *the Commissioner of Income-tax* v. *Pemsel*,(2) Lord Macnaghten observed :

> "No doubt the popular meaning of the words "charity" and "charitable" does not coincide with their legal meaning . . . . . "Charity" in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads. The trusts last referred to are not the less charitable, in the eye of the law, because incidentally they benefit the rich as well as the poor, as indeed, every charity that deserves the name must do either directly or indirectly."

The use of word "charity" has been avoided in this section so as to avoid possible difficulty in the interpretation of the term, but the section incorporates, in substance, all that has been held to fall within the meaning of the term "charity" as interpreted by the English decisions.

In order to test whether a gift is for "charity" or not it is usual in England to refer, as an index, or chart, to the Preamble of the Statute 43 Eliz.,

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10b. 1941 Mad 188 (191) [AIR V 28] (DB).
1923 Cal 708 (713) [AIR V 10] (DB). (Religious gifts are not in all respects on the same footing as secular gifts—They are exempt from the rule against perpetuities.)

11. 1921 Cal 389 (392) [AIR V 8] : 48 Cal 124 (DB).

12. ('09) 33 Bom 122 (189).

Section 18 — Note 3

1. 1921 Bom 338 (347, 359) [AIR V 8]. (Wakf—Feasts and ceremonies by whole community in honour of a saint are charitable objects.)
('10) 32 All 503 (512) (DB). (Term 'charity' under Hanafi law has more general import than under the English law.)
('06) 28 All 384 (386, 387) (DB).
('92) 16 Bom 217 (227) (DB).
(1890) 61 L J Q B 265 (274, 290) : 1891 App Cas 531. Commissioners, Income-tax v. John Frederik Pemsel.
(1924) 93 L J P C 173 (178) : 1924 App Cas 496, Verge v. Somerville.
(1895) 64 L J Ch 856 (856) : (1895) 2 Ch 501, In re Foveaux.

2. (1890) 61 L J Q B 265 (290) : 1891 App Cas 531 (583).

Ch. IV, 1601(3) which ran as follows :

> "Whereas lands, tenements, rents, annuities, profits, hereditaments, goods, chattels, money and stocks of money, have been heretofore given limited, appointed and assigned, as well by the Queen's most excellent Majesty and her most noble progenitors, as by sundry other well disposed persons, some for relief of aged, impotent and poor people, some for maintenance of sick and maimed soldiers and mariners, schools of learning, free schools and scholars in Universities, some for repair of bridges, ports, havens, causeways, churches, seabanks and highways, some for education and preferment of orphans, some for or towards relief, stock or maintenance for houses of correction, some for marriages of poor maids, some for supportation, aid and help of young tradesmen, handicraftsmen and persons decayed, and others for relief or redemption of prisoners or captives, and for aid or ease of any poor inhabitants concerning payments of fifteens, setting out of soldiers and other taxes; which lands, tenements, rents, annuities, profits, hereditaments, goods, chattels, money, and stocks of money nevertheless have not been employed according to the charitable intent of the givers and founders thereof, by reason of frauds, breaches of trust and negligence in those that should pay, deliver and employ the same."

A transfer must, in order to fall within the exception provided by this section, be "for the benefit of the *public*." The law recognises no purpose as charitable unless it is of a public character. In other words, a purpose must, in order to be charitable, be directed to the benefit of the community or a section of the community.(4) The distinction between a public purpose and one which is not public is often subtle,(5) but the general principle is that if the intention of the donor is merely to benefit *specific* individuals, the gift is not charitable even though the motive of the gift may be to relieve their poverty or to accomplish some other purpose in reference to these particular individuals which would be charitable if not so confined: on the other hand, if the donor's object is to accomplish the *abstract purpose* of relieving poverty, advancing education or religion, etc., without reference to any *particular* individuals and without giving any particular individual the right to claim the funds, the gift is charitable.(6) Thus, in *The Attorney General* v. *Pearce*,(7) Lord Hardwicke observed:

> "Where testators have not any particular person in their contemplation but leave it to the discretion of a trustee to choose out the objects, though such person is private and each particular object may be said to be private, yet in the extensiveness of the benefit accruing from them, they may very properly be called public charities. A sum to be disposed of by *A B* and his executors at their discretion, among poor house-keepers is of this kind."

In deciding whether an object is beneficial to the public, the customary law and the common opinion among the community to which the parties interested belong must also be taken into consideration.(8) Objects which the English law would possibly regard as superstitious are sometimes allowable and even commendable according to Hindu and Muhammadan laws.(9) Thus, a trust for the maintenance of an idol has been

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3. (1854) 61 E R 781 (784): 23 L J Ch 947, Heath v. Chapman.
✠(1890) 61 L J Q B 265 (289): 1891 App Cas 531, Commissioners of Income-tax v. John Frederick Pemsel.
4.† ('10) 32 All 503 (511) (DB).
('92) 15 Mad 424 (444) (DB).
(1895) 64 L J Ch 856 (857): (1895) 2 Ch 501, In re Foveaux.
(1824) 57 E R 270 (274): 25 R R 153, Attorney-General v. Heelis.
(1905) 74 L J Ch 512 (516): (1905) 2 Ch 60 (66), In re Good. (Gift to Officers' Regimental Mess to maintain a library was held a good charitable gift.)
(1924) 93 L J P C 173 (177): 1924 App Cas 496 (499), Verge v. Somerville.
(1837) 40 E R 773 (777): 7 L J (NS) Ch 51, Attorney-General v. Aspinal.
5. ('10) 32 All 503 (511) (DB).
(1842) 49 E R 545 (547): 5 Beav 177, Nash v. Morley.
6. (1842) 49 E R 545 (547): 59 R R 456, Nash v. Morley. ((1740) 26 E R 454 followed.)
†('10) 32 All 503 (511) (DB).
7. (1740) 26 E R 454 (454): 2 Atk 87.
8. ('81) 6 Bom 42 (50).
9. ('09) 33 Bom 122 (163).
†('81) 6 Bom 42 (50).
('75) 12 Bom H C R 214 (216) (DB).
('70) 1 Bom H C R A C 9 (15) (DB). (Statute of superstitious uses does not apply to India.)
(1953) 1 All E R 63 (69).

held to be one for a public purpose among Hindus.(10)

The *intention* to benefit the community is sufficient and it is not necessary to see in every case that if the object is carried out the community would in fact be benefited.(11)

A *religious* purpose can be a charitable purpose only where the religious services tend directly or indirectly towards the instruction or edification of the *public*.(12)

The following have been held to be good as charitable gifts : —

(1) gift for saying masses:(13)

(2) gift to hospitals:(14)

(3) gift for the improvement of a town:(15)

(4) gift for the maintenance of the post of a school-master;(16)

(5) trust for promoting the knowledge of the poor and ignorant inhabitants of a certain named place;(17)

(6) trust for making a pest-house;(18)

(7) gift "to poor pious persons male or female, old or infirm, as the trustees see fit not omitting large and sick families if of good character";(19)

(8) bequest to widows and orphans of a parish:(20)

(9) gift to a voluntary association having for its object the teaching of ignorant and nursing of the sick;(21)

(10) gift to a society having for its object the total suppression of vivisection;(22)

(11) gift for the purpose of providing or keeping in good order a burial ground;(23)

(12) trust for the provision of play fields, parks, gymnasiums for the health and welfare of the working classes.(24)

See also the undermentioned cases(25) and the illustrations to section 118, Indian Succession Act, 1925.

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10. ('81) 6 Bom 42 (50).

11. (1895) 64 L J Ch 856 (858) : (1895) 2 Ch 501, In re Foveaux.

12. ('06) 28 All 384 (386) (DB).
(1893) 62 L J Ch 342 (346) : (1893) 2 Ch 41 (53), In re White.
(1871) 40 L J Ch 640 (651) : L R 12 Eq 574, Cocks v. Manners.

13. ('68) 2 Beng L R (OC) 148 (151).
(1930) 99 L J Ch 232 (234) : (1930) 1 Ch 524, In re Roadley.
(1934) 103 L J Ch 49 (52): (1934) 1 Ch 162, In re, Caus.
[But see ('92) 15 Mad 424 (447) (DB).
(1854) 61 E R 781 (784) : 100 R R 204, Heath v. Chapman.
(1862) 31 L J Ch 52 (54), Re Blundell's Trust. (Trust for the benefit of priests in Roman Catholic chapels on condition of their saying masses for the repose of the soul of the donor.)
(1835) 39 E R 1106 (1111) : 39 R R 327, West v. Shuttleworth.]

14. ('02) 6 Cal W N 321 (324).
('75) 14 Beng L R 442 (447). (Mortmain Acts are not operative in India.)

15. (1799) 31 E R 278 (283) : 4 R R 292, Howse v. Chapman.
(1824) 57 E R 270 (274) : 25 R R 153, Attorney-General v. Heelis.

16. (1703) 23 E R 890 (890) : 2 Vern 453, Attorney-General v. Rye.

17. (1835) 39 E R 1106 (1110) : 39 R R 327, West v. Shuttleworth.

18. (1840) 48 E R 1305 (1306) : 50 R R 299, Attorney-General v. Kell.

19. (1842) 49 E R 545 (547) : 59 R R 456, Nash v. Morley.

20. (1824) 57 E R 281 (281) : 25 R R 163, Attorney-General v. Comber.

21. (1871) 40 L J Ch 640 (650, 651) : L R 12 Eq 574, Cocks v. Manners.

22. (1895) 64 L J Ch 856 (858) : (1895) 2 Ch 501, In re, Foveaux.

23. (1905) 74 L J Ch 95 (98) : (1905) 1 Ch 68 (73), Attorney-General v. Lucas.

24. (1932) 101 L J Ch 52 (54) : (1932) 1 Ch 133, In re Hadden.

25. 1941 Mad 188 (192) [AIR V 28] (DB). (Dedication to feed poor pilgrims and distribute

The following have been held not to fall within the class of charitable gifts, as having been made with a view to the private advantage of individuals : –

(1) bequest with a direction "that a house for performing religious ceremonies to my late husband and myself be erected";(26)

(2) gift merely for the purpose of keeping up a tomb of the testator and of his family;(27)

(3) gift to a voluntary association of women for the purpose of working out their own salvation by religious exercises and self-denial;(28)

(4) bequest for the purpose of encouraging *mere sports*;(29)

(5) legacy for the maintenance and up-keep of a masonic temple.(30)

See also the undermentioned cases.(31)

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oil among them on certain days is for the benefit of the public and does advance religion.)

('09) 33 Bom 122 (211). (Trusts relating to Muktad and Baj ceremonies prevailing among Parsis—11 Bom 441, Not followed.)

('92) 16 Bom 217 (228) (DB). (Sir Cowasji Jahangir Hall, Library and Rajabai Tower which are occupied by Bombay University are buildings occupied for charitable purposes.)

('58) 1958-1 W L R 1258 (1264), North of England Zoological Society v. Chester Rural District Council. (Objects being '(a) To acquire and take over as a going concern and conduct as a scientific and educational undertaking the business heretofore carried on as the Chester Zoological Gardens by Chester Zoological Gardens, Limited, together with any part of the real or personal property and assets of the company used in connection with that business. (b) To promote, facilitate and encourage the study of biology, zoology and animal physiology; aviculture, acuaria, ichthyology; entomology; botany and horticultural and all kindred sciences and to foster and develop among the people an interest in and knowledge of animal life. (c) To establish, equip and carry on and develop zoological parks or gardens and living zoological collections at such places as the society shall determine. (d) To establish sanctuaries for all kinds of wild life, particularly animal and bird sanctuaries and to police in such manner and do all things necessary for the protection of all animal and plant life therein'. Held, charitable.)

(1915) 84 L J Ch 825 (826) : (1915) 2 Ch 284 (289), In re Mariette. (Gift to Governing Body of School for building Fives Courts and also gift to Headmaster to provide for prize in school athletic sports.)

(1929) 98 L J Ch 261 (264) : (1929) 1 Ch 557 (582), In re Grove Grady. (Trust for the benefit of animals if in its execution there is necessarily involved a benefit to public.)

(1925) 1 Ch 362 (369) : 94 L J Ch 430, In re Gray. (Gifts for the purpose of promoting sports in the army.)

(1787) 29 E R 1183 (1183) : 1 Cox 316, Turner v. Ogden.

(1866) 35 L J Ch 345 (347) : L R 1 Eq 585, Hoare v. Osborne. (A gift for ever for the reparation of the monuments in the Abbey is for the public benefit.)

(1767) 27 E R 422 (422) : Amb 651, Jones v. Williams. (Bequest of £1,000 by sale of lands, to be applied in water works for the use of the inhabitants of a town is public charitable use.)

(1875) 44 L J Ch 766 (768) : L R 20 Eq 483, Attorney-General v. Webster.

26. (1875) L R 6 P C 381 (396) : 24 W R (Eng) Dig 174, Yeap v. Ong.

27. (1864) 55 E R 507 (508, 509) : 140 R R 289, Fowler v. Fowler.

(1862) 54 E R 1132 (1133) : 10 W R (Eng) 657, Richard v. Robson.

[See however 1941 Mad 188 (192) [AIR V 28] (DB). (It cannot be said that ex necessitate rei the offering of prayers at the grave can never be for the public benefit.)]

28. (1871) 40 L J Ch 640 (651) : L R 12 Eq 574, Cocks v. Manners.

29. (1895) 64 L J Ch 695 (701) : (1895) 2 Ch 649 (656), In re Nottage. (Sport of yacht-racing.)

30. (1925) 95 L J Ch 46 (47) : 1925 Ch 746, In re Porter. (By Masonic temple is meant a hall or building devoted to Masonic purposes which include ceremonial and business meetings and banquets.)

31. 1956 Bom 81 (86) [AIR V 43 C 19]. (It was held that the deed did not create a public charitable trust.)

('13) 40 Cal 192 (209). (Trust with a direction to the trustee to keep in repair testator's grave and those of his wife and child is a perpetuity.)

('91) 14 Mad 1 (6) (DB). (Grant with an intention to perpetuate the spiritual family of grantor's guru.)

(1944) 1944 App Cas 341 : (1944) 2 All E L R 60, Chichester Diocesan Fund & Board of Finance v. Simpson.

[A gift by a testator "for such charitable institution or institutions or other charitable or benevolent object or objects as executors select" —Held gift was void for uncertainty.]

(1943) 1 Ch 332 : (1943) 2 All E L R 519, In re Corelli. (Gift to maintain house and contempts in perpetuity at Stratford-upon—Avon: House to be used as hostel by distinguished persons visiting

Whether a particular charity was for the benefit of the public or not is a question of fact.(32)

See also the undermentioned case.(33)

4. Hindu law.—Before the passing of the Transfer of Property (Amendment) Act XX of 1929, the section did not affect any rule of Hindu law. (Section 2). But even under the Hindu law, a gift to a charity constituted an exception to the rules forbidding the accumulation(1) or the tying up of property in perpetuity.(2) There was, however, this difference between the English law and the rules of Hindu law, namely, that the Hindu law made no distinction between a religious endowment having for its object the worship of a *household* idol and one which was for the benefit of the *general public*.(3)

The following were held to be gifts for charitable purposes under Hindu law :

(1) a trust for the maintenance of an idol;(4)
(2) a gift for the maintenance of a temple;(5)
(3) payments to poor devotees:(6)
(4) feeding of and payments to Brahmins;(7)
(5) a gift to a 'Sadavarat';(8)
(6) a gift for building a well and 'Avada'(9)

In the undermentioned case(10) caste feasts were held not to be for charitable or religious purposes.

The amendment of S. 2 in 1929 renders this section applicable to transfers by Hindus, and the rules of Hindu law are abrogated so far as they are in conflict with this section.

5. Muhammadan law.—This section does not affect any rule of Muhammadan law (see S. 2) Independent of this section, however, the principle of this section has,

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town. No valid charitable bequest and failed for remoteness.)

(1866) 36 L J Ch 147 (149), In re Rigley's Trusts.

(1805) 32 E R 947 (955) : 10 Ves Jun 522, Morice v. Durham.

32. 1941 Mad 188 (192) [AIR V 28] (DB).

33. (1954) 1954-1 All E R 227 (229) : (1954) 1 W L R 238, Re. Bagshaw ; Westminster Bank, Ltd. v. Taylor. (A charity founded as a perpetual charity can never come to an end even though its objects may be altered, and, indeed, its name may be altered, according to due process of law.)

Section 18 — Note 4

1. 1916 Cal 70 (73) [AIR V 3] (SB).

† ('06) 34 Cal 5 (11, 12).

2 ('37) 41 Cal W N 1103 (1111) (DB). (The English rule of law which prohibits creation of perpetuities cannot possibly apply to gifts to idols in this country or to permanent grants of money to be paid out of income of properties for the maintenance and worship of deities which must in the nature of things be permanent passing from generation to generation.)

1914 Oudh 255 (259) [AIR V 1] (DB). (Rule of succession cannot be changed under the colour of fictitious endowment.)

†('97) 25 Cal 112 (125).

('05) 1 Cal L Jour 605 (614).

('82) 4 Mad 200 (203) (DB). (Where the estate created was secular, though the motive was religious, it was held that it did not stand on the same footing with a religious endowment-grant to an idol.)

[*See also* 1936 Cal 556 (561) [AIR V 23] : 63 Cal 1098 (DB). (Gift to an idol or deity is not hedged in by same limitations and is not subject to same restrictions as a gift to human being or living person.)]

3. 1914 Oudh 255 (259) [AIR V 1] (DB). (In the case of family idol the consensus of the whole family might give the estate another direction.)

('88) 12 Bom 247 (261) (DB).

('85) 9 Bom 169 (171) (DB).

[*See also* ('81) 6 Bom 42 (50). (A trust for the maintenance of an idol is one for a public charitable purpose amongst Hindus.)]

4. ('88) 11 All 8 (21, 22) (FB).

[*See also* ('81) 6 Bom 42 (50).]

5. ('01) 23 Bom 659 (664) (DB).

('84) 8 Bom 432 (451, 458).

6. ('84) 8 Bom 432 (451, 459).

7. ('08) 12 Cal W N 1083 (1086) (DB).

('81) 6 Bom 24 (25) (DB).

('78) 4 Cal 443 (454) (DB).

8. ('99) 23 Bom 659 (664) (DB).

('93) 17 Bom 351 (353). (Gift to dhurm held invalid.)

9. ('89) 14 Bom 1 (9, 10) (DB).

10. 1924 Sind 140 (142, 143) [AIR V 11].

as seen in Note 2, been recognised by the Muhammadan law. Thus, a *wakf*(1) or a provision for accumulation for the benefit of charitable purposes(2) is not bad under the Muhammadan law, even though it may create a perpetuity.

A *wakf* is defined in S. 2 sub-s. (1) of the Mussalman Wakf Validating Act, 1913, as "the *permanent* dedication by a person professing the Mussalman faith of any property for any purpose recognised by the Mussalman law as religious, pious or charitable." It is not necessary for the valid creation of a *wakf* that the term '*wakf*' should be used in the document. It is enough if the intention to create a *wakf* is obvious.(3) On the other hand, where the real purpose of the deed is to gain legal recognition for a transaction which is invalid in law, the mere name and form of a *wakf* would not validate it.(4)

Before the passing of the Mussalman Wakf Validating Act, 1913, there was difference of opinion on the question whether a Muhammadan could create a valid *wakf* in favour of himself, his family and descendants with an ultimate benefit in favour of the poor or other religious, pious or charitable purposes. In the undermentioned cases(5) it was held that in order to constitute a valid *wakf* there must be a dedication of property solely to the worship of God, or to religious or charitable purposes and that there is nothing in a settlement of property in favour of a person himself or his descendants any element of charity or religion. The decisions given below(6) took quite an opposite view and held that a provision even for one's children and kindred, in perpetuity is a charitable and religious Act. The undermentioned cases(7) took a third view that if the condition of *an ultimate dedication to a pious and unfailing purpose* be satisfied, a *wakf* is not rendered invalid by an intermediate settlement on the founder's children and their descendants. The benefits these persons successively take, may constitute a perpetuity but that does not vitiate the settlement provided the ultimate charitable object be clearly designated. All these views were subsequently overruled by their Lordships of the Privy Council in a number of

Section 18 — Note 5

1. 1939 P C 185 (189) [AIR V 26]. (Successive future life-interests in favour of unborn persons are valid.)

[*See* ('03) 25 All 236 (255) : 30 Ind App 94 (PC). (By the law of the Shia sect of Muhammadans as well as by that of the Sunni sect, a valid wakf can be created by will.)]

[*See also* ('02) 24 All 190 (194) (DB).]

2. ('10) 34 Mad 12 (18, 19) (DB).

3. (1840) 2 Moo Ind App 390 (420, 421) (PC).
1930 Oudh 32 (36) [AIR V 17] (DB).
('03) 25 All 418 (420) (DB). (Words purporting to effect a transfer may, when read together with the surrounding circumstances, be sufficient to create a valid wakf. What is really essential for the creation of a wakf is that the words of transfer should be direct, express and explicit.)
('99) 2 Oudh Cas 115 (131) (DB).

[*See also* ('07) 31 Bom 250 (255) (DB). (A mental act, although afterwards sufficiently expressed in conduct, will not, unless clothed in appropriate words, create a wakf.)]

4. ('05) 27 All 320 (324) : 32 Ind App 86 (PC).
† ('03) 5 Bom L R 624 (627, 628). (To be a true wakf the provisions of the document must be of a religious or charitable character.)
('75) 10 Bom H C R 7 (14). (Trying to keep up a family house in perpetuity.)

[*See also* (1900) 1900 All W N 93 (94) (DB). (Will making over property to the exclusive possession of A, one of several heirs of testatrix—A enjoined to perform certain acts for the benefit of souls of testatrix and her deceased daughter—Held, no wakf created—It was only an attempt to give to A under colour of religious bequest an interest in contravention of Mahomedan law.)]

5. ('81) 6 Cal 744 (748) (DB). (10 Bom H C R 7, followed.)
('75) 10 Bom H C R 7 (13).

[*See also* ('83) 9 Cal 176 (180) (DB).

6. ('92) 20 Cal 116 (176, 177) (FB). (Per Ameer Ali, J.)
('92) 19 Cal 412 (434) (DB).

7. ('89) 13 Bom 264 (274) (DB).
('81) 6 Bom 42 (53).

[*See also* ('78) 3 Bom 84 (88) (DB). (Quaere—Whether wakf could be created for the purpose of merely conferring a perpetual and an inalienable estate on a particular family, without an ultimate express limitation to the use of the poor or some other inextinguishable class of beneficiaries.)]

cases(8) and it was laid down that although a provision for family and descendants out of the grantor's property is not inconsistent with the gift of it as a *wakf*, the Muhammadan law does not treat a gift to family, etc., *per se* as a good and valid *wakf*. The *wakf* would be valid if the effect of the deed was to give the property *in substance to charilable uses*; but would not be valid if the effect of it was to give the property in substance to the grantor's family and descendants under the name of charity.(9)

The abovementioned decisions disabled a Muhammadan from making a settlement for or in favour of his family, children and descendants or what is known as *wakf-alal-aulad* in the Muhammadan law. In order to remove this disability the Mussalman Wakf Validating Act, VI of 1913, was passed. The Act is entitled "an Act to declare the rights of Mussalmans to make settlements of property by way of *wakf* in favour of their families, children and descendants." Sections 3 and 4 of the Act provide as follows :

> "3. It shall be lawful for any person professing the Mussalman faith to create a *wakf* which in all other respects is in accordance with the provisions of Mussalman law, for the following among other purposes :
>
> (a) for the maintenance and support wholly or partially of his family, children or descendants, and
>
> (b) where the person creating a *wakf* is a Hanafi Mussalman, also for his own maintenance and support during his lifetime or for the payment of his debts out of the rents and profits of the property dedicated :
>
> Provided that the ultimate benefit is in such cases expressly or impliedly reserved for the poor or for any other purpose recognised by the Mussalman law as a religious, pious or charitable purpose of a permanent character.
>
> "4. No such *wakf* shall be deemed to be invalid merely because the benefit reserved therein for the poor or other religious, pious or charitable purpose of a permanent nature is postponed until after the extinction of the family, children or descendants of the person creating the *wakf*."

The Act in effect restored the third view, which was overruled, to its original value.(10) It had however, no retrospective effect and the rule laid down by the Privy Council decision in *Abdul Fata* v. *Rasamaya*(10a) and other decisions taking that view continued to be applied to *wakfs* created before the passing of the Act.(11) The Mussalman Wakf Validating Act, XXXII of 1930, was, therefore, passed to give retrospective effect to the Mussalman Wakf Validating Act, 1913.

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8. 1916 P C 86 (87) [A I R V 3] : 44 Ind App 21 : 40 Mad 116.
('05) 27 All 320 (324) : 32 Ind App 86 (PC).
('01) 23 All 233 (242) : 28 Ind App 15 (PC).
('94) 22 Cal 619 (634) : 22 Ind App 76 (PC).
('93) 17 Bom 1 (4) : 19 Ind App 170 (PC). (17 Cal 498 (PC), followed.)
('89) 17 Cal 498 (511) : 17 Ind App 28 (PC).

9. *See also the following cases of the High Courts :*
('90) 13 Mad 66 (73) (SB).
✠('93) 20 Cal 116 (208) (FB).
('11) 33 All 400 (413) (DB).
('10) 34 Mad 12 (18) (DB).
('09) 31 All 136 (147, 148) (DB).
('08) 11 Oudh Cas 48 (56) (DB).
('06) 28 All 633 (636, 637) (DB).
('06) 8 Bom L R 245 (250).
('06) 4 Cal L Jour 442 (455) (DB).
('03) 5 Bom L R 624 (627).
('03) 30 Cal 666 (676) (DB).
('02) 24 All 257 (272, 273) (DB).
('97) 19 All 211 (214) (DB).
('96) 1896 Pun Re No. 84, p. 263 (266) (DB). (22 Cal 619 (PC), followed.)
✠('91) 18 Cal 399 (412) (DB). (A valid wakf must be in favour of a religious or charitable purpose, although there may be a temporary intermediate application of the whole or part of the benefits thereof to the appropriator's family and the dedication must not depend upon an uncertain contingency, such as the possible extinction of the appropriator's family.)
('82) 9 Cal L R 66 (75).
[*See also* ('05) 2 All Jour 519 (537, 538) (DB).]

10. 1930 All 169 (173) [AIR V 17] : 52 All 368 (DB). (Where objects of endowment are clear, fact that no defined portion of property or specified amounts of usufruct have been dedicated would not invalidate a wakf.)

10a. (94) 22 Cal 619 (634) : 22 Ind App 76 (PC). (Attempted family settlement in perpetuity — Ultimate but illusory gift for religious purposes—Held, invalid wakf.)

11. †1927 P C 191 (192) [A I R V 14] : 9 Lah 203 : 54 Ind App 372.

It has been held in the undermentioned case(12) that the definition of *wakf* in Act VI of 1913 would cover not only objects which are charitable but also those which are religious or pious. A contrary view has, however, been expressed in a decision of the High Court of Madras,(13) where it was observed by Beasley, C. J.:

"In our view, no change in the law was brought about with regard to the purposes, namely, "religious, pious ot charitable." Those purposes had always previously been recognised and this is perfectly clear from the Privy Council decision in *Ramanadhan Chettiar* v. *Vava Levvai*(14) and other cases and it is not right to say that the words "or charitable" really provide an alternative to "religious and pious".. .....According to Lord Robertson the test must be the charitable use or uses; and even before Act VI of 1913, the purpose according to the decisions had to be religious or charitable. The words then were exactly the same as they are now; and it appears to us that in all cases upon this point the charitable purposes of the gift have always been stressed as the important ones."

The Oudh Estates Act (1 of 1869) is a special Act affecting special class of persons i.e. Talukdars irrespective of the religion to which they belong. Section 18 of that Act deals with gifts for religious or charitable uses. Where under a *wakf.alal-aulad* executed by a Muhammadan Talukdar an insignificant portion of the income of the property is to be used for certain religious purposes and the rest of the income is to be used for the benefit of the wakif and his descendants from generation to generation and it is only when the line of the wakif is completely extinct that the whole of the income could be utilised for charitable or religious purposes such a wakf cannot be considered to be for religious or charitable purposes within the meaning of S. 18 of the Act though in theory it may vest the property in God Almighty.(15)

6. Transfer to several objects some of which fail.— A trust for charity does not become void because it is incorporated in a deed of transfer which, in respect of other interests created thereby, is void by reason of perpetuity.(1) The portion of the deed relating to other interests will be rejected and effect will be given to the portion creating a trust in favour of the charity.(2)

Where a fund is given to charity as well to other objects and it is possible for the Court to ascertain how much is required for one object and how much for another it will direct an enquiry. But where that is not possible the fund will be divided equally among the different objects on the principle of "equality is equity" and the portion declared to be bad will go to the residuary estate of the donor.(3)

1922 P C 107 (111) [AIR V 9] : 49 Cal 820 : 49 Ind App 153.
1916 P C 86 (87) [AIR V 3] : 40 Mad 116: 44 Ind App 21.
1918 All 2 (4, 6) [AIR V 5] : 41 All 1 (DB).
1914 Bom 109 (110) [A I R V 1] : 39 Bom 563.

12. 1930 Bom 191 (195) [AIR V 17] : 54 Bom 358.

13. 1935 Mad 29 (31) [AIR V 22] : 58 Mad 204 (DB).

14. 1916 P C 86 (87) : [AIR V 3] : 40 Mad 116 : 44 Ind App 21.

15. 1962 S C 1722 (1729) (Pr 12) [A I R V 49 C 241] : ILR (1962) 2 All 869 : 1 S C R 20.

Section 18 — Note 6

1. ('03) 5 Bom L R 624 (632).
[*See also* 1937 PC 4 (8) [AIR V 24]: 64 Ind App 5 : ILR (1937) All 3. (Trust deed attacked, as many of the provisions were invalid under Ss. 14, 16 and 17, Transfer of Property Act — Entire deed not to be treated as nullity—Suit for construing the deed and for having its valid provisions applied is proper remedy.)]
1941 Mad 188 (192) [AIR V 28] (DB). (Even where questions may arise under Ss. 14, 16 or 17 in connection with certain dispositions in favour of private persons, nevertheless an attack on the trust deed on such grounds cannot be made except in a suit for administration of the trust or the assets belonging to the person who made the dedication or created the trust.)

2. ('81) 7 Cal L R 241 (245, 246).
('03) 5 Bom L R 624 (632).

3. (1866) 36 L J Ch 147 (149), Re Rigley's Trust.
(1866) 35 L J Ch 345 (347) : L R 1 Eq 585, Hoare v. Osborne.

19. Where, on a transfer of property, an interest therein is created Vested interest. in favour of a person without specifying the time when it is to take effect, or in terms specifying that it is to take effect forthwith or on the happening of an event which must happen, such interest is vested, unless a contrary intention appears from the terms of the transfer.

A vested interest is not defeated by the death of the transferee before he obtains possession.

Explanation. — An intention that an interest shall not be vested is not to be inferred merely from a provision whereby the enjoyment thereof is postponed, or whereby a prior interest in the same property is given or reserved to some other person, or whereby income arising from the property is directed to be accumulated until the time of enjoyment arrives, or from a provision that if a particular event shall happen the interest shall pass to another person.

Synopsis

1. Analogous law.
2. Section does not affect rules of Muhammadan law.
3. Hindu law.
4. Scope of the section.
5. "Or in terms specifying that it is to take effect forthwith."
6. "On the happening of an event which must happen."
7. "Unless a contrary intention . . . . . transfer."
8. Vested interest is transferable and heritable.
9. Postponement of enjoyment.
10. Direction to accumulate.
10a. Condition subsequent.
11. Provision for gift over is not proof of intention to the contrary.
12. Power of appointment.

1. Analogous law. — Section 119 of the Indian Succession Act, 1925, corresponds to this section and runs as follows :

"*119.* Where by the terms of a bequest the legatee is not entitled to immediate possession of the thing bequeathed, a right to receive it at the proper time shall, unless a contrary intention appears by the will, become vested in the legatee on the testator's death, and shall pass to the legatee's representatives if he dies before that time and without having received the legacy, and in such cases the legacy is from the testator's death said to be vested in interest.

Explanation.—An intention that a legacy to any person shall not become vested in interest in him is not to be inferred merely from a provision whereby the payment or possession of the thing bequeathed is postponed, or whereby a prior interest therein is bequeathed to some other person, or whereby the income arising from the fund bequeathed is directed to be accumulated until the time of payment arrives, or from a provision that, if a particular event shall happen, the legacy shall go over to another person.

Illustrations

(1) *A* bequeaths to *B* 100 rupees, to be paid to him at the death of *C*. On *A's* death the legacy becomes vested in interest in *B*, and if he dies before *C*, his representatives are entitled to the legacy.

(2) *A* bequeaths to *B* 100 rupees, to be paid to him upon his attaining the age of 18. On *A's* death the legacy becomes vested in interest in *B*.

(3) *A* fund is bequeathed to *A* for life, and after his death to *B*. On the testator's death the legacy to *B* becomes vested in interest in *B*.

(4) *A* fund is bequeathed to *A* until *B* attains the age of 18 and then to *B*. The legacy to *B* is vested in interest from the testator's death.

(5) *A* bequeaths the whole of his property to *B* upon trust to pay certain debts out of the income, and then to make over the fund to *C*. At *A's* death the gift to *C* becomes vested in interest in him.

(6) A fund is bequeathed to *A*, *B* and C in equal shares to be paid to them on their attaining the age of 18, respectively, with a proviso that, if all of them die under the age of 18, the legacy shall devolve upon *D*. On the death of the testator, the shares vested in interest in *A*, *B* and *C*, subject to be divested in case, A, *B* and *C* shall all die under 18, and, upon the death of any of them (except the last survivor) under the age of 18, his vested interest passes, so subject, to his representatives."

2. Section does not affect rules of Muhammadan law. — By virtue of the last paragraph of S. 2, this section, on account of its being in the second chapter, does not affect any rule of Muhammadan law. In *Abdul Wahid Khan* v. *Nuran Bi*(1) it was held by the Privy Council that a vested remainder after a life-estate is not recognised by Muhammadan law. In *Umesh Chunder* v. *Zahur Fatima*(2) it was, however, held by the Privy Council that an interest in the nature of a vested remainder created by a Muhammadan is attachable in execution. In *Ajmad Khan* v. *Ashroff Khan*(3) the creation of a life-interest was held valid under the Muhammadan law. As regards the Indian High Courts themselves there is a difference of opinion on the question arising on the interpretation of the Privy Council decisions.(4) In the undermentioned case(5) it was held that the principle of vested remainders can be applied to the Talukdars of Oudh, though Muhammadans, in respect of the taluqdari property by virtue of S. 19 of the Oudh Estates Act (1 of 1869). Sections 3 and 4 of the Mussalman Wakf Validating Act (6 of 1913) recognise in the case of *wakfs*, vested remainders.

It has been held that it is open to a Shia Muhammadan to create a vested remainder in favour of an unborn person provided that life estates are created in favour of persons in existence.(6).

3. Hindu law.—The last paragraph of S. 2, as it stood prior to the amendment of 1929, provided that nothing in this chapter should be deemed to affect any rule of Hindu law also. But the rules of Hindu law did not differ from most of the

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Section 19 — Note 2

1. ('85) 11 Cal 597 (606, 608) : 12 Ind App 91 (PC).

2. ('91) 18 Cal 164 (177) : 17 Ind App 201 (PC).

3. 1929 P C 149 (151) [AIR V 16] : 4 Luck 305 : 56 Ind App 213.

1939 Pat 406 (408) [AIR V 26]. (Limited estate, when created by contract is not repugnant to Muhammadan law.)

4. P L D 1955 Lah 516 (520). (Gift of land to B and on her death to M held invalid according to Muhammadan law.)

('54) ILR (1954) Mys 212 (217) : AIR 1955 N U C (Mys) 705. (Property bequeathed to A after the life interest created in favour of H is not invalid under Muhammadan law.)

1938 Oudh 51 (53, 54) [AIR V 25] : 13 Luck 713 (DB). (Limited interests can be created under Muhammadan law.)

1933 Bom 324 (328, 330) [A I R V 20] : 57 Bom 737 (DB). (Sunni law—Per Beaumont, C. J.: vested remainder valid; Per Rangnekar, J. not valid.)

('26) 98 Ind Cas 522 (523) (DB) (All). (Assumed valid.)

1922 Oudh 93 (94) [AIR V 9] : 24 Oudh Cas 321. (Shia law permits the creation of life-estates with a remainder akin to that of a vested remainder in English law, but the remainderman must be in existence on the date of gift.)

('11) 36 Bom 214 (251, 252). (Shiah law—Vested remainder not valid.)

('09) 2 Ind Cas 865 (868) (All). (There is nothing unlawful or against public policy in allowing a Muhammadan by a compromise to carve out of land a life-interest for one person and to give the vested remainder to another.)

†('08) 32 Bom 172 (177) (DB). (Shiah law—Vested remainder is valid.)

('07) 9 Bom L R 295 (302). (Vested remainder recognised neither under Sunni nor Shiah law —Life estates are recognised under the latter.)

('88) 13 Bom 264 (275) (DB). (A donee under a gift of life-interest takes as a rule an absolute estate.)

[*See also* ('10) 34 Bom 604 (612). (Whether a Muhammadan can validly make a gift of a vested remainder doubted.)]

5. 1933 Oudh 439 (444, 445) [A I R V 20] : 8 Luck 602 (DB).

6. 1947 Bom 185 (187) [A I R V 34 C 58] : ILR (1947) Bom 636. (1927 Rang 242 [AIR V 14] and Mulla's Muhammadan law dissented from; Ameer Ali and Tyabji on Muhammadan law approved.)

rules laid down in this chapter. In fact the English notions of vested interest had vested remainder had been applied to transaction by Hindus, even before the passing of this Act.(1) A gift to an unborn person was, however, void under the Hindu law and in this respect differed from the rule laid down in S. 13 of the Act. This principle was modified by the passing of the Hindu Disposition of Property Act (15 of 1916) and by the Hindu Transfers and Bequests (City of Madras) Act (8 of 1921) and the Madras Hindu Transfers and Bequests Act (Madras Act 1 of 1914) thus bringing the law into line with rules laid down in this chapter. The saving of Hindu law rules from the operation of this chapter was thus rendered unnecessary and was consequently repealed by S. 3 of the amending Act 20 of 1929. This section will, therefore, now directly apply to transfers by or in favour of the Hindus.

4. Scope of the section. — This section and the corresponding S. 119 of the Succession Act, 1925, give expression to the English notion of *vested inerests* and make it the law of the land except in the case of Muhammadans.(1) A vested interest is an *immediate right*, as distinguished from a right which may come into existence in the future. The immediate right may be either a right of *present enjoyment* or a right of *future enjoyment*. In *Sashi Kantha* v. *Promode Chandra*(2) their Lordships of the Calcutta High Court pointed out the distinction between a vested interest and a contingent interest in the following words :

> "An estate or interest is vested, as distinguished from contingent, either when enjoyment of it is presently conferred or when its enjoyment is postponed the time of enjoyment will certainly come to pass; in other words, an estate or interest is vested when there is an immediate right of present enjoyment or a present right of future enjoyment. An estate or interest is contingent if the right of enjoyment is made to depend upon some event or condition which may or may not happen or be performed; . . . . . in other words an estate or interest is contingent when the right of enjoyment is to accrue, on an event which is dubious or uncertain."

See also the following cases.(3)

This section deals with the question under what circumstances a person obtains a vested interest or immediate right on a transfer of property. It provides that *unless a contrary intention appears from the terms of the transfer*, a person gets a vested interest when it is created in his favour —

(1) without specifying the time when it is to take effect, or
(2) in terms specifying that it is to take effect forthwith, or
(3) in terms specifying that it is to take effect on the happening of an event which must happen.

It will be noticed that the *test* to find out whether an interest is vested or otherwise, is the *intention of the person creating the interest*. Such intention must, however,

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Section 19 — Note 3

1. 1933 Oudh 439 (445) [A I R V 20] : 8 Luck 602 (DB).
1920 Mad 783 (785) [AIR V 7] (DB).

Section 19 — Note 4

1. 1957 S C 255 (261) [A I R V 44 C 36] : 1957 S C R 77. (Where the question is whether the interest of a person under a deed of trust is a vested as opposed to contingent interest then the determination of the question has to be guided generally by the principles recognised under Ss. 19 and 21 T. P. Act and Ss. 119 and 120, Succession Act.)
1933 Oudh 439 (444) [AIR V 20] : 8 Luck 602 (DB).

2. 1932 Cal 600 (609) [A I R V 19] : 59 Cal 859 (DB).
Also see S. 21 Note 3.

3. 1965 Mad 193 (194, 195) [AIR V 52 C 68] : ILR (1965) 1 Mad 41 (DB).
1954 Hyd 185 (189) [AIR V 41 C 61] : ILR (1954) Hyd 250 (DB).
1933 Mad 885 (886) [AIR V 20] (DB). (The ordinary distinction between vested and contingent interest consists in the nature of the event or condition on which the donee should take property. If the event is such which must happen, the interest is vested—If the event may or may not happen the interest is contingent.)

be gathered from the language employed by the grantor in the grant, giving the plain and natural meaning to the words employed by him.(4) The document must be construed as a whole, giving attention to every provision therein.(5) In cases of doubt, the rule is to so construe the document, if possible, as to lean to vesting.(6) "It has long been an established rule for the guidance of the Courts of Westminster," said Lord Chief Justice Best in *Duffield* v. *Duffield*,(7)

> "in construing devises, that all estates are to be holden to be vested, except estates in the devise of which a condition precedent to the vesting is so clearly expressed that the Courts cannot treat them as vested, without deciding in direct opposition to the terms of the will. If there be the least doubt, advantage is to be taken of the circumstance occasioning that doubt; and what seems to make a condition is holden to have only the effect of postponing the right of possession."

See also the following cases.(8)

A vested interest is not the less so, because it might not be of any value when it actually falls into possession. Thus, where a residuary legacy was given to *B* after payments of the debts of the testator, it was held that *B* got a vested interest in the legacy though there might not remain any balance after the payment of the debts.(9)

This section does not apply unless there is a *transfer* of property.(10)

Where an estate is to vest in a person on fulfilment of certain conditions, strict compliance is necessary before the party claiming the estate under the instrument can assert that he has become the owner of the estate.(11)

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4. 1957 S C 255 (261) [AIR V 44 C 36] : 1957 S C R 77.
1929 P C 149 (151) [AIR V 16] : 4 Luck 305 : 56 Ind App 213.
1967 Guj 161 (165) [AIR V 54 C 31] (DB).
1965 Mad 193 (194, 195) [A I R V 52 C 68] : ILR (1965) 1 Mad 41 (DB).
('60) ILR (1960) Ker 1119 (1120) (DB).

5. 1957 S C 255 (261) [A IR V 44 C 36] : (1957) S C R 77. (Question is one of intention to be gathered from a comprehensive view of all the terms of a document.)
1928 P C 35 (37) [AIR V 15].
1967 Guj 161 (165) [AIR V 54 C 31] (DB).
1965 Mad 193 (194, 195) [AIR V 52 C 68] : ILR (1965) 1 Mad 41 (DB).
('57) I L R (1957) Ker 822 (825) (DB). (Mother settling property on daughter. Settlement deed prohibiting encumbrances by daughter and also directing that the property should devolve in the male line of daughter's children—Estate obtained by daughter is a life estate—Intention of settlor is to give the properties to the grandsons through the daughter as a vested remainder.)

6. 1957 S C 255 (261) [AIR V 44 C 36] : 1957 S C R 77.
('63) ILR (1963) Mad 512 (516). (Settlement deed by A—Settled property to be enjoyed by A herself for life—After that her son T and his wife without powers of alienation—After them A's grandsons to enjoy the income without power of alienation — After their life time issues of R and M to take the property absolutely—No provision in the deed that R and M were to take a joint estate with right of survivorship inter se or that their issues should take only after the lifetime of the survivor among R and M — R and M took as co-tenants and the remainder in the interest which each had vested in his issue—Death of M before R—M's son is entitled to possession of what his father enjoyed immediately after the death of M.)
1960 Punj 257 (260) [A I R V 47 C 89] : I L R (1958) Punj 1852.
(1855) 24 L J Ch 505 (507) : 20 Beav 205 : 52 E R 581 : 3 W R (Eng) 341, Brockle Bank v. Johnson.

7. (1829) 4 E R 1334 (1338) : 3 Bli (N S) 260 : 1 Dow & Cl 268.

8. 1967 Guj 161 (164, 165) [AIR V 54 C 31] (DB).
1965 Mad 193 (194, 197) [AIR V 52 C 68] : I L R (1965) 1 Mad 41 (DB).
1935 Mad 865 (866, 867) [AIR V 22]. ((1829) 4 E R 1334, followed.)
(1904) 2 Ch 95 (103, 104) : 73 L J Ch 742 : 90 L T 748, In re Wrightson ; Battie Wrightson v. Thomas.
(1926) 95 L J Ch 172 (175) : 1926 Ch 223 : 134 L T 367, Blackwell v. Blackwell.

9.† 1931 Pat 76 (77) [AIR V 18].

10. 1947 Pat 7 (10) [AIR V 34 C 3] (DB). (Compromise arrangement held did not constitute transfer of property.)
1943 Bom 7 (9) [AIR V 30] (DB). (Deposit of money in a company in the name of depositor and his wife B — Deposit receipt reciting that A was the owner and B was to get it after A's death —Contention that there was a gift by A to B and B took vested interest under S. 19 — Held there was no transfer and hence no gift — Section 19 therefore was not helpful.)

11. 1954 Hyd 185 (189) [AIR V 41 C 61] : ILR (1954) Hyd 250 (DB).

5. "Or in terms specifying that it is to take effect forthwith." — Where a transfer is made to *A* "when" or "if" he shall attain a particular age the words "when" or "if" will, *unaided by context*, show that *A* was given only a contingent interest (see Note 8 on S. 21). But the words may be so controlled by other expressions as to show that the grantor's intention is merely to postpone the enjoyment and not the vesting of the interest itself.(1) In such cases the interest will be a vested one and not contingent. Thus, where *X*, by will, directed the trustees to divide the estate 21 years after the testator's death into certain shares and give one such share to his wife, and *stated that such share should vest in her at the date of his death*, it was held by their Lordships of the Privy Council that she took a vested estate, though postponed in possession for 21 years.(2)

Illustrations

(1) *A* bequest was made to *A* and *B* when they shall attain 21 years of age, and in the meanwhile the property was given to trustees to hold it for the benefit of *A* and *B*. It was held that the grant to trustees for the benefit of *A* and *B* indicated a vesting of the property in *A* and *B*.(3)

(2) *A* gift was made to *A* "provided he lives to attain the age of 21 years." It was held that the word "provided" was a technical word indicating a condition subsequent, and that consequently *A* obtained a vested interest.(4)

(3) *A* trust deed provided that the trustee should hold a fund for the use and benefit of *A* and *B* to be "made over" to them on their attaining 21 years of age. It was held that the words "to be made over" were more consistent with the postponement of a vesting *in possession* of that which is vested in interest than with the postponement of the vesting *in interest itself*.(5)

6. "On the happening of an event which must happen." — The *death* of a person is a certain and not an uncertain event.(1) It is an event which, in the case of every person, *must happen*. Thus, where a transfer is made to *A* for life and then to *B*, *B's* interest is created on the happening of an event which must happen, namely, *A's* death. It is, therefore, a vested interest.(2) Where the income of a fund was given

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Section 19 — Note 5

1. 1957 S C 255 (263) [AIR V 44 C 36] : 1957 S C R 77.
(1802) 32 E R 171 (171) : 7 Ves 421, Branstrom v. Wilkinson.

2. 1930 P C 7 (8) [AIR V 17].

3. (1802) 7 Ves 421 (422) : 32 E R 171, Branstrom v. Wilkinson.

4. (1861) 54 E R 704 (705) : 29 Beav 455.
(1855) 24 L J Ch 505 (507) : 52 E R 581 : 20 Beav 205.

5. ('01) 28 Cal 621 (633) : 28 Ind App 159 (PC).
†1931 Cal 651 (655) [AIR V 18] : 58 Cal 768.
(1841) 66 E R 930 (931) : 11 L J Ch 49 : 1 Hare 10, Lister v. Bradley. (Legacy payable to A when he attains 21 is a vested interest.)
[See ('78) 4 Cal 304 (313).

Section 19 — Note 6

1. 1957 S C 255 (260) [AIR V 44 C 36] : 1957 S C R 77.
1960 Punj 257 (260) [AIR V 47 C 89] : ILR 1958 Punj 1852.
1934 Oudh 454 (455) [AIR V 21] : 9 Luck 173 (DB).
1932 Cal 600 (609) [AIR V 19] : 59 Cal 859 (DB).
1925 All 389 (390) [AIR V 12] : 47 All 486 (DB).
1925 Mad 599 (602) [AIR V 12] (DB).
1914 Mad 64 (66) [AIR V 1] (DB).

2. ('11) 38 Cal 468 (472) : 38 Ind App 54 (PC).
(1846) 4 Moo Ind App 137 (174) : 7 Suth W R 35 (PC).
1960 Punj 257 (260) [AIR V 47 C 89] : ILR (1958) Punj 1852. (Property bequeathed to A, B and C in equal shares — A and B not to alienate but to keep the property till their lives and for maintenance — Their shares to go to C after their death—C's interest is vested interest.)
('58) 1958-2 Mad L Jour 57 (57, 58). (Where by a Settlement deed husband settles his property on the wife for life and further provides that the sons born to her by the settlor would thereafter take the property absolutely, the sons born to them after the execution of the settlement deed would get the vested remainder in the property.)
1956 Trav-Co 107 (109) [AIR V 43 C 43] (DB). (Christian, governed by Travancore Christian Succession Act, 2 of 1092, dying intestate leaving behind his widow and son — Son has a vested interest even during lifetime of his mother, subject to her life interest which is terminable on death or remarriage.)
1933 Mad 885 (887) [AIR V 20] (DB).
1929 Nag 29 (28, 29) [AIR V 16].
1927 Lah 166 (168) [AIR V 14].
1927 Nag 226 (229) [AIR V 14].

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to *A* for his life the *corpus* to be then divided and given to *B*, *C* and *D* it was held by the Privy Council that the date of the division of the corpus was a *dies certus*, namely the death of *A*, which in the course of nature must occur sooner or later, and that consequently *B*, *C* and *D* got a vested interest in the corpus, even before the death of *A*.(3) Again, where a testator provided that *A* and *B* should get his property after *his and his wife's* death, it was held that *A* and *B* obtained under the will a vested interest.(4) Where *A* nominated *B* as one entitled to receive the provident fund of *A* in the event of *A's* death, it was held in the undermentioned case(5) that *B* took a vested interest in the fund even before *A's* death.

The position would, however, be different where a transfer is made creating an interest in favour of *B* not merely in the event of *A's* death but *in the event of B surviving A*. This latter event is not a certain event and *B* would take only a contingent interest which would become vested only if he survived *A*.(5a) This was the view taken by the High Court of Madras in *Adams* v. *Mrs. Gray*,(6) where Coutts-Trotter C. J., observed as follows:

> "If a bequest is to a person for life and after his death to his children, the bequest becomes vested in each child as and when he or she is born and the vesting is not postponed till the death of the life-tenant. The expression 'after his death' is taken to indicate merely the time when the gift over becomes reduced to possession and not the time when the *right* to such possession vests. The principle underlying this rule is that no contingency is imported by the fact that the legacy is given after a life estate in the property bequeathed. As nothing is more certain than that every person who lives must die, the death of a life-tenant is an event not contingent but certain; and therefore a gift on the death of a life tenant is a bequest to take effect, not on a contingency but on an event certain to happen; and therefore the donees of the gift are held to obtain vested interest in it as and when they come into being. But if the bequest had been not merely after the death of the life tenant but to *such of her children as may survive* her or should be alive at her death, then clearly the condition of surviving or being alive at her death would be a condition precedent to the vesting itself, and in such a case, therefore, no child that does not so survive will acquire a vested interest in the bequest. The obvious principle underlying this rule of construction is that though the death of the life tenant is certain, still it is by no means certain that the donee will survive the life tenant. And if, from the words of the gift the intention of the testator is clear that the persons taking should be only such persons as survive or are alive on the death of the life tenant, then it follows necessarily that it is a contingent gift, contingent upon the donee surviving the life tenant."

In the undermentioned cases,(7) however, where property was given to *A* for

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1927 Rang 165 (166) [AIR V 14]: 5 Rang 145 (DB).
('26) 98 Ind Cas 522 (523) (DB) (All).
1925 All 389 (390, 391) [AIR V 12]: 47 All 496 (DB). (Where under a compromise decree it was settled that A was to hold an estate till his death after which it was to go to B, held that the interest acquired by B under the decree was a vested interested.)
1924 Mad 811 (811) [AIR V 11] (DB).
1923 Bom 415 (415) [AIR V 10] (DB).
1919 Mad 768 (769) [AIR V 6] (DB).
1918 Mad 458 (459) [AIR V 5] (DB).
1918 Oudh 191 (192)]AIR V 5]: 21 Oudh Cas 312 (DB).
(1900) 24 Bom 420 (423) (DB).
(1896) 22 Bom 409 (414) (DB).
('85) 9 Bom 491 (507).
('81) 4 Mad 124 (127, 128) (DB).
(1851) 4 De G & Sm 472 (477): 64 E R 918 (920), Williams v. Clark.
(1809) 16 Ves 314 (316, 317): 33 E R 1004.

[*See also* ('11) 12 Ind Cas 546 (546) (DB) (Mad).]

3. 1936 P C 285 (287) [AIR V 23].

4. ('11) 33 All 558 (559) (DB). (10 Ind Cas 641 (PC), followed.)

5. 1936 Mad 477 (479) [AIR V 23]: 59 Mad 855 (DB).

5a. *See* 1936 P C 131 (133) [A I R V 23]: 59 Mad 633: 63 Ind App 224.
1925 Mad 61 (62) [A I R V 12] (DB). (To A for life then to her issue if they survived her—Contingent estate becoming vested only on survival.)
[*See also* 1920 Bom 295 (296) [A I R V 7] (DB). (Remainder to B made contingent on birth of son to her before adoption by A or on death of A without making adoption—Is a contingent and not a vested remainder.):
1937 Pat 247 (249) [AIR V 24] (DB).]

6. 1925 Mad 599 (602) [AIR V 12] (DB).

7. 1934 Oudh 454 (455) [A I R V 21]: 9 Luck 173 (DB).

life and after his death to *B* if he survived *A*, or to his heirs if he did not survive *A*, it was held that *B* took a vested interest and not a contingent interest, contingent on his surviving A. Unless it can be assumed in these cases that it was not the intention of the transferor to regard the survival as a condition precedent to *B's* acquiring the interest, the decisions cannot, it is submitted, be regarded as correct.

An interest created in favour of a person to take effect *after the expiration of a term of years*, will be a vested interest, inasmuch as the expiration of the term is an event which must happen. Where a transfer was made for a term of years and then to trustees till *A* attained the age of 21, after which he was to enjoy the property, it was, accordingly held that A took a vested interest in the property even before the expiration of the term.(8)

The *attainment of a particular age* is not a certain event which must happen and consequently a transfer to a person when he shall attain a particular age will give that person only a contingent interest. (See Note 8 on section 21.)

A Hindu executed a deed of trust in respect of all his properties. The deed allotted specified properties to each of his two sons. It was provided that it was only after the discharge of all the debts of the settlor and the death of the settlor himself, that the trust would come to an end and the respective lots devolve on the sons. It was held by the Supreme Court that while though the settlor attached considerable importance to the liquidation of debts, yet there was nothing to show that he was apprehensive that the debts would remain undischarged out of his properties and its income and that he contemplated that the ultimate discharge of his debts to be such an uncertain event as to drive him to make the accrual of the interest to the sons under the deed to depend upon the event of the actual discharge of his debts that the interest which the sons took was a vested interest but the enjoyment of the income was restricted till the liquidation of the debts.(9)

7. "Unless a contrary intention . . . . . transfer." — The burden of proving the contrary intention is on those that assert it, and the weight of the burden is aggravated by the elimination, in the explanation, of circumstances which might, apart from the explanation, be thought sufficient to discharge it.(1)

See also Note 4.

8. Vested interest is transferable and heritable.—A vested interest, even though there is no present possession is a transferable interest in law.(1) It can be attached and sold in execution of a decree.(2) It is also a heritable interest which will

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1934 Oudh 59 (61) [A I R V 21] : 9 Luck 378 (DB).
1925 All 389 (391) [AIR V 12] : 47 All 496 (DB).

8. (1857) 76 E R 668 (673) : 3 Co Rep 16a, Boraston's case.

9. 1957 S C 255 (263) [AIR V 44 C 36] : 1957 S C R 77.

Section 19 — Note 7

1. 1931 Cal 651 (655) [AIR V 18] : 58 Cal 768.

Section 19 — Note 8

1. 1960 Punj 257 (260) [A I R V 47 C 89] : ILR (1958) Punj 1852. (Property bequeathed in equal shares to A, B and C—A and B given life estates only — Their shares to go to C on their death — C's interest is a vested interest which devolves on his heir in the event of his death before A and B.)
1956 Trav-Co 107 (109) [AIR V 43 C 43] (DB).
1937 Pat 163 (165) [AIR V 24] (DB).
1937 Sind 306 (307, 308) [A I R V 24] : 31 Sind L R 506 (DB).
1933 Mad 885 (887) [AIR V 20] (DB).
1927 Lah 166 (168) [AIR V 14].
('26) 98 Ind Cas 522 (523) (DB) (All).
1925 All 389 (391) [AIR V 12] : 47 All 496 (DB).
1923 Bom 415 (415) [AIR V 10] (DB).
1918 All 115 (120) [AIR V 5] : 40 All 692 (DB).
1918 Oudh 191 (192) [AIR V 5] : 21 Oudh Cas 312 (DB).
('05) 1905 Pun L R No. 143, p. 499 (502) (DB).
Also see S. 6, Note 6.

2. 1947 Bom 185 (187) [AIR V 34] : ILR (1947) Bom 636. (Vested remainder.)

descend on the death of the owner of the interest to his heirs.(3) In the words of this section a vested interest is not defeated by the death of the transferee before he obtains possession.(4)

9. **Postponement of enjoyment.**—It has been seen in Note 4 that an interest may be vested though the enjoyment thereof is postponed. And the explanation makes it clear that from the mere provision for postponement of the enjoyment, it should not be inferred that the interest is not vested. In other words, the mere fact that a transferee is not entitled to immediate enjoyment does not necessarily make the interest a contingent one.(1) Thus, where a gift was made to A with a direction postponing the enjoyment of it, it was held that the direction did not postpone the vesting.(2)

But though the provision for postponement does not by itself prevent the vesting of property, such a provision cannot be said to be *valid* under all circumstances. Such a provision will be valid where—

(1) the right of enjoyment is given in the meanwhile to some other person, or

(2) the transferee is under the age of majority and the enjoyment is postponed till he attains that age.

The leading case on the point is *Gosling* v. *Gosling*,(3) where Vice-Chancellor, Sir W .Page-Wood, made the following observations:

> "The principle of this Court has always been to recognise the right of all persons who attain the age of 21 to enter upon the absolute use and enjoyment of the property given to them by a will, notwithstanding any directions by the testator to the effect that they are not to enjoy it until a later age unless, during the interval the property is given for the benefit of another. If the property is once theirs, it is useless for the testator to attempt to impose any fetter upon their enjoyment of it in full so soon as they attain 21. And upon that principle unless there is in the will or in some codicil to it, a clear indication of an intention on the part of the testator, not only that his devisees are not to have the enjoyment of the property he has devised to them until they attain 25, but that some other person is to have that enjoyment, or unless the property is so clearly taken away from the devisees up to the time of their attaining 25, as to induce the Court to hold, that, as to the previous rents and profits, there has been an intestacy . . . . . the Court does not hesitate to strike out of the will any direction that the devisees shall not enjoy it in full until they attain the age of 25 years."

1934 Oudh 454 (454) [A I R V 21] : 9 Luck 173 (DB).
1934 Oudh 59 (61) [A I R V 21] : 9 Luck 378 (DB).
1930 Rang 184 (185) [AIR V 17] (DB).
1926 Mad 371 (373) [AIR V 13] (DB).

3. 1936 Cal 802 (803) [AIR V 23] : ILR (1937) 1 Cal 583 (DB). (Right of inheritance not affected by death of the holder of vested interest before the termination of the prior interests.)
1939 Nag 27 (28) [AIR V 26].
('28) 109 Ind Cas 654 (654) (Lah).
1927 Lah 166 (168) [AIR V 14].
1927 Nag 226 (229) [AIR V 14].
1919 Mad 768 (769) [A I R V 6] (DB). (Reversionary interest turned into vested one by compromise—Such interest does not pass by survivorship but by inheritance.)
('96) 22 Bom 409 (414) (DB).
('81) 4 Mad 124 (127) (DB).

4. 1960 Punj 257 (260) [A I R V 47 C 89] : ILR (1958) Punj 1852.
1937 Pat 247 (249) [AIR V 24] (DB).
1929 Mad 32 (33) [AIR V 16].

Section 19 — Note 9

1. 1957 S C 255 (263) [AIR V 44 C 36] : 1957 S C R 77.
1941 Rang 239 (240) [A I R V 28]. (Where according to the rules of Burma Oil Subsidiary Provident Fund the member's money is handed over to the trustees to be dealt with by them in accordance with those rules, and a subscriber relinquishes his right of complete control but nowhere is it suggested that the money ceases to be his property, a member has a vested interest in the deposits made by him.)
1935 Mad 865 (866) [AIR V 22].
† 1933 Mad 885 (886, 887) [AIR V 20] (DB).

2. ('60) ILR (1960) Ker 1119 (1120, 1121) (DB).
1926 Mad 645 (646, 647) [AIR V 13] (DB).
1926 Mad 371 (373) [AIR V 13] (DB).

3. ✠ (1859) 70 E R 423 (426) : 1859 John 265.

See also the following case.(3a)

The principles enunciated in *Gosling's case* have been followed in this country also. In *Gosavi Shivgar* v. *Rivett Carnac*,(4) where a testator constituted *A* as his heir but directed the trustees to hand over the properties to him when he should attain the age of 30, it was held by the Bombay High Court that the direction for postponement of enjoyment after the coming of age of the devisee must be disregarded. In *Hussein-bhoy* v. *Ahmed Bhoy*,(5) where a testator gave an absolute gift to the legatee but directed that the property shall not be made over to him until he attained a certain age beyond the period of his majority, it was held following *Gosling's case* that the direction was inoperative after the legatee's coming of age, as there was no gift of the right of enjoyment to any one else during the intervening period. Where a testator who died in the year 1896, bequeathed the whole of his property to his only son who had attained majority at the father's death, but subject to the restriction that his enjoyment of the right should be postponed till the year 1900, it was held by the High Court of Calcutta that the son took a vested interest and that the restriction on the immediate enjoyment was repugnant and void.(6) In *Enid Browne* v. *Florence Yoda Moody*,(7) where the income of a fund was to *A* for life, at whose death the corpus was to be divided and given to *B*, *C* and *D*, it was held by the Privy Council that the mere postponement of distribution of the fund to enable the life tenant to enjoy the rent has never been by itself held to exclude the vesting of the capital. See also the undermentioned cases.(8)

10. Direction to accumulate. — An intention that an interest shall not be vested is not to be inferred from a direction to accumulate the income arising out of the property until the time of payment arrives. In *Blease* v. *Burgh*.(1) a testatrix gave her residuary estate to trustees to accumulate and to stand possessed thereof and of the accumulations in trust for all the children of *J. B.* other than *A*, and to be paid on attaining 23, with a gift over, in the event of the death of all the said children under twenty-three. The Master of the Rolls observed :

> "It does not appear to me that a gift in terms which import a present vested interest, with a postponed time of payment, is made contingent by a direction to accumulate till the time of payment arrives."

3a. (1894) 63 L J Ch 753 (756) : (1894) 3 Ch 204 (208) : 42 W R (Eng) 616 : 71 L T 392. Re Johnston. (Gosling's case, (1859) 70 E R 423, followed.)

4. ('88) 13 Bom 463 (468, 469) (DB).

5. ('01) 26 Bom 319 (323, 324) (DB).

6. ('96) 24 Cal 44 (52), Lloyd v. Webb.

7. †1936 P C 285 (287) [AIR V 23] : 164 Ind Cas 321.

8. 1927 Lah 404 (407) [AIR V 14] : 8 Lah 181 (DB). (Direction postponing payment held repugnant to estate created unless the property was given for the benefit of another in the interval.)
(1907) 1 Ch 470 (474) : 76 L J Ch 296 : 96 L T 560, In re Couturier; Couturier v. Shea. Bequests payable as to part at 21, further part at 25, and the balance at 30 years of age—Each of the legatees upon attaining 21 is entitled to the payment of his legacy with the intermediate interest of income, and that the legal representative of any legatee surviving the testatrix and dying before actual payment is entitled to the legacy or balance remaining unpaid of both income and principal.)
('05) 1 Cal L Jour 605 (612). (Gift of property to a person with a proviso that for 13 years the income of the property should be used for other purposes is valid—The gift to the person during the period of 13 years is limited one and becomes absolute on the expiry of that period.)

Section 19 — Note 10

1. (1840) 48 E R 1164 (1167) : 2 Beav 221 : 9 L J Ch 226.

10a. Condition subsequent. — An interest may be vested though it may be defeated by a condition subsequent.(1) In *Umesh Chunder Sircar* v. *Mt. Zahoor Fatima*,(2) where *A* granted certain land to his wife *B* on condition that if she had a child by him the grant should be taken as a perpetual *mokurrari*, but if she had no child by him the grant should be taken as a life *mokurrari* with remainder to *X* and *Y*, it was held by their Lordships of the Privy Council that the deed conferred on *X* and *Y* a *vested* remainder liable to be displaced in the event of a child being born to *B*. In the following Bombay case, where a testator bequeathed his estate to his wife for her life and on her death to his two sisters as owners, with a proviso that if a child was born to the wife, it was to be the owner of the properties, it was held that the two sisters took vested interest in the properties on the death of the testator which was liable to be divested by the birth of a child to the widow.(2a) In an Oudh case,(3) where a will provided that after the testator's death certain property should go to *B* for life and on his death to *B's* male issue and on failure of such issue to *D*, the Privy Council case of *Umesh Chunder* was applied and it was held that *D* took a vested interest in the property.

11. Provision for gift over is not proof of intention to the contrary.— The last part of the explanation states that an intention that an interest shall not be vested is not to be inferred merely from a provision that if a particular event shall happen, the interest shall pass to another person. So where property is given to the donee in clear words, the inclusion of a clause providing for the divesting of the property from the donee would not come in the way of the property being vested in him on the date of the gift.(1) In England, where property is transferred to *A* upon his attaining a particular age, and if he should die before attaining that age, then, to *B*, *A* would get a vested interest.(2) In such cases "it is considered that the words are introduced for the sole purpose of limiting the period when he is to take an indefeasible estate and not for the purpose of showing an intention of keeping him out of the enjoyment of the property till that particular event happens."(3) In the case of transfers of *personal* property it has been held in some cases that the provision for a gift over must be taken to indicate that the prior gift was only a contingent one.(4) In this country the distinction between real estates and personal estates does

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Section 19 — Note 10a

1. 1941 Rang 239 (240) [AIR V 28].
[*See also* (1728) 24 ER 836 (837) : 2 P Wms 504 (506), Taylor v. Johnson.]

2. ('90) 18 Cal 164 (176) : 17 Ind App 201 (209) (PC).

2a. 1950 Bom 289 (292, 295) [A I R V 37 C 82] : ILR (1951) Bom 203 (DB).

3. 1940 Oudh 184 (189) [AIR V 27].

Section 19 — Note 11

1. 1914 Mad 64 (66) [AIR V 1] (DB).

2. (1683) 83 ER 614(615): 3 Lev 132, Edwards v. Hammond.
(1782) 28 E R 1069 (1070) : 1 Bro C C 181, Barnes v. Allen. (Devise to wife for life—If she dies without issue living at her death to testator's two brothers—They both died in the lifetime of the wife—The legacy was vested in both as joint tenants.)
(1921) 90 L J Ch 499 (504), In re Astor; Astor v. Adams. (Phipps v. Ackers, 8 E R 539 followed —Affirmed in appeal in (1922) 91 L J Ch 277.)
(1846) 67 E R 1036 (1038) : 5 Hare 567 : 16 L J Ch 185, Bull v. Pritchard.
(1842) 49 E R 554 (559) : 11 L J Ch 338 : 5 Beav 201, Davies v. Fisher. ((1830) 39 E R 78 not followed.)
(1808) 103 E R 625 (626, 627) : 9 East 400, Doe de Wight v. Coudall.
(1811) 104 E R 732 (734) : 14 East 601 : 13 R R 329, Doe de Hunt v. Moore.
(1866) 36 L J Ch 258 (260) : 3 Eq 315 : 15 W R (Eng) 120, Pearson v. Dolman.
[*See also* (1840) 48 E R 1164 (1167) : 2 Beav 221 : 9 L J (N S) Ch 226 : 50 R R 165, Blease v. Burgh.]

3. (1831) 58 E R 254 (261) : 5 Sim 44, Phipps v. Williams. (Affirmed in Phipps v. Ackers, 8 E R 539.)

4. *See* (1830) 39 E R 78 (80) : 1 Rus & M 208, Vaudry v. Geddes.

not apply, and by virtue of the explanation, it is clear that a provision for gift over will not render the prior gift a contingent one.(5) Thus, where property is given to *K* for life and then to *R*, the mere fact that there is a provision that if *R* should pre-decease *K*, *R's* heirs should take the property on *K's* death does not make the interest of *R* other than a vested interest.(5a) But if, in addition to the provision for a gift over, the grantor uses words clearly showing an intention to create only a contingent interest, the intention will prevail and the interest created will only be a contingent one. Thus, where a testator gave his property to his son "to be a vested interest on his attaining 21" and provided that if he died before attaining that age the property was to go to his daughter, it was held that the words that the legacy *should vest at 21* clearly indicated the testator's intention to give his son only a contingent interest.(6)

12. Power of appointment. — A power of appointment gives the donee of the power the right of disposition of the property of the donor of the power. The question arises as to whether any person can get a vested interest in the property before the exercise by the donee of his power of appointment. The general rule is that if the donor of the power indicates the class of persons or the individual who is to take the property *in default of the exercise* of the power by the donee thereof, such individual or class of persons take a vested interest in the property, which is liable to be divested by the exercise of the power subsequently.(1) In other words, the pendency of the power does not prevent the vesting of the property. But where there is no gift to an individual or a class, otherwise than as they might take by the execution of a power of appointment given to a third person, the individual or the class can take only by the execution and authority of the power. They do not take a vested interest from the time of the creation of the power.(2) In *Lambert* v. *Thwaites*,(3) where a settlement was made to *A* for life and after her death amongst all or every of the children of the settlor in such shares and proportions as should be directed by the settlor, hereafter, and the settlor died without exercising the power, it was held as follows :

> "(1) The existence of a power of appointment does not prevent the vesting of the estate until, and in default of, execution of power.
>
> (2) An estate may be vested notwithstanding the pendency of such a power liable only to be divested by the execution of the power.
>
> (3) Where the power is so created that in terms nothing is given to any person or class of persons except through the execution of the power, the general principle is that if you can only ascertain from the terms of the power itself, those who are intended to

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5. 1930 P C 7 (8) [AIR V 17].
1920 Mad 783 (786) [AIR V 7] (DB).
†('84) 6 All 583 (597) (DB).
(1879) 5 Cal 59 (63).
('79) 4 Cal 304 (313).

5a. 1926 Cal 1175 (1176) [AIR V 13] (DB).

6. (1816) 35 E R 855 (855) : 2 Mer 38 : 16 R R 142, Glanvill v. Glanvill.
(1836) 58 E R 979 (981) : 7 Sim 628 : 5 L J (N S) Ch 122 : 40 R R 193 : 3 L J (N S) Ex 194 Russel v. Buchanan.

Section 19 — Note 12

1. (1857) 69 E R 1219 (1222) : 3 K & J 529 Salisbury v. Denton.
(1883) 31 W R (Eng) 945 (946) : 24 Ch D 244 (249) : 53 L J Ch 52 : 49 L T 124, Wilson v. Duguid.
(1867) 36 L J C P 218 (223) : L R 2 C P 511 (522) : 16 L T 587 : 15 W R (Eng) 922, Bradley v. Cartwright.

2. (1750) 28 E R 41 (41, 52) : 2 Ves Sen 61, Marlbrough (Duke) v. Godolphin (Lord).

3. (1866) 35 L J Ch 406 (408, 410) : 2 Eq 151 (155) : 14 L T 153 : 14 W R (Eng) 532.

be benefited, you must hold that the persons who are to take in default of appointment are those who may take under the appointment.

(4) The above principle does not apply when by the terms of the instrument itself the settlor or the testator himself declares whom he means to take in default of appointment."

In the undermentioned Patna case(4) a will bequeathed property to *A* for life with remainder to *B*. *A* was also given a general power of appointment under which she could appoint her daughter's sons to certain portion of the property. The question arose whether *B* took a vested interest on the death of the testator, during the pendency of the power. The High Court observed as follows :

"The existence of a power of appointment would not prevent the vesting of the remainder, because where estates are subjected to a general power of appointment in the first taker with remainder over in default of such appointment, the power does not suspend the remainder from vesting."

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20. Where, on a transfer of property, an interest therein is created for the benefit of a person not then living, he acquires upon his birth, unless a contrary intention appear from the terms of the transfer, a vested interest, although he may not be entitled to the enjoyment thereof immediately on his birth.

When unborn person acquires vested interest on transfer for his benefit.

Synopsis

1. Scope of the section.
2. Interest created for the benefit of. See Note 3 on Section 13.
3. "Unless a contrary intention appear from the terms of the transfer."
4. Postponement of enjoyment.
5. Rules of Hindu and Muhammadan law as to transfers for benefit of unborn persons. See Notes 5 and 6 on Section 13.

1. Scope of the section. — Sections 13 and 14 deal with the restrictions, subject to which only, the creation of an interest in favour of an unborn person will be operative. Where an interest is *validly* created in favour of an unborn person, this section declares that such interest becomes *vested* in the unborn person, *upon his birth* unless a contrary intention appears from the terms of the transfer.(1) In the undermentioned case(1a) where the donor transferred the property to his daughter's son *A* and by the very transfer he directed that the property was to be enjoyed not only by *A* but also by other sons of the daughter who might be born to her before *A* attained majority, it was held that such a case was covered not by the provisions of S. 13 but by this section and as soon as another son was born to the daughter he became entitled to a moiety of the property under this section. (See also Section 13, Note 2.)

Relinquishment of an interest in immovable property by a coparcener in a Mitakshara Joint Hindu family in favour of unborn sons is not a transfer of property Section 20 contemplates the creation of an interest on a transfer of property for benefit of unborn person. As S. 20 is not attracted, the release in favour of persons not in

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4. 1937 Pat 163 (164) [AIR V 24] (DB).

Section 20 — Note 1

1. ('01) 28 Cal 621 (634, 635) : 28 Ind App 159 (PC). (Case of bequest.)
1925 Mad 599 (602) [AIR V 12] (DB). (Do.)

1a. 1962 Mys 98 (100) [AIR V 49 C 35].

existence confers no benefit in law on the after begotten sons.(2)

Section 19 lays down the rule as regardr the vesting of interests created on transfers of property in general, while this section deals with the particular case of the creation of an interest in favour of unborn persons.

2. Interest created for the benefit of.—See Note 3 on Section 13.

3. "Unless a contrary intention appear from the terms of the transfer." – The rule that an unborn person in whose favour an interest has been created, acquires a vested interest on his birth, only applies where no contrary intention appears from the terms of the transfer. Where, for instance, the transferor expresses his intention that the property should not vest in the unborn transferee until some time after his birth, or makes the vesting contingent on the happening of an uncertain event, the vesting will be postponed till the time specified arrives, or till the uncertain event happens.(1) In no case, however, can the vesting be postponed beyond the limits laid down by S. 14.(2)

See also Notes on Sections 13 and 19.

4. Postponement of enjoyment.—The vesting of an interest does not necessarily carry with it the right to enjoy such interest immediately. Hence an interest may vest in the unborn person as soon as he is born, although he may not be entitled to the enjoyment thereof immediately on birth. See also Note 9 on Section 19.

5. Rules of Hindu and Muhammadan law as to transfers for benefit of unborn persons.—See Notes 5 and 6 on Section 13.

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21. Where, on a transfer of property, an interest therein is created
Contingent interest. in favour of a person to take effect only on the happening of a specified uncertain event, or if a specified uncertain event shall not happen, such person thereby acquires a contingent interest in the property. Such interest becomes a vested interest, in the former case, on the happening of the event, in the latter, when the happening of the event becomes impossible.

Exception.—Where, under a transfer of property, a person becomes entitled to an interest therein upon attaining a particular age, and the transferor also gives to him absolutely the income to arise from such interest before he reaches that age, or directs the income or so much thereof as may be necessary to be applied for his benefit, such interest is not contingent.

Synopsis

1. Analogous law.
2. Section does not affect rules of Muhammadan law.
3. Scope of the section.
4. Contingent interest is a transferable interest.
5. Contingent interest, if includes expectancies and mere possibilities.

2. 1965 Andh Pra 177 (183) [A I R V 52 C 47] : ILR (1965) Andh Pra 771 (FB).

Section 20 — Note 3

1. 1948 Bom 188 (192) [A I R V 35 C 55] (DB).

(What is given to an unborn person need not necessarily vest in him at his birth.)

2. 1948 Bom 188 (197, 198) [A I R V 35 C 55] (DB).

6. "Specified uncertain event." See Section 28, Note 7.
7. Death, not an uncertain event, but survival at death of another, is.
8. Transfer to person at particular age.
9. Transfer to persons 'then' living after prior interests.
10. Direction to do what the law enjoins as a duty, if a contingency.
11. Contingent interest when becomes vested.
12. Two or more contingencies.
13. Exception.
14. "Before he reaches that age."
15. "Or directs."

1. Analogous law.—Section 120 of the Indian Succession Act, 1925, corresponds to this section and runs as follows :

"120. (1) A legacy bequeathed in case a specified uncertain event shall happen does not vest until that event happens.

(2) A legacy bequeathed in case a specified uncertain event shall not happen does not vest until the happening of that event becomes impossible.

(3) In either case, until the condition has been fulfilled, the interest of the legatee is called contingent.

Exception.—Where a fund is bequeathed to any person upon his attaining a particular age, and the will also gives to him absolutely the income to arise from the fund before he reaches that age, or directs the income, or so much of it as may be necessary, to be applied for his benefit, the bequest of the fund is not contingent."

2. Section does not affect rules of Muhammadan law.—Section 2 provides that nothing in the second chapter of the Act shall be deemed to affect any rule of Muhammadan law. This section does not, therefore, affect any rule of Muhammadan law. Under that law contingent interests are not recognised.(1) Thus, a contingent interest cannot be the subject of a valid gift.(2) As to whether a *vested* remainder can be validly created under that law, see Note 2 on Section 19.

3. Scope of the section. — This section defines what a contingent interest is and when such interest becomes *vested*. The words "is created in favour of a person *to take effect* only on the happening of a specified uncertain event," etc., show that an estate or interest is contingent when the *right* of enjoyment is to *accrue* on an event which is dubious or uncertain.(1a) Where a *right* accrues immediately but the enjoyment of the interest is postponed to a future day, the interest is *vested* and not contingent. (See Note 9 on S. 19). The test, therefore, to see whether an interest created is vested or contingent is to see whether there is an *immediate right* of present or future enjoyment, or whether the right itself is to *accrue* on the happening of an uncertain event.(1) The question is really one of intention to be gathered from a comprehensive view of all the terms of a document. Further, the Court has to approach the task of construction in such cases with a bias in favour of a vested interest unless the intention to the contrary is definite and clear.(1aa)

Illustrations.

(1) A grant provided that on the death of the last surviving widow of the late Raja of Tanjore, his daughter, or failing her the next heir, if any, should inherit the property.

Section 21 — Note 2

1. ('06) 28 All 342 (345) (DB).
2. ('11) 36 Bom 214 (226).
('66) 5 Suth W R 4 (19) (DB).

Section 21 — Note 3

1a. 1965 Mad 193 (195) [AIR V 52 C 68] : I L R (1965) 1 Mad 41.
1954 Hyd 185 (189) [A I R V 41 C 61] : I L R (1954) Hyd 250.
1. 1932 Cal 600 (609) [A I R V 19] : 59 Cal 859 (DB).
Also see S. 19, Note 4.
Also see S. 23, Note 5.
1aa. 1957 S C 255 (261) [A I R V 44 C 36] : 1957 S C R 77.

It was held by their Lordships of the Privy Council that until the death of the last surviving widow, the interest created in favour of the daughter was only contingent on her surviving the last widow.(2)

(2) A testator bequeathed to *A*, *B* and *C* Rs. 1,000 each to be paid to them on the occasion of their marriage. It was held that the gift was contingent upon their marriage taking place after the will came into effect. *A* and *C* married before the testator's death and the contingency contemplated did not therefore happen, with the result that they did not take the bequest. *B* married after the testator's death, and on such marriage, the gift became a vested one.(3)

(3) A transfer was made "to *A* for life, then to her adopted son; if she dies without adopting anybody then to *B* and her sons." *B* predeceased *A*. It was held that *B* obtained only a contingent interest the contingency being that *A* should die without making an adoption.(4)

See also the undermentioned cases.(5)

A provision as to provident fund money that if a member while in service should die or become insane the sum standing to his credit should be paid to certain persons, does not mean that his right to the money takes effect only if he does not die or become insane during service and hence his interest in the money is not merely a *contingent* interest.(6)

One of the features of a contingent interest is that if a person dies before the contingency disappears and before the vesting occurs, the heirs of such a person do not get the benefit of the gift.(7)

Contingent interest does not necessarily require a prior interest for its support.(8)

4. Contingent interest is a transferable interest. — It has already been seen in Note 5 on S. 5 that a contingent interest, not being a mere possibility, is a well recognised form of property which is capable of being transferred. Such a transfer would effectually pass to the transferee all the interest which the transferor possessed when the contingency happened and the interest vested in possession.(1)

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2. 1936 P C 131 (133) [AIR V 23] : 59 Mad 633: 63 Ind App 224.
Also see S. 23, Note 5.

3. 1930 Bom 191 (199, 200) [AIR V 17] : 54 Bom 358.

4. 1920 Bom 295 (296) [AIR V 7] (DB).

5. 1965 Mad 193 (194, 195) [A I R V 52 C 68] : ILR (1965) 1 Mad 41. (Partition deed between father A and son B giving A right to mortgage and lease but not to sell or gift — B to get A's share in case of A not getting son by second marriage — A not marrying again — Held on construction, that A got only life estate under the deed and B was entitled to vested remainder.)
1956 Mad 304 (304, 305) [AIR V 43 C 95]. (Settlement in favour of wife in case of disagreement between husband and wife — Interest of wife is contingent.)
1944 Bom 196 (197) [AIR V 31]. (Bequest to testator's wife for her lifetime and after her death to testator's nephew if he remains obedient to her and renders service to her — Held, that the vesting was postponed till the death of the wife and was contingent upon his remaining obedient to her.)
1936 Lah 1002 (1004) [AIR V 23] (DB). (Plot of land purchased by wife — Mutual agreements between husband and wife providing that husband would build house on the site and on consideration thereof would be entitled to live in house for his lifetime — Both husband and wife to have right of residence and on their death their daughter to inherit it — Agreements held to create contingent interest.)
('81) 6 Cal 421 (426, 428) (DB). (Gift to several sons with the proviso that if any one should die leaving no male issue, his share should go over to the others.)
(1911) 38 Cal 327 (333). (Bequest to daughters "when they will be married"—Held that having regard to other provisions in will, was not contingent on marriage which was an uncertain event.)

6. 1941 Rang 239 (241) [AIR V 28].

7. 1957 S C 255 (263) [A I R V 44 C 36] : 1957 S C R 77.

8. 1960 Cal 609 (615) [AIR V 47 C 167].

Section 21 — Note 4

1.† 1921 P C 138 (144) [AIR V 8].
1967 Guj 161 (164) [AIR V 54 C 35] (DB). (Gift contingent on person's surviving upto 31-3-1987 — Interest in corpus of property not a spes successionis).

But though a contingent interest can be made the subject of a valid transfer *inter vivos* it cannot be made the subject of a *forced sale in attachment proceedings.* The reason is that S. 60, sub-s. (1), cl. (m) of Code of Civil Procedure expressly provides that a merely contingent or possible right or interest shall not be liable to attachment and sale in execution of a decree.(2)

It has been held in the undermentioned case(3) that a contingent interest is not an *existing right* and may never ripen into an existing right, and is not a sufficient interest to ground an action for declaration of right.

5. Contingent interest, if includes expectancies and mere possibilities.—The chance of an heir apparent to succeed to a person as heir or other mere possibility of a like nature is not a "contingent interest" within the meaning of this section.(1)

6. "Specified uncertain event."—See Section 28, Note 7.

⑦ Death, not an uncertain event, but survival at death of another, is.—As has been seen in Note 6 on S. 19 the *death* of a person is not an uncertain event but is a certain one. An interest created to take effect *on the death of another person* is, therefore, not a *contingent* one, but is a *vested* interest. The *survival* or the being alive of a person at the death of another is, on the other hand, an uncertain event and consequently a transfer to a person *if he survives or is alive at the death of another* creates only a contingent interest.

⑧ Transfer to person at particular age. — A transfer to a person to take effect upon his attaining a particular age gives him only a contingent interest till he attains that age.(1) This is also clear from the language of the exception to the section. In the undermentioned case,(1a) however, it was observed that the law "does not regard as uncertain the *event of a person attaining a given age* or of the death of somebody beyond which his enjoyment is postponed because if he lives long enough the event is sure to happen." It is submitted that the observations as to the attainment of age are not correct.

The question whether a transfer has been made to take effect in favour of a person on his attaining a particular age, so as to give him only a contingent interest is one which must be decided having regard to the intention of the transferor as expressed by the words used by him and by other circumstances.(1aa) In England, it has

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1960 Cal 609 (615) [AIR V 47 C 167]. (Contingent interest does not necessarily require a prior interest for its support.)
(1841) 3 Moo Ind App 435 (446) (PC).
See also cases under S. 5 N 6 Pt. 12.

†('06) 30 Bom 304 (315). (Affirmed on appeal in 31 Bom 165.)
[But see ('87) 1887 All W N 84 (88) (DB). (An expectancy is spoken of as a contingent interest, but this section has not been referred to.)]

2. 1957 S C 255 (259) [A I R V 44 C 36] : 1957 S C R 77.

†1939 P C 6 (8) [AIR V 26] : ILR (1939) Bom 36 : 32 Sind L R 963. (Bequest of income of property to husband and wife for life — Upon death of both gift over to their children — Held on construction of will that during lifetime of both the parents, a child's interest was only contingent and not liable to attachment — Confirming 1936 Sind 65 [AIR V 23].)

3. ('08) 35 Cal 777 (789) (SB). (Per Maclean, C. J.).

Section 21 — Note 5

1. 1967 Guj 161 (164) [AIR V 54 C 31] : (1966) 2 I T J 893 : 63 ITR 133 (DB).

Section 21 — Note 8

1. See cases cited in foot-notes 2 to 7.
[But see (1849) 19 L J Ch 146 (147) : 3 De G & Sm 629, Riley v. Garnett.)]

1a. 1932 Cal 600 (609) [AIR V 19] : 59 Cal 859 (DB).

1aa. 1967 Guj 161 (168, 169) [A I R V 54 C 31] (DB). (Held that in view of other provisions in the deed the interest created was vested and not contingent.)
[*See* ('60) ILR (1960) Ker 1119 (1120, 1121). (Testator keeping certain amount with wife to be paid to son on attaining age of 35 — Direction to wife to withhold payment in case she

generally been held that a gift to A *when* or *if* he shall attain a particular age, unaided by context, is contingent upon the donee attaining the particular age.(2)

In *Hanson* v. *Graham*(3) the Master of the Rolls observed :

"No case has determined, that the word 'when', as referred to a period of life, standing by itself and unqualified by any words or circumstances, has been ever held to denote merely the time, at which it is to take effect in possession ; but standing so unqualified and uncontrolled it is a word of condition, denoting the time, when the gift is to take effect in substance. That this is so, is evident upon mere general principles ; for it is just the same, speaking of an uncertain event, whether you say 'when' or 'if' it shall happen. Until it happens, that, which is grounded upon it, cannot take place."

It has also been held in England that a gift to such of a class of persons, as shall attain a particular age, is also only a contingent gift.(3a) In *Festing* v. *Allen*(4) where a gift was made to A for life and then to such of her children as shall attain the age of 21 years, it was held that the gift to the children created only a contingent interest. The decision rested upon *Duffield* v. *Duffield*,(5) where the House of Lords accepted the reasons given by the Chief Justice of the Court of Common Pleas in the following words :

"It is impossible to say that the words of this will do not import conditions precedent to the vesting of these estates. The estates are not given to any particular children by name, but to such children as shall attain the age of twenty-one years; until they have attained that age, no one completely answers the description which the testator has given of those who are to be devisees under his will, and therefore, there is no person in whom the estates can vest. It is an established principle of law, recognised by all the cases that are in the books, and founded on the nature of things, that estates must remain contingent until there be a person having all the qualifications that the testator requires, and completely answering the description given of the object of his bounty in his will."

In *Adams* v. *Mrs. Gray*,(6) where a bequest had been made to A for life and then to her child who being a son shall attain the age of twenty-one years, Coutts-Trotter C. J., of the High Court of Madras observed as follows :

"There can be no doubt whatever that the attaining of twenty-one years is clearly a condition and the intention of the testator was, apart from the other clauses in the will, that no son of Hester Alice Gray who does not attain twenty-one years should take. The requirement, therefore, that son of Hester Alice Gray to take should be one who had attained twenty-one years is a contingency and would make the bequest a contingent bequest. The position then is this: that a bequest to E. G. Adams which would otherwise have vested on his birth is made contingent on his attaining twenty-one years."

In *Ma Yait* v. *Official Assignee*,(7) where under a settlement an interest was created

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feels son would waste money with option to pay yearly interest — Amount held was an outright gift and only payment was deferred for future date — Interest of son was vested interest.)

2. Jarman on Wills, 5th Edn., Vol. I, Page 762.

(1817) 35 E R 979 (988) : 2 Mer 363, Leake v. Robinson.

(1825) 4 L J Ch 13 (16) : 27 R R 251, Bentinck v. Duke of Portland.

(1881) 30 W R (Eng) Dig 225 (225) : 7 L R Ir 306, Love v. Love.

(1905) 74 L J Ch 487 (488, 489) : (1905) 2 Ch 295 (300), In re Francis.

(1921) 90 L J Ch 499 (504), In re Astor. ((1905) 74 L J Ch 487 followed—This case was affirmed on appeal in (1922) 91 L J Ch 277.)

(1742) 2 Atk 329 (330) : 26 E R 600, Haughton v. Harrison.

(1841) 66 E R 930 (931) : 1 Hare 10, Lister v. Bradley.

[*See also* (1851) 87 R R 449 (450, 451) : 4 De G & Sm 472, Williams v. Clark. (Direction to pay A at 21 without anything further creates contingent interest but context may show that vested interest was given.)]

[But see (1587) 76 E R 668 (675) : 1 Eq Cas Abr 180, Boraston's case.]

3. (1801) 31 E R 1030 (1032, 1033) : 6 Ves 239.

3a (1921) 90 L J Ch 499 (506), In re Astor.

(1817) 35 E R 979 (988) : 2 Mer 363, Leake v. Robinson.

4. (1843) 152 E R 1204 (1213) : 12 M & W 279.

5. (1827) 6 E R 525 (542, 543) : 1 Dow & Cl 268.

6. 1925 Mad 599 (603) [AIR V 12] (DB).

7. 1930 P C 17 (18) [AIR V 17] ; 8 Rang 9 : 57 Ind App 10.

in favour of all the children of the settlor to take effect after the youngest child attained the age of twenty, it was held by their Lordships of the Privy Council that until the youngest child attained that age, the children had only a contingent interest in the property.

9. Transfer to persons 'then' living after prior interests. — Where a person devised a house to A for life, then to J and after him to his widow W and thereafter to K "if then living," it was held by their Lordships of the Privy Council that the rule is that where there is a gift, after prior interests, to a person then living the word "then" must be taken to refer to the *last* antecedent.(1)

10. Direction to do what the law enjoins as a duty, if a contingency.— In *Ranganatha Mudaliar* v. *Mohana Krishna*(1) it was held by the High Court of Madras that a mere direction by the testator that his legacies charged should be given *after the debts are discharged* would not make the gifts which are otherwise vested, contingent, as it is the duty which the law casts upon the executors, that they shall discharge the debts before giving effect to the legacies or gifts.

11. Contingent interest when becomes vested.—An interest contingent *on the happening* of a specified event becomes vested on the happening of the event. If the contingency becomes impossible, the interest never comes into effect. Where a bequest was made in favour of *A* upon his attaining the age of 21, it was held by the High Court of Calcutta that the interest was contingent on *A's* attaining the age of 21, that until then it did not take effect, but that the property would vest in the heir-at-law of the testator as on an intestacy until the happening of the event.(1) *A* mortgaged property *x* to *B* with a clause providing that, in the event of the security being lost or diminished by reason of claims made thereto by third persons, *B* should recover his moneys from property *y*. Subsequently, *A* mortgaged property *y* to *C*. *Thereafter* the security given to *B* was diminished by the successful claims of third persons to property *x* as contemplated. *B* thereupon claimed to enforce his rights against property *y* in priority to *C*. It was held that *B's* claim against property *y* was only a contingent one and became vested on the happening of the contingency, namely, the diminution of the security. That having happened subsequent to the mortgage to *C*, *B* could not claim any priority against him.(2)

An interest, to take effect if a specified uncertain event *shall not* happen, will become vested when the happening of the event becomes impossible.

12. Two or more contingencies. — Where on a transfer of property, an interest is created in favour of a person to take effect on the happening of *more contingencies* than one *all* the contingencies must be fulfilled before the interest can become vested.(1) Thus, in the case of a transfer "to A, and if he should die before marriage

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Section 21 — Note 9

1.† 1918 P C 206 (208) [AIR V 5] : 45 Ind App 257 : 43 Bom 88.

Section 21 — Note 10

1. 1926 Mad 645 (646) [AIR V 13] (DB).

Section 21 — Note 11

1. ('05) 32 Cal 861 (869) (DB).
('81) 7 Cal 218 (224).
2. 1930 Oudh 129 (131) [AIR V 17] (DB).

Section 21 — Note 12

1. 1944 PC 67 (70) [AIR V 31] : 71 Ind App 93 ILR (1944) Kar (PC) 238. (Attaining a particular age and surviving a named person.)
†(1860) 54 E R 435 (437) : 28 Beav 440, Seccombe v. Edwards.
(1827) 6 E R 525 (543) : 1 Dow & Cl 268, Duffield v. Duffield. (Attaining of age and taking of a particular name.)
(1831) 58 E R 524 (561) : 5 Sim 44, Phipps v. Williams. (Attaining age and giving security.)

and have no issue, then to *B*," *B* will not take the estate unless *both* the events happen.(2) Where a transfer is made by which an interest is created on the fulfilment of two contingencies in the *alternative*, the estate would vest on either of them happening. Where neither of the contingencies happen the estate would not vest.(3)

13. Exception. - It has been seen in Note 8 that where on a transfer of property an interest is created in favour of a person upon his attaining a particular age such interest is *prima facie* a contingent one. This exception provides that where on such a transfer the transferor, by a further clause, gives the transferee the income to arise from such interest, or directs such income to be applied for his benefit, the interest is not to be considered contingent. The law is the same in England.(1) The principle on which this exception rests is that, ordinarily, a person is not entitled to the income of property unless the property itself is vested in him, so that the giving of the income is presumptive proof of the intention to give a vested estate. The principle was stated in *Stapleton* v. *Cheales*,(1a) decided in the year 1711 in England. In that case the question arose whether, if a legacy was devised to *A* upon his attaining the age of 21, and, by a subsequent clause, the income (by way of interest) from the legacy was also given to him in the meanwhile, he took a vested or contingent interest. The Master of the Rolls observed as follows:

> "If a legacy be devised to one at 21 or if, or when he shall attain the age of 21 years, and the legatee dies before that age, in this case the legacy is lapsed, and shall not go to his executors or administrators. But if in that case the testator had added, that in the meantime, or until the legatee attains that age, that he shall have interest for the said legacy at such a rate, from the time of his, the testator's decease, *this subsequent clause explains the intent of the testator, so as to make the legacy, which was the principal, an interest vested*, which shall go to his executors or administrators, though the legatee die before that age, *because, if the principal were not due presently upon the testator's decease, there could no interest accrue to the legatee at the time.*"

But it is necessary, for the applicability of the above principle that the *whole* of the income to arise from the interest created should be made available to the person in whose favour the interest is created.(2) Where the income is partly given to the owner of the interest created and partly to a *third person*, obviously the presumption that the owner of the income is the owner of the property cannot be applied. In such cases the interest created will be only a *contingent* one. But a direction to apply the *whole or a part* of the income for the benefit of *A* until he shall attain a particuler age,

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† (1857) 10 E R 1216 (1227) : 6 H L C 61, Grey v. Pearson.
(1871) 40 L J Ch 355 (358) : 11 Eq 514 (522), Reed v. Braithwaite.

2. (1860) 54 E R 435 (437) : 28 Beav 440, Seccombe v. Edwards.
(1858) 70 E R 294 (300) : 4 K & J 709, Maddison v. Chapman.

3. (1871) 40 L J Ch 316 (317) : 24 L T 223, In re Eddel's Trusts.
(1807) 33 E R 570 : 14 Ves 389, Knight v. Cameron.
(1873) 16 Eq 221 (224, 225) : 42 L J Ch 422, In re Pecks Trusts.
(1880) 29 W R (Eng) 348 (348) : 16 Ch D 47 (48), Issacson v. Webster.
[*See also* (1867) 36 L J Ch 258 (260) : 3 Eq 315, Pearson v. Dolman.]

Section 21 — Note 13

1. (1857) 26 L J Ch 635 (643) : 3 Sm & G 568, Browne v. Browne.
(1871) 6 Ch App 782 (788), Williams v. Haythorne.
(1756) 1 Burr 228 (233, 234) : 97 E R 287, Goodtitle v. Whity.

1a. (1711) 24 E R 150 (150) : 3 Ch 317.

2. 1967 Guj 161 (168) [AIR V 54 C 31] : (1966) 2 I T J 893 : 63 I T R 133 (DB). (Direction requiring application of income for the benefit of beneficiary and his wife—Exception applies.)
(1906) 75 L J Ch 359 (361) : (1906) 1 Ch 783 (788), Whitby v. Von Luedecke.
(1876) 45 L J Ch 208 (209) : 34 L T 120, Bolding v. Strugnell.
(1879) 27 W R (Eng) 544 (545) : 11 Ch D 406 (411), In re Gyimshaws Trusts.
(1896) 65 L J Ch 863 (867) : (1896) 2 Ch 711, Re Wintle.
[*See also* (1875) 23 W R (Eng) 314 (314) : 19 Eq 286, Fox v. Fox.]

without any gift over of the unapplied portion is really a gift of the whole of the income and consequently *A* will get a vested interest. The fact that the part of the income to be applied for his benefit depends upon the *discretion* of the trustee or other person, does not affect the matter, provided such person has no discretion to spend any part of the income for the benefit of a third person. In *Fox* v. *Fox*(3) a legacy was given contingent upon the legatee attaining a particular age with a direction to apply, in the meantime, the income or *so much thereof as the trustees may think fit* for the maintenance of the legatee. Sir George Jessel, M. R. observed :

> "The gift must be read as a direction to apply the whole income for maintenance with a discretionary power reposed in the trustees to apply less than the whole income for the purpose if they thought fit. A gift of the intermediate income to be applied for the benefit of the parties contingently entitled would, according to *Hanson* v. *Graham*,(4) vest the fund, and he should regard the fund as not the less vested if to that direction a discretion was appended not to apply the whole income in that manner, *provided there was no gift over of the unapplied* portion."

The view taken in *Fox* v. *Fox*(4a) has been generally followed in England,(5) and the words "the income or *so much thereof as may* be necessary to be applied for his benefit" in the exception have only given to the view expressed in that case.

It is also necessary for the exception to apply that the income to arise out of an interest must be given to the *person to whom such interest is given on his attaining a particular age.* Where property is given to such members of a *class* of persons as shall attain a particular age and the income is directed to be applied for their benefit without specifying at the same time that the income from the *respective* shares should be applied for their benefit, the exception cannot apply and the interests taken would be only contingent ones.(5a) The reason is that in such cases, the income from the share of one of the members of the class may be spent, according to the direction, for the benefit of the others, and the principle underlying the exception cannot be applied. In *In re Gossling*(6) there was a gift to *A* and *B* equally on their attaining the age of 21 with a direction that the income of the property should be applied during their minorities for their benefit. It was held that the interest taken was only a contingent one. Swinfen Eady, J., in coming to this conclusion, observed as follows :

> "There is no gift except in the direction to pay on his attaining the age of 21 years, and *prima facie* his interest is contingent. It was, however, argued that the direction as to maintenance that followed had the effect of making the interest vested. The question at once arises, is the income divided into aliquot shares of equal moieties corresponding with the *corpus*, or is the income of the entire fund given for the maintenance and support of the two children, and in such terms that it would not be a breach of trust to apply more than half the income for the maintenance and support of one of the children if the circumstances justified or required it? I am of opinion that, according to the true construction of the clause, the whole income, while both children were under age might be applied in unequal proportions for their main-

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3. (1875) 23 W R (Eng) 314 (314) : 19 Eq 286 (291). (Following Hanson v. Graham, (1801) 31 E R 1030.)

4. (1801) 31 E R 1030 (1035, 1036) : 6 Ves 239. (Distinguishing Baraston's case, 3 Co. 16; May v. Wood, 3 Bro. C. C. 471—Stapleton v. Cheales, 2 Vern 673, Referred to.)

4a. (1875) 23 W R (Eng) 314 (314) : 19 Eq 286.

5. (1899) 68 L J Ch 1 (5) : (1899) 2 Ch 739 (747), Turney v. Turney.
(1907) 76 L J Ch 41 (44) : (1907) 1 Ch 180 (184), Williams v. Williams.
(1922) 91 L J Ch 521 (527) : (1922) 2 Ch 321 (331), Foster v. Ussher.
[But see (1896) 65 L J Ch 863 (867) : (1896) 2 Ch 711 (719), Re Wintle.
(1879) 27 W R (Eng) 544 (545) : 11 Ch D 406, In re Grimshaw's Trusts.]

5a. †(1902) 71 L J Ch 680 (682) : (1902) 1 Ch 945, In re Gossling.
(1891) 60 L J Ch 671 (673, 674) : (1891) 3 Ch 197 (202), In re Mervin.
('87) 12 Bom 137 (145).
[*See* ('46) 51 Cal W N 227 (238). (The exception to S. 21 will not be applicable to a gift to a contingent class which is governed by S. 22.)]

6. (1902) 71 L J Ch 680 (682) : (1902) 1 Ch 945 (948, 949).

tenance and support . . . . . I am of opinion that John Tom Gossling did not attain a vested interest."

The case of *In re Gossling*(6a) was followed in *Cowasji Edalji* v. *Ratanbai* (7) a case arising under S. 107 of the Indian Succession Act, 1865.(8) In that case a testator, after stating that his wife was in the family way, directed the executor to maintain the testator's wife, the expected son or daughter and the executor himself, *out of the properties and effects bequeathed.* He further declared:

"should a son be born he also shall be cherished and maintained and educated and brought up. And when he comes of age, my executor or after his death his executors or executrices shall make over the whole of my *remaining properties to the said son.*"

It was held by the trial Court that in view of the fact that the executor could utilise even the *corpus* of the property itself, it could not be said that there was any definite ascertained interest "to arise from the fund" within the meaning of S. 107 of the Succession Act, 1865. Their Lordships of the Privy Council agreed with this view and observed:

"In the first place it is to be noticed that there is no direct gift to the son, but only a direction to hand over, not any particular fund, but the whole of the testator's remaining properties when the son comes of age. Nor is income of such remaining properties to be employed in any way in accordance with the terms of the section absolutely for the son, nor is it directed that the income, or so much of it as may be necessary, should be applied for his benefit. That would be impossible, as the remaining properties are not in any way ascertained or ascertainable."

See also the undermentioned case(8a) to a similar effect.

It makes no difference whether a gift of the income *precedes* or *follows* the gift of the *corpus* if the other conditions of the exception are satisfied.(9)

The exception applies only when a person becomes entitled to an interest on his 'attaining a particular age'. It has no relation to any other contingency e.g., 'his surviving a named person'. Hence where on a transfer of property a person becomes entitled to an interest therein upon a double contingency namely, upon his attaining a particular age and also upon his surviving a particular named person the exception would not apply.(10)

14. "Before he reaches that age." — In *Davies* v. *Fisher*(1) a bequest was made to "such children of W. D. as shall severally attain the age of *twenty-five* years; the income of the property during their *minorities* to be applied for their respective support, maintenence," etc. Nothing was said about the disposal of the income between legatees attaining majority and their attaining the age of twenty-five. In other words, there was a period before the legatees attained the specified age during which, the income was not expressly stated to be given to them. It was nevertheless held that the children of W. D. took *vested* and not contingent interests. The direction as to application of the income was considered only a qualification of the first direction as to the division of the *corpus*, and the result of the direction to divide followed by the direction to apply the income, was without more held to give vested interests.

6a. (1902) 71 L J Ch 680 (682): (1902) 1 Ch 945.

7. 1925 P C 27 (28, 29) [AIR V 12] : 49 Bom 167 : 52 Ind App 95.

8. Now see the Indian Succession Act, 1925, S. 120, reproduced in Note 1.

8a. ('46) 51 Cal W N 227 (238).

9. (1876) 45 L J Ch 208 (209) : 34 L T 120, Bolding v. Strugnell. (But see a contrary opinion expressed in Spencer v. Wilson, (1873) 21 W R (Eng) 838 (839)).

10. 1944 PC 67 (70) [AIR V 31] : 71 Ind App 93 : ILR (1944) Kar (PC) 238. (Case under S. 120, Succession Act.)

Section 21 — Note 14

1. (1842) 49 E R 554 (558) : 5 Beav 201.

15. "Or directs."—A direction to trustees to pay or apply the income to arise out of a fund for the benefit of the person to whom the fund is transferred on his attaining a particular age has been held not to be the same as a *power* to trustees to pay or apply as aforesaid. A direction has practically the same effect as a gift but not a power.(1) In *Sewdayal* v. *Official Trustee*(2) a trust deed provided that the trustees

> "should hold the trust fund for the use and benefit of the son or sons of the settlor to be made over to him or them on attainment by him or them of the age of 21 years with *power* in the meantime to spend such sum or sums out of the income for the maintenance, etc., of such son or sons as the trustee thinks fit and accumulate the balance to form part of the *corpus*."

It was held by Mr. Justice Panckridge that the *power* given to the trustee was not a "direction" within the meaning of the exception to this section and that therefore the interest in favour of the sons would be only a contingent one.

See also undermentioned case.(3)

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22. Where, on a transfer of property, an interest therein is created in favour of such members only of a class as shall attain a particular age, such interest does not vest in any member of the class who has not attained that age.

Transfer to members of a class who attain a particular age.

Synopsis

1. Analogous law.
2. Scope of the section.
3. Provision for gift over—Effect.
4. Provision for applying income for the benefit of the transferee before attaining age—Effect.
5. Ascertainment of persons taking under transfer to class.

1. Analogous law.— Section 121 of the Indian Succession Act, 1925, provides as follows:

> "*121.* Where a bequest is made only to such members of a class as shall have attained a particular age, a person who has not attained that age cannot have a vested interest in the legacy.
>
> *Illustration*
>
> A fund is bequeathed to such of the children of *A* as shall attain the age of 18, with a direction that, while any child of *A* shall be under the age of 18, the income of the share, to which it may be presumed he will be eventually entitled, shall be applied for his maintenance and education. No child of *A* who is under the age of 18 has a vested interest in the bequest."

2. Scope of the section. — It has been seen in Note 8 on S. 21 that a transfer to a person to take effect upon his attaining a particular age gives him only a *contingent* interest which becomes vested only on his attaining such age. This section is an application of the same principle to transfers creating interests in favour of *such members only of a class* as shall attain a particular age. The transfer is *contingent* on the members attaining a particular age and the interest does not vest in any member of the class who has not attained that age.(1)

Section 21 — Note 15

1. (1926) 95 L J Ch 172 (176) : (1926) 1 Ch 223 (228, 229), Blackwell v. Blackwell.

2. 1931 Cal 651 (656) [AIR V 18] : 58 Cal 768.

3. 1967 Guj 161 (166) [AIR V 54 C 31] : (1966) 2 I T J 893 : 63 I T R 133 (DB). (Trust deed requiring trustees to apply "income or such portion thereof as the trustees in their absolute discretion deem fit for the maintenance", etc., of the beneficiary and his wife—Provision is one in the nature of direction—Discretion, if any, is only in respect of how much may be expended—Case is one covered by the Exception.)

Section 22 — Note 2

1. (1869) L R 8 Eq 619 (624) : 17 W R (Eng) 985, Merry v. Hill.
(1881) 7 Cal 218 (223).

A transfer of this kind must be distinguished from a transfer to a class on a contingency. Thus, a gift to the children of *X*, if an uncertain event happens, is a gift to a class on a contingency. It is quite clear from the beginning, in such a case, who the donees would be if the contingency happened. But where a gift is made to *such* children of *X* as shall attain the age of 18 years, it cannot be stated who the donees would be until the contingency has happened.

3. Provision for gift over—Effect. — It is a settled rule of construction in England that, where property is given to *A* "when he should attain a particular age and, in the event of his dying before that age, to *B*" the provision for gift over is taken to show that a grantor did not mean to treat the attaining of the particular age as a condition precedent to the vesting of the property in *A*, and that therefore *A* takes a vested interest. See *Phipps* v. *Ackers*.(1)

The said rule does not apply, even in England, to cases where a transfer is made to such a *class of persons* as attain a particular age. As stated in Theobald on *Wills*:(2)

> "There is an important distinction between a devise to definite persons at 21 and a devise to such of a class as attain 21 or those who attain 21. In the latter case, the finding or not finding the legatee depends upon his attaining a particular qualification, and till the contingency happens, there is no one to whom the doctrine laid down in *Phipps* v. *Ackers*(3) can apply."

As has been said in Note 11 on S. 19 the English rule of construction above mentioned has no application in this country. Much less would it apply to cases where a transfer is made to such members only of a class as shall attain a particular age, with a gift over in case the contingency does not happen.(4)

4. Provision for applying income for the benefit of the transferee before attaining age — Effect. — The exception to S. 21 does not apply to transfers to *such members of a class* as shall attain a particular age.(1a) This is made clear by the illustration to S. 121 of the Indian Succession Act, 1925,(1) which section corresponds to this section. See also Note 13 on section 21.

5. Ascertainment of persons taking under transfer to class.

(1) *A* transfers property to such of his grand-children as shall attain the age of 18 years. On the date of the transfer *A* has two grand-children *B* and *C*, ages respectively 15 and 13 years. By the time *B* attains the age of 18 years another grandson *D* is born and subsequently two more grand-sons *E* and *F* are born. It has been held in England that, in such cases, only those grandsons who are alive on the date when the *first* grandson attains the age of 18 years will take under the transfer to the exclusion of after-born grandsons. In other words the members of the class taking under the transfer *must be ascertained* when the first grandson attains 18 years of age. In the above illustration *B*, *C* and *D* will take under the transfer to the exclusion of *E* and *F*,(1) *B* taking a vested interest as

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Section 22 — Note 3

1. (1835) 57 R R 27 (31) : 9 C & F 583.
2. Theobald on Wills, 6th Edn., 1905, p. 552.
3. (1835) 57 R R 27 (31) : 9 C & F 583.
4. (1881) 7 Cal 218 (223, 224).
(1946) 51 Cal W N 227 (241, 242).

Section 22 — Note 4

1a. (1946) 51 Cal W N 227 (238).

1. See Note 1 where the illustration is reproduced.

Section 22 — Note 5

1. 1959 Mad 475 (478, 479) [A I R V 46 C 152].
(1791) 3 Bro C C 401 (404): 29 E R 610, Andrews v. Partington.
(1871) 40 L J Ch 556 (557): L R 12 Eq 427 (430), Gimblett v. Perton.

soon as he attains the age of 18 years in one-third of the property, and *C* and *D* each taking a *contingent* interest in one-third of the property which would become vested in them when they attain the age of 18 years.(1a) The rule is based on the principle that it is desirable to make property vest as soon as possible and to render it available to the persons to whom it belongs.(2) But for the rule it would be impossible to say, until the possibility of grandsons being born, ceases, who are all the grandsons that will take under the transfer and what their shares would be.

(2) *A* transfers property to *B* for life and then to such children of *X* as shall attain 18 years of age. *C*, the first child of *X* is only 15 years of age when *B* dies, but before he attains the age of 18 years another child *D* is born. On the principles stated above, *C* and *D* will take under the transfer but not children born subsequent to *C's* attaining the age of 18 years. The fact that *D* was born *after B's death* does not disentitle him from taking under the transfer.(3)

(3) *A* transfers property to *B* for life and then to such children of *X* as shall attain the age of 18 years. *C*, the first child of *X* attains the age of 18 years *during the lifetime of B*. After *C* attains the age of 18, and before *B's* death two children *D* and *E* are born to *X*. *C*, *D* and *E who were alive at B's death* will take under the will but not sons born subsequent thereto.(4)

(4) *A* transfers property to such of his grandchildren as shall attain the age of 18 years. On the date of the transfer the first grandchild is over 18 years of age. In this case only those grandsons *living at the date of the transfer* will take under the transfer to the exclusion of grandsons subsequently born.(5)

Tran-fer contingent on happening of specified uncertain event.

23. Where, on a transfer of property, an interest therein is to accrue to a specified person if a specified uncertain event shall happen, and no time is mentioned for the occurrence of that event, the interest fails unless such event happens before, or at the same time as, the intermediate or precedent interest ceases to exist.

(1804) 10 Ves 152 (154) : 7 R R 366 (368), Whitbread v. Lord St. John.

(1879) 28 W R (Eng) 401 (402) : 13 Ch D 484, In re Emmet's Estate.

† (1801) 5 R R 322 (326) : 6 Ves 345 (348, 349), Barrington v. Tristram. (Child by subsequent marriage included in the class.)

(1805) 8 R R 137 (137) : 11 Ves 238 (238, 239), Gilbert v. Boorman.

(1891) 39 W R (Eng) 697 (699) : (1891) 3 Ch 197, Mervin v. Crossman. (The words "hereafter to be born" cannot change the ordinary rule.)

1a. (1911) 80 L J Ch 249 (251) : (1911) 1 Ch 441, In re Williams' Settlement.

2. (1871) 40 L J Ch 556 (557) : L R 12 Eq 427, Gimblett v. Perton.

3. (1836) 42 R R 101 (104) : 8 Sim 59 (62), Clarke v. Clarke.

4. *See* (1856) 112 R R 23 (24) : 3 K & J 48 (49), Gilman v. Daunt. ("To *A*, a younger son of *X* if he attained 21; if he died before that date to such of the other sons of *X* as shall attain 21" — *A* died an infant — At his death one of his brothers *B* was already 21—Held that *B's* share became immediately vested on *A's* death to the exclusion of rest.)

5. (1891) 39 W R (Eng) 697 (699) : 60 L J Ch 671, Mervin v. Crossman.

Synopsis

1. Analogous law.
2. Scope of the section.
3. "An interest therein is to accrue . . . . . shall happen."
4. "And no time is mentioned."
5. "At the same time as."

1. Analogous law.—Section 124 of the Indian Succession Act, 1925, provides as follows :

"*124.* Where a legacy is given if a specified uncertain event shall happen and no time is mentioned in the will for the occurrence of that event, the legacy cannot take effect, unless such event happens before the period when the fund bequeathed is payable or distributable.

Illustrations

(i) A legacy is bequeathed to *A*, and, in case of his death, to *B*. If *A* survives the testator the legacy to *B* does not take effect.

(ii) A legacy is bequeathed to *A*, and, in case of his death without children, to *B*. If *A* survives the testator or dies in his lifetime leaving a child, the legacy to *B* does not take effect.

(iii) A legacy is bequeathed to *A* when and if he attains the age of 18, and, in case of his death, to *B*. *A* attains the age of 18. The legacy to *B* does not take effect.

(iv) A legacy is bequeathed to *A* for life, and, after his death to *B*, and, 'in case of *B*'s death without children,' to *C*. The words 'in case of *B*'s death without children' are to be understood as meaning 'in case *B* dies without children during the lifetime of *A*'.

(v) A legacy is bequeathed to *A* for life, and, after his death to *B*, and, 'in case of *B*'s death', to *C*. The words 'in case of *B*'s death' are to be considered as meaning 'in case *B* dies in the lifetime of *A*'."

2. Scope of the section. — A person is entitled to create an interest in property in favour of another, to take effect on the happening of an uncertain event. He is also entitled to specify the time within which such uncertain event is to happen, and provided the time limit fixed does not offend the rule against perpetuities, the person in whose favour the interest is created will take the interest on the happening of the event within the time so limited. It is not necessary in such cases that the event should have happened before or at the same time as the precedent or intermediate interest ceased to exist.

Illustration

A transfers property to *X* for life, then to *Y* if he should go to Europe within ten years from the date of the transfer. *X* dies two years after the date of the transfer. *Y* goes to Europe five years after the death of *X* but within ten years of the date of the transfer. The interest created in favour of *Y* will take effect even though the contingency happened *after* the prior interest ceased to exist. During the period between *X*'s death and *Y*'s going to Europe, the property will revert to the transferor or his heirs, to be divested on the happening of the contingency.

But where no *time* is mentioned by the transferor for the happening of the contingency, the law fixes the time limit within which the contingency should happen. This section accordingly provides that the contingency must happen before or at the same time as the intermediate or precedent estate ceases to exist. The principle on which this time limit is fixed is that the law is in favour of early vesting, and against the indefinite postponement thereof.(1a)

Section 23 — Note 2

1a. *See* 1966 Pat 40 (45) [A I R V 53 C 11] : 45 Pat 855. (Bequest to *A* for life and after *A*'s death to *B* and *C* absolutely in equal shares with condition that in case *B* or *C* dies issueless survivor to get entire property absolutely —Death of *B* issueless after *A*'s death — S. 124, Succession Act held applied—Subsequent legacy in favour of *C* does not take effect.)

The rule is somewhat analogous to the old rule of the English Common law that every legal contingent remainder must vest during the continuance of the particular estate which supports it, or at the very moment that it determines.(1) That rule, however, rests upon the peculiar principle of English law that seisin or *feudal possession* must never be without an owner.(2)

This section has no application where the interest is to accrue on the happening of a *certain* event such as the death of a person.(3)

This section expressly refers to a contingent gift to a 'specified person.' It has no reference to a gift to contingent class. This section should not, therefore, be applied to a gift to a contingent class falling within S. 22.(4)

The section which deals with the case of subsequent contingent interest arising on the termination of a prior interest is not exhaustive of contingent interests as a whole.(5).

3. "An interest therein is to accrue . . . . . shall happen."—An interest which is to take effect only on the happening of a specified uncertain event is, as has been seen in the Notes on S. 21, a *contingent* interest.(1a) As to the meaning of the expression "specified uncertain event," see S. 28, Note 7.

4. "And no time is mentioned." — A testator bequeathed legacy to his son Nasli and provided :

> "In the event of Nasli coming and meeting us there (i. e., dying) without marrying, or if married, without any lineal heir, his share shall revert equally to his surviving sisters or their heirs."

It was held, on a construction of these words, that no time was fixed for the happening of the contingency, (namely of Nasli's dying without marrying, or, if married, without leaving any lineal heir), and that the mere fact that the testator contemplated that, in the ordinary course of nature, his son would survive him, did not justify the Court in concluding that the testator *had fixed* a time for the occurrence of the uncertain event.(1)

5. "At the same time as." — A specified uncertain event may be such as can happen *only at the same time as* the prior estate ceases to exist, and not before. Thus, where *A* transfers to *B if he survives C* to whom the prior estate is granted, the uncertain event of *B* surviving *C* can only happen, if at all at the same time as the cesser of the prior interest and not before. In *Srimant Chota Raja Saheb* v. *S. Sundaram*,(1) where a grant was made to certain widows with the proviso that "on

1. Topham, New Law of Property, 4th Edn., 1932, page 201.

2. Topham, New Law of Property, 4th Edn., 1932, page 201; Williams & Eastwood, Principles of the Law of Real Property, 1933 Edn., page 221.
[*See also* (1876) 46 L J Ch 128 (129, 130) : 3 Ch D 393, Cunliffe v. Brancker.
(1881) 29 W R (Eng) 449 (450) : 17 Ch D 211 (229), In re Finch; Abbiss v. Burney.]

3. *See* 1915 P C 101 (103) [A I R V 2] : 43 Cal 432 : 43 Ind App 12. (Case under S. 111 of the Indian Succession Act, 1865.)
[*See also* 1960 Punj 257 (260) [AIR V 47 C 89] : ILR (1958) Punj 1852. (Bequest to *A* and *B* for life and on their death to *C*—Death being certain event, property vests in C and devolved on *C*'s heirs on death of *C* during lifetime of *A* and *B*.)]

4. (1946) 51 Cal W N 227 (243, 244).

5. 1960 Cal 609 (615) [AIR V 47 C 167].

Section 23 — Note 3

1a. 1960 Ker 1 (5) [AIR V 47 C 1] : I L R (1959) Ker 665 (FB). (If the condition fails the will becomes inoperative and void thereafter.)

Section 23 — Note 4

1. ('13) 37 Bom 644 (649).

Section 23 — Note 5

1. 1936 P C 131 (133) [A I R V 23] : 63 Ind App 224 : 59 Mad 633.
Also see S. 21, Note 3.

the death of the last surviving widow the daughter will take the property," it was held by their Lordships of the Privy Council that no gift was expressed in favour of the daughter until she survived the last widow, but that on such survival she would take the gift.

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24. Where, on a transfer of property, an interest therein is to accrue to such of certain persons as shall be surviving at some period, but the exact period is not specified, the interest shall go to such of them as shall be alive when the intermediate or precedent interest ceases to exist, unless a contrary intention appears from the terms of the transfer.

Transfer to such of certain persons as survive at some period not specified.

Illustration

A transfers property to *B* for life, and after his death to *C* and *D*, equally to be divided between them, or to the survivor of them. *C* dies during the life of *B*. *D* survives *B*. At *B*'s death the property passes to *D*.

Synopsis

1. Analogous law.
2. Scope of the section.
3. "As shall be alive."
4. "Unless a contrary intention appears from the terms of the transfer."

1. Analogous law.— Section 125 of the Indian Succession Act, 1925, provides as follows :

"*125.* Where a bequest is made to such of certain persons as shall be surviving at some period, but the exact period is not specified, the legacy shall go to such of them as are alive at the time of payment or distribution, unless a contrary intention appears by the will.

Illustrations.

(i) Property is bequeathed to *A* and *B* to be equally divided between them, or to the survivor of them. If both *A* and *B* survive the testator, the legacy is equally divided between them. If *A* dies before the testator, and *B* survives the testator, it goes to *B*.

(ii) Property is bequeathed to *A* for life, and, after his death, to *B* and *C*, to be equally divided between them, or to the survivor of them. *B* dies during the life of *A*; C survives *A*. At *A*'s death the legacy goes to *C*.

(iii) Property is bequeathed to *A* for life and after his death to *B* and *C*, or the survivor, with a direction that, if *B* should not survive the testator, his children are to stand in his place. *C* dies during the life of the testator; B survives the testator, but dies in the lifetime of *A*. The legacy goes to the representative of *B*.

(iv) Property is bequeathed to *A* for life, and after his death, to *B* and *C*, with a direction that, in case either of them dies in the lifetime of *A*, the whole shall go to the survivor. *B* dies in the lifetime of *A*. Afterwards *C* dies in the lifetime of *A*. The legacy goes to the representative of C."

2. Scope of the section.—It has been seen in Note 2 on S. 23 that where a time *is* mentioned for the occurrence of an uncertain event on the happening of which an interest created on a transfer of property is to take effect, it is *not* necessary that the event should happen before or at the same time as the precedent or intermediate interest ceases to exist. This section deals with cases where the transfer *refers to some period* within which a particular kind of contingency is to happen, but does not *exactly* specify the period. Thus, suppose *A* transfers property to *B* for life and after his death to *C* and *D* equally to be divided between them or to the survivor of them. The word

"survivor" shows that the transferor has in his mind some period at which the survival is to happen. It may refer to one of three events, namely—

(1) to C or D surviving the *other*, or

(2) to C or D surviving the transferor A, or

(3) to C or D surviving B the owner of the prior interest.

Which of these three periods the transferor has in his mind is, however, not *exactly specified*. This section provides a rule of construction in such cases, that in the absence of any indication to the contrary in the terms of the transfer, the last mentioned alternative is to be adopted.(1)

This rule and S. 125 of the Indian Succession Act, 1925,(1a) are based on the analogous rule of English law relating to bequests that, if a legacy is given to two or more persons equally to be divided between them, or to the survivor or survivors of them, and there is no special intent to be found in the will the survivorship is to be referred *to the period of division*.(2) The period of division, where no prior interest is given in the legacy, is the death of the testator,(3) and, where a prior life estate is given, it is the death of the tenant for life.(4)

The interest created to accrue to such of certain persons as shall be surviving at some period, is only a *contingent* interest, which would become vested only when they survive the owner of the precedent interest.(5)

3. "As shall be alive."—Where a person has not been heard of for a long time by those who would naturally have heard of him if he were alive, there is a rebuttable presumption that he is dead (See S. 108 of the Evidence Act, 1872.) There is, however, no presumption as to the *time* of his death.(1) Where, therefore, a question arises as to whether a transferee of an interest survived the owner of the precedent interest, it is not sufficient merely to show that he has not been heard of for more than seven years. It is necessary to prove, like any other fact, that he died, after the owner of the prior interest died.

4. "Unless a contrary intention appears from the terms of the transfer."—The rule of construction enacted in this section is to be applied only where there is no "contrary intention" expressed by the transferor. In *Rogers* v. *Towsey*(1) a testator gave £5,000 stock to S for life. At her decease the stock was to be divided equally among the testator's nieces A, B, C, D and E or "the survivors of them." Thus, the will contained the following clause : "In case my niece A should not survive *me* her child or children are to inherit what I have bequeathed to her; and the same if any other of my nieces may marry and have children." It was held

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Section 24 — Note 2

1. (1860) 129 R R 9 (14) : 29 L J Ch 577, White v. Baker.

1a. See Note 1 where it is reproduced.

2. (1819) 20 R R 268 (271) : 4 Madd 11 (15), Cripps v. Wolcott.

3. 1915 Cal 414 (415) [AIR V 2] (DB).
('79) 5 Cal 59 (61).

4. (1819) 20 R R 268 (271) : 4 Madd 11, Cripps v. Wolcott.
(1853) 98 R R 12 (15) : 3 De G M & G 18, Neathway v. Reed.
(1856) 110 R R 281 (283) : 2 K & J 383, Hearn v. Baker.
(1864) 139 R R 170 (174) : 2 De G J & Sm 428, In re Gregson's Trust Estate.
(1854) 104 R R 538 (540) : 18 Beav 590, Stevenson v. Gullen.

5. 1937 Pat 247 (249) [AIR V 24] (DB).

Section 24 — Note 3

1. 1926 P C 9 (11) [A I R V 13] : 5 Pat 312 : 53 Ind App 24.
('05) 33 Cal 173 (178) : 32 Ind App 177 (PC).
('07) 35 Cal 25 (26) (DB).
('10) 37 Cal 103 (105) (DB).

Section 24 — Note 4

1. (1845) 72 R R 779 (783) : 9 Jur 575.

that in view of the subsequent clause in the will, the words of survivorship were to be referred to the *testator's* death and not the death of the tenant for life.

See also illustrations (iii) and (iv) to S. 125 of the Indian Succession Act, 1925, given in Note 1.

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25. An interest created on a transfer of property and dependent upon
Conditional transfer. a condition fails if the fulfilment of the condition is impossible, or is forbidden by law, or is of such a nature that, if permitted, it would defeat the provisions of any law, or is fraudulent, or involves or implies injury to the person or property of another, or the Court regards it as immoral or opposed to public policy.

Illustrations

(a) *A* lets a farm to *B* on condition that he shall walk a hundred miles in an hour. The lease is void.

(b) *A* gives Rs. 500 to *B* on condition that he shall marry *A's* daughter *C*. At the date of the transfer *C* was dead. The transfer is void.

(c) *A* transfers Rs. 500 to *B* on condition that she shall murder *C*. The transfer is void.

(d) *A* transfers Rs. 500 to his niece *C* if she will desert her husband. The transfer is void.

Synopsis

1. Analogous law.
2. Scope of the section.
3. "If the fulfilment of the condition is impossible."
4. "Is forbidden by law."
5. "Would defeat the provisions of any law." See Note 31 on S. 6.
6. "Is fraudulent." See Note 32 on S. 6.
7. "Involves or implies injury to the person or property of another." See Note 33 on S. 6.
8. Fulfilment of the condition is immoral.
9. "Opposed to public policy."

1. Analogous law.—This section corresponds to Ss. 126 and 127 of the Indian Succession Act, 1925, which run as follows :

"126. A bequest upon an impossible condition is void.

Illustrations

(i) An estate is bequeathed to *A* on condition that he shall walk 100 miles in an hour. The bequest is void.

(ii) *A* bequeaths 500 rupees to *B* on condition that he shall marry *A's* daughter. *A's* daughter was dead at the date of the will. The bequest is void."

"127. A bequest upon a condition, the fulfilment of which would be contrary to law or to morality, is void.

Illustrations

(i) *A* bequeaths 500 rupees to *B* on condition that he shall murder *C*. The bequest is void.

(ii) *A* bequeaths 500 rupees to his niece if she will desert her husband. The bequest is void."

2. Scope of the section.—Section 23 of the Contract Act, 1872, provides that an *agreement is void* if the consideration or object thereof is unlawful as being—

(1) forbidden by law, or

(2) of such a nature, that, if permitted it would defeat the provisions of any law, or

(3) fraudulent, or

(4) injurious to the person or property of another, or

(5) immoral or opposed to public policy.

Section 6, clause (h) provides that a *transfer for an unlawful object or consideration* within the meaning of S. 23 of the Contract Act cannot be recognised. This section deals with transfers to take effect *on the happening of conditions* which, as agreements, would be void under Ss. 23 and 36 of the Contract Act. A provision good by way of contract is also valid by way of condition.(1)

The words "dependent upon a condition" show that the condition referred to is a condition *precedent*, that is, a condition until the fulfilment of which the transfer is not to take effect. If such a condition falls within any of the categories specified in the section, the interest itself does not take effect. In other words, both the condition and the transfer dependent upon it are void. The English *common law* rule is to the same effect.(2) But the English Courts of Equity follow a different rule derived from the civil law, where the transfer relates to *personalty*. In Jarman on *Wills*(3) it is observed as follows:

> "But with respect to legacies out of personal estate, the civil law, which, in this respect has been adopted by Courts of Equity, differs in some respects from the common law in its treatment of conditions precedent, the rule of the civil law being that where a condition precedent is originally impossible, or is made so by the act or default of the testator, or is illegal as involving *malum prohibitum*, the bequest is absolute just as if the condition had been subsequent. But where the performance of the condition is the sole motive of the bequest, or its impossibility was unknown to the testator, or has since become impossible by the act of God, or where it is illegal as involving *malum in se*, in those cases the civil agrees with the common law in holding both gift and condition void."

See also the undermentioned cases to the same effect.(4)

As to the effect of a condition subsequent being void on the interest created, see Note 11 on section 32.

3. "If the fulfilment of the condition is impossible."—This section lays down that if the fulfilment of the condition is impossible, the interest dependent upon it fails. It is not clear whether the section refers to conditions which are impossible at the date of the transfer or whether it includes conditions which *become* impossible after the date of the transfer. Section 34 which protects the transferee when the fulfilment of a condition whether precedent or subsequent is rendered impossible by the act of the person benefited by the non-fulfilment of the condition, would seem to show that this section applies even to cases where the condition *becomes* impossible after the date of the transfer.(1) In the undermentioned case(1a) where a testator made a bequest subject to a condition precedent which, before his death, was rendered impossible by the testator's own act, it was held by the Calcutta High Court that the

Section 25 — Note 2

1. (1846) 17 L J Ex 106 (109) : 15 M & W 727, Cooke v. Turner.

2. (1926) 95 L J Ch 136 (138, 139) : 134 L T 439, In re Turton.

3. 4th Edn., Vol. II, Page 12.

4. 1926 Mad 648 (650) [AIR V 13] (DB).

1924 All 625 (638) [A I R V 11] : I L R 46 All 575.

(1883) 39 Ch D 116 (131, 132) : 57 L J Ch 936, In re Moore, Trafford v. Maconochi.

(1930) 99 L J Ch 286 (288) : (1930) 2 Ch 67, Powell v. Thomas.

(1926) 95 L J Ch 136 (138, 139) : 134 L T 439 In re Turton.

(1876) 2 Ch D 753 (755) : 45 L J Ch 217 (218), Dawson v. Oliver Massey.

Section 25 — Note 3

1. *See* 1936 All 197 (199) [AIR V 23] : 58 All 687 (DB). (A land was gifted to a religious institution for the purpose of building an Ashram thereon. The institution ceased to exist without building the Ashram—Held, gift must fail : (1909) 2 Ch D 1 and AIR 1934 Oudh 329, relied on.)

1a. 1922 Cal 116 (117) [A I R V 9] : 48 Cal 1100 (DB).

question whether the bequest took effect or not depended upon what the testator intended, that where it could be gathered from the circumstances of the case that the testator intended that the transfer should take effect only if the condition was fulfilled, then the interest failed, but not otherwise. It is doubtful whether this principle would apply to transfers *inter vivos* in view of the clear wording of this section.

Where the fulfilment of a small part only of the condition has become impossible and the part capable of fulfilment has been carried out, the condition would be deemed to be substantially fulfilled and the transfer would take effect under S. 26.

The mere fact that it is not in the power of a party to perform a condition without the *consent or assistance of another* does not render it necessarily "impossible." Thus, where a condition precedent was imposed that the grantee, a woman, should release all her rights in her real and personal property, and this she could not do without the consent of her husband, it was held that the condition was not to be considered impossible of performance merely because the husband might refuse to give his consent.(2)

4. "Is forbidden by law." — The prohibition of law need not be express. Thus, where a penalty is imposed by law for the commission of a certain act, there is an implied prohibition against the commission of the act.(1) See also Note 30 on S. 6.

5. "Would defeat the provisions of any law."— See Note 31 on S. 6.

6. "Is fraudulent."—See Note 32 on Section 6.

7. "Involves or implies injury to the person or property of another."— See Note 33 on Section 6.

8. Fulfilment of the condition is immoral.—A transfer made conditional on the continuance of immoral relations between the transferor and the transferee would be void.(1) See also Note 34 on Section 6.

9. "Opposed to public policy." — This section closely follows the wording of S. 23 of the Contract Act, 1872. But the expression 'public policy' in this section seems to include matters which may not fall within the meaning of the same expression used in S. 23 of the Contract Act. Restraints on marriage and restraints on trade are dealt with separately under the Act and would not be brought within the meaning of the words "public policy" as used in S. 23 of the Act. These cases would, however, be matters which would fall within the meaning of the expression under this Act.

It is a well established rule of law that a condition against the public good, or public policy, is illegal and void;(1) but the expression "public policy" is a vague and unsatisfactory expression which may lead to uncertainty and error when applied to the decision of legal rights.(2) In one sense every rule of law, which has been laid down by the Courts in that course of judicial legislation which has evolved the law of the country, has been based on considerations of public interest or policy. But public policy in the narrower sense means that there are considerations of public interest

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2. (1739) 125 E R 1106 (1110) : Willes 153, Acherley v. Acherley.

Section 25 — Note 4

1. (1834) 110 E R 1019 (1023) : 39 R R 698, Forster v. Taylor.

Section 25 — Note 8

1. (1900) 23 Mad 613 (615, 616) (DB). (Case under S. 114 of the Indian Succession Act, 1865, corresponding to S. 127 of the Indian Succession Act, 1925.)

Section 25 — Note 9

1. (1853) 23 L J Ch 348 (385) : 4 H L C 1, Egerton v. Brownlow.

2. (1853) 23 L J Ch 348 (370) : 4 H L C 1, Egerton v. Brownlow.

which require the Courts to depart from their primary function of enforcing contracts and, exceptionally, to refuse to enforce them. Public policy in this sense is disabling.(3) It is not a branch of the law to be extended(4) but is governed by the judicial precedents.(5) As remarked by Jessel, M. R., in *Printing and Numerical Registering Company* v. *Sampson*:(6)

> "You are not to extend arbitrarily these rules which say that a given contract is void as being against public policy, because if there is one thing which, more than another, public policy requires, it is, that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily, shall be held sacred and shall be enforced by Courts of justice. Therefore, you have this public policy to consider—that you must not lightly interfere with this freedom of contract."

Where a legacy is given to a person on condition that she shall marry with the consent of X, it is a valid condition.(7)

As to illustrations of provisions against public policy, see Note 35 on S. 6 and Note 5 on Section 32.

Fulfilment of condition precedent.

26. Where the terms of a transfer of property impose a condition to be fulfilled before a person can take an interest in the property, the condition shall be deemed to have been fulfilled if it has been substantially complied with.

Illustrations

(a) *A* transfers Rs. 5,000 to *B* on condition that he shall marry with the consent of *C*, *D* and *E*. *E* dies. *B* marries with the consent of *C* and *D*. *B* is deemed to have fulfilled the condition.

(b) *A* transfers Rs. 5,000 to *B* on condition that he shall marry with the consent of *C*, *D* and *E*. *B* marries without the consent of *C*, *D* and *E*, but obtains their consent after the marriage. *B* has not fulfilled the condition.

Synopsis

1. Analogous law.
2. Scope of the section.
3. Substantial compliance.
4. Condition as to residence.
5. Alternative conditions.
6. Name and arms clause.
7. Condition precedent, if can be relieved against.

1. Analogous law. — This section corresponds to S. 128 of the Indian Succession Act, 1925, which runs as follows :

> "*128*. Where a will imposes a condition to be fulfilled before the legatee can take a vested interest in the thing bequeathed, the condition shall be considered to have been fulfilled if it has been substantially complied with.
>
> *Illustrations*
>
> *(i)* *A* legacy is bequeathed to *A* on condition that he shall marry with the consent of *B*, *C*, *D* and *E*. *A* marries with the written consent of *B*. *C* is present at the marriage. *D*

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3. (1937) 106 L J K B 641 (651): 53 T L R 885: (1937) 3 All E R 402, Fender v. Mildmay. (Promise to marry a third party by a husband after a decree nisi has been passed in a suit for divorce by his wife is not against public policy.)

4. 1931 Bom 269 (271) [AIR V 18] (DB).
1927 All 462 (464) [AIR V 14] : 39 All 51 (FB).
(1937) 106 L J K B 641 (651) : 53 T L R 885 ; (1937) 3 All E R 402, Fender v. Mildmay.
(1902) 71 L J K B 857 (863) : (1902) A C 484 : 1 Com Cas 268, Janson v. Driefontien Consolidated Mines, Ltd.

5. (1937) 106 L J K B 641 (651) : 53 T L R 885: (1937) 3 All E R 402. Fender v. Mildmay.
(1891) 60 L J Q B 397 (399) : 64 L T 117 : (1891) 1 Q B 594, In re Mirams.

6. 1875) 44 L J Ch 705 (705) : 32 L T 354.

7. (1899) 68 L J Ch 15 (18) : (1899) 1 Ch 63 : 79 L T 376 : 47 W R (Eng) 116, In re Nourse.
(1788) 21 E R 448 (452) : 2 W & T L C 146 : 2 Dick 712 (724, 725), Scott v. Tayler.

sends a present to *A* previous to the marriage. *E* has been personally informed by *A* of his intentions, and has made no objections. *A* has fulfilled the condition.

(ii) *A* legacy is bequeathed to *A* on condition that he shall marry with the consent of *B*, *C* and *D*. *D* dies. *A* marries with the consent of *B* and *C*. *A* has fulfilled the condition.

(iii) *A* legacy is bequeathed to *A* on condition that he shall marry with the consent of *B*, *C* and *D*. *A* marries in the lifetime of *B*, *C* and *D*, with the consent of *B* and *C* only. *A* has not fulfilled the condition.

(iv) *A* legacy is bequeathed to *A* on condition that he shall marry with the consent of *B*, *C* and *D*. *A* obtains the unconditional assent of *B*, *C* and *D* to his marriage with *E*. Afterwards *B*, *C* and *D* capriciously retract their consent, *A* marries *E*. *A* has fulfilled the condition.

(v) *A* legacy is bequeathed to *A* on condition that he shall marry with the consent of *B*, *C* and *D*. *A* marries without the consent of *B*, *C* and *D*, but obtains their consent after the marriage. *A* has not fulfilled the condition.

(vi) *A* makes his will whereby he bequeaths a sum of money to *B* if *B* shall marry with the consent of *A*'s executors. *B* marries during the lifetime of *A*, and *A* afterwards expresses his approbation of the marriage. *A* dies. The bequest to *B* takes effect.

(vii) *A* legacy is bequeathed to *A* if he executes a certain document within a time specified in the will. The document is executed by *A* within a reasonable time, but not within the time specified in the will. *A* has not performed the condition, and is not entitled to receive the legacy."

Note: — Illustrations (ii) and (v) above, are similar to the Illustrations given under S. 26 of the Transfer of Property Act.

2. Scope of the section. — This section deals with the fulfilment of a *condition precedent*. The general principle is that where a transfer is made on a condition precedent, the transfer fails unless the condition is first fulfilled.(1) This section provides that such a condition shall be deemed to be fulfilled if it is *substantially* complied with. It is an application of the well recognised principle that the *law leans in favour of early vesting of estates*. It is also in accordance with what is known as the *cypres* docrine(2) applicable to wills.(3) According to that doctrine when, in the case of a gift or a bequest, the intention of the donor or testator is incapable of being literally acted upon or where its literal performance would be unreasonable or in excess of what the law allows, the intention of the donor or testator is to be carried into effect *cypres* i.e., as nearly as may be practicable or reasonable or consistent with law.(4)

3. Substantial compliance. — In *Beni Chand* v. *Ekram Ahmed*,(1) where by an agreement between *A*, a widow, on the one side, and *B*, *C* and *D* on the other, it was agreed that *A* should not transfer her property without the consent of *B*, *C* and *D*, and *A* transferred her property with the consent of *B*, the other two being dead at the time, it was held that there was no substantial compliance with the condition.

Section 26 — Note 2

1. 1964 S C 587 (592) [AIR V 51 C 76] : (1964) 2 S C R 180.

I L R (1955) Mys 241 (243). (Gift to person as adopted son — Adoption not proved — Gift becomes inoperative.)

('49) 1949 All L Jour 566 (574) (DB).

1928 Rang 47 (48) [AIR V 15] : 5 Rang 636 (DB). (Mere registration does not amount to transfer.)

† 1921 Cal 389 (391) [AIR V 8] : 48 Cal 124 (DB).

('04) 28 Mad 124 (126) (DB).

[*See also* 1929 Mad 32 (33) [AIR V 16]. (Condition in the deed held not to be condition precedent.)]

2. See Broom, A Selection of Legal Maxims, 10th Edition, 1939, pages 367, 378.

3. † 1921 Cal 389 (392, 393) [A I R V 8] : 48 Cal 124 (DB). (Cypres doctrine applies only to wills and not to deeds.)

4. See Broom, A Selection of Legal Maxims, 10th Edition, 1939, pages 378, 379. See Desai Narotam, A Manual of Legal Maxims, 2nd Edition, 1911, *sub voce* "Cypres."

Section 26 — Note 3

1. † 1926 All 181 (183, 185) [AIR V 13] (DB).

In coming to this conclusion, the learned Judges, however, differed as to the test to be applied for determining whether there had been a substantial compliance with the condition. Mr. Justice Mukerji observed :

> "Broadly speaking, till the *majority* or at least one-half of the people, whose consent is necessary, give it, it cannot be said that there has been a 'substantial' compliance with the condition. The compliance would be partial only."

Mr. Justice Boys disagreed with the view that the test of substantial compliance can be the mere existence one way or the other of a *numerical majority*. He observed :

> ".....the mere existence of a numerical majority one way or the other fails to furnish a satisfactory test; at any rate, it is not a principle applicable in all cases. Is there, then, any other principle generally applicable to test whether there has been substantial compliance? I think there is. It must, I think, be conceded that the best judges of whether the compliance was substantial would be the deceased persons, if in any way their view would be ascertained. To ascertain that view directly is obviously impossible. But it is possible to form, upon all the known circumstances of the case as existing at the time the condition was made, a reasonable opinion as to whether the deceased persons would have been likely to agree that the consent of a survivor should be accepted as sufficient if they had foreseen the circumstances in which the sufficiency of his consent might be in question."

It may be observed that the test applied by Mukerji, J., is a negative one, and even that is applicable to a particular class of conditions, namely, conditions requiring the consent of a particular number of persons for the doing of a thing. This test cannot be applied to all conditions precedent in general. The test applied by Mr. Justice Boys assumes that the person who imposed the condition is dead. It cannot be applied where he is alive. Further, the result of applying the test is to make the Court launch into a mere speculation as to what the person who imposed the condition would regard as sufficient in the light of subsequent circumstances. It is submitted that neither of the two tests can be regarded as correct.

The true test appears to be to see, *firstly*, whether, in cases where it is possible for the transferee to fully perform the condition, he has endeavoured his best to do so, and, *secondly*, whether the intention of the transferor in imposing the condition (as ascertained from the terms of the transfer and the surrounding circumstances) can be said to have been, in substance, satisfied by what has actually been done by way of compliance with the condition. Applying this test to the facts in *Beni Chand's case*, referred to above, it will be seen that the first part of the test is satisfied by the transferee; but the second part is not. Where the consent of three persons is necessary, the obtaining of the consent of one of them only cannot, *ordinarily*, be said to be a carrying out in *substance* the intention of the transferor though there may be *special circumstances*, such as those pointed out by Mr. Justice Boys in the said case, when the obtaining of the consent of even one may be said to be a carrying out, in substance, the intention of the transferor.

In illustration (a) to the section, *B* cannot fully comply with the condition since *E* is dead. He has obtained the consent of *C* and *D* which is the only possible thing to do, and the intention of the transferor may be said to be, in substance, satisfied by such consent. The condition is, therefore, according to the test stated above, *substantially complied* with. But if *E*, in the above illustration, is alive and his consent is not obtained, there would be no substantial compliance with the condition. For, though the consent of the other two might in substance satisfy the intention of the transferor, it cannot be said that *B* has endeavoured to *fully* comply with the condition. This is illustration (iii) to S. 128 of the Indian Succession Act.

In illustration (b) to the section, *B* cannot be said to have endeavoured fully to satisfy the condition. Nor can it be said that the intention of the transferor (namely that consent should be obtained *before* marriage) is at all satisfied by obtaining their consent *after* the marriage.

Illustrative cases.

(1) *A*, by his will, gave to trustees £312 and several jewels in Vienna, in trust, to sell the same and pay rateably the creditors of his son if such creditors should within four months of the testator's decease, accept it as a composition, *and discharge* the son. The creditors applied within four months for payment of their demands agreeing to accept the payment as a composition and agreeing to discharge the son. The trustees, however, did not sell the jewels within four months and the creditors did not therefore actually discharge the son. It was held that the condition was substantially complied with by the creditors applying within time and agreeing to give a discharge on payment.(2)

(2) *A* gave a legacy to *X* who was in Australia "if he returned to England before the death of *Y*." *X* embarked within the time specified on board a British ship to return to England, but the ship and all the passengers perished at sea. It was held that the condition was not fulfilled and *X*'s administratrix could not claim the legacy.(3)

(3) *A* bequeathed personal estate to *B* provided she married with the consent of *C*. *C* gave a *general* permission to *B* to marry as she thought fit. *B* subsequently married without the knowledge of *C*. It was held that the condition was sufficiently complied with.(4)

(4) *M* executed a sale deed in favour of S, a minor, and it was agreed in the deed that *S*'s father should discharge certain debts. *S*'s father discharged a portion of such debts and the balance was discharged by *S* himself. It was held that the payment of the debts was not a condition precedent to the vesting of the property in *S*, and in any view, the payment of the debt by *S*'s father and *S* was a compliance with the alleged condition.(5)

(5) *A* made a bequest to *B* and *C*, (a suit by whom for partition against *A* was then pending) as an act of grace on the condition that "should the suit which is brought by them under an illusion be disposed of against them and should they, after the Court's final decision humbly apply for assistance" they should receive a sum of money for their maintenance. After the death of *A*, *B* applied to the Collector of the District who was administering *A*'s estate asserting *A*'s *duty* to maintain the applicant and demanding a larger sum of money than that bequeathed. It was held that this was not a *humble* request, and that the condition was not fulfilled.(6)

4. Condition as to residence.—Where a testator bequeathed a legacy to such of his nieces as should, at the time of his death, be "living" in England, it was held that the *temporary absence* of a niece from England would not deprive her of the legacy.(1) This is not a case of "substantial compliance" but simply one of interpretation of the word "living" referred to in the condition. If "living" as used by the testator meant "*having permanent residence*" the condition was *fully* satisfied by the niece having a permanent residence in England even though she was temporarily absent from England on the date of his death.

5. Alternative conditions.—Where a testator bequeathed a fund to *X* on her attaining the age of twenty-one years or her marrying with the consent of her parents, and at the death of the testator *X* had only one parent living, and she married under twenty-one with the consent of the living parent, it was held that the condition was

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2. (1746) 26 E R 998 (1000) : 3 Atk 342, Franco v. Alvares.

3. (1857) 69 E R 1116 (1117) : 112 R R 153, Priestley v. Holgate.

4. (1816) 35 E R 612 (614) : 1 Mer 181, Pollock v. Croft.

[*See also* (1793) 29 E R 917 (918) ; 4 Bro C C 326, Mercer v. Hall.]

5. 1924 Mad 544 (545) [AIR V 11].

6. ('05) 28 Mad 173 (180, 181) : 32 Ind App 105 (PC).

Section 26 — Note 4

1. (1853) 90 R R 719 (723) : 68 E R 1295, Woods v. Townley.

fulfilled and that she got vested interest on her marriage.(1)

6. **Name and arms clause.** — Where an estate is given to *X* on condition of the devisee's changing his name, it is sufficient if he changes his name. It is not necessary that he should apply for the Royal Sign Manual.(1)

7. **Condition precedent, if can be relieved against.** — It will be seen in Note 6 on S. 31 that a condition *subsequent* can, under certain circumstances, be relieved against by the Court. Conditions *precedent*, however, stand on a different footing. As the Lord Chancellor observed in *Popham* v. *Bampfield*,(1) "precedent conditions must be literally performed; and this Court will never vest an estate, where by reason of a condition precedent, it will not vest in law."

But where the transferor *fixes a time limit* within which the condition precedent is to be performed the performance of the condition within a reasonable time though not within the time specified would, in English law, be sufficient if the parties can be placed in the same situation as if the condition had been strictly performed.(2) The law seems, however, to be different in this country. As shown in illustration (vii) to S. 128 of the Indian Succession Act, 1925,(2a) it is *not* a substantial compliance with the condition, if the transferee does the thing *after* the time limit, even though it has been done within a *reasonable* time. But if *no time* limit is fixed it would be sufficient compliance with the condition if the thing was done within a reasonable time.(3) In *Packard In re*(4) it was held that where the time fixed was not of the substance of the condition, but merely *directory*, the performance of the act within a reasonable time was a substantial compliance with the condition.

Conditional transfer to one person coupled with transfer to another on failure of prior disposition.

27. Where, on a transfer of property, an interest therein is created in favour of one person, and by the same transaction an ulterior disposition of the same interest is made in favour of another, if the prior disposition under the transfer shall fail, the ulterior disposition shall take effect upon the failure of the prior disposition, although the failure may not have occurred in the manner contemplated by the transferor.

But, where the intention of the parties to the transaction is that the ulterior disposition shall take effect only in the event of the prior disposition failing in a particular manner, the ulterior disposition shall not take effect unless the prior disposition fails in that manner.

Illustrations

(a) *A* transfers Rs. 500 to *B* on condition that he shall execute a certain lease within three months after *A's* death, and, if he should neglect to do so, to *C*. *B* dies in *A's* lifetime. The disposition in favour of *C* takes effect.

Section 26 — Note 5

1. (1876) 2 Ch D 753 (761, 762) : 45 L J Ch 519, Dawson v. Oliver Massey.

Section 26 — Note 6

1. (1835) 53 R R 266 (267) : 131 E R 1247, Davies v. Lowndes. (Held, condition was complied with.)

Section 26 — Note 7

1. (1682) 23 E R 325 (326) : 1 Vern 80.

2. (1826) 25 R R 117 (122) : 38 E R 193, Hollinroke v. Lister.

(1691) 23 E R 743 (744): 2 Vern 222, Woodman v. Blake. (Time was extended.)

2a. See Note 1 where the section is reproduced.

3. (1835) 53 R R 266 (267) : 1 Bing N C 597, Davies v. Lowndes.

4. (1920) 89 L J Ch 301 (303, 304) : (1920) 1 Ch 596.

(b) *A* transfers property to his wife; but, in case she should die in his life-time, transfers to *B* that which he had transferred to her. *A* and his wife perish together, under circumstances which make it impossible to prove that she died before him. The disposition in favour of *B* does not take effect.

Synopsis

1. Analogous law.
2. Scope of the section.
3. "Same interest."
4. "Shall fail."

1. Analogous law. — This section corresponds to Ss. 129 and 130 of the Indian Succession Act, 1925, which run as follows :

"*129.* Where there is a bequest to one person and a bequest of the same thing to another, if the prior bequest shall fail, the second bequest shall take effect upon the failure of the prior bequest although the failure may not have occurred in the manner contemplated by the testator.

Illustrations

(i) *A* bequeaths a sum of money to his own children surviving him, and, if they all die under 18, to *B*. *A* dies without having ever had a child. The bequest to *B* takes effect.

(ii) *A* bequeaths a sum of money to *B*, on condition that he shall execute a certain document within three months after *A's* death, and, if he should neglect to do so, to *C*. *B* dies in the testator's life-time. The bequest to *C* takes effect.

"*130.* Where the will shows an intention that the second bequest shall take effect only in the event of the first bequest failing in a particular manner, the second bequest shall not take effect, unless the prior bequest fails in that particular manner.

Illustration

A makes a bequest to his wife, but in case she should die in his life-time, bequeaths to *B* that which he had bequeathed to her. *A* and his wife perish together under circumstances which make it impossible to prove that she died before him; the bequest to *B* does not take effect."

2. Scope of the section.—As has been seen in Note 3 on S. 16 this section gives legislative effect to the general rule that where an interest created on a transfer of property is intended to take effect *upon the failure* of a prior interest created by the same transaction, such interest will take effect upon the failure of the prior interest in *any* manner, unless it is clearly intended that the subsequent interest is not to take effect unless the prior interest failed in a *particular* manner and the failure happened in some *other* manner. In English law the rule is called the *rule of acceleration* inasmuch as, on the failure of the prior interest the subsequent interest is *accelerated*, i. e., takes effect before it would normally come into existence. As has been observed in Halsbury's *Laws of England* :(1)

"The effect of failure of a prior life interest . . . . . is to accelerate the subsequent interests which are limited to take effect on the regular determination of that prior interest; the Court construes the gifts of such interests as intended to take effect on the failure or determination of the prior interest in any manner."

The object of the rule is *to give effect to the intention of the transferor*. The Court will, therefore, always look to the intention of the transferor as disclosed in the document of transfer.(2) Where no particular mode of failure is specified, the

Section 27 — Note 2

1. Halsbury, Laws of England, Vol. 28, para. 1188.

2. 1932 Oudh 161 (162, 163) [AIR V 19] (DB). (1853) 104 R R 263 (265) : 43 E R 1063, Lainson v. Lainson. (1855) 111 R R 85 (87) : 21 Beav 255, Tennant v. Heathfield. (1861) 131 R R 258 (262) : 10 W R (Eng) 66, Hall v. Wanen. (An ulterior bequest is not invalidated by the illegality of the original be-

Court presumes the intention of the transferor to be to benefit the subsequent transferee in *whatever manner* the prior interest may fail. This is the effect of the first part of the section. But where the transferor specifies the mode of failure of the prior interest as the only condition on which he intends the subsequent interest is to take effect, there is no question of any presumption, and the subsequent interest will fail, in accordance with the intention of the transferor, if the failure of the prior interest has not taken place in the manner specified.(3) This is the effect of the second paragraph of the section.

Under the English law, the doctrine of acceleration does not apply where the ulterior disposition is in favour of persons who are not ascertainable at the time of the transfer but can only be ascertained subsequently. Thus, in Halsbury's Laws of England, after the paragraph from which the passage quoted above has been taken occurs the following :

> "Such a failure of a prior gift, however, does not accelerate a subsequent executory limitation not taking effect merely on determination of the prior interest; and subsequent gifts cannot be accelerated where the persons who are to take under them are only contingently ascertainable at a future date."

And this principle has been applied to a bequest in this country.(4) It is, however, a question whether the word "another" in this section necessarily refers only to an ascertained person.

See the undermentioned illustrative cases.(5)

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quest as the person bequeathing the property was illiterate man and intention must be given effect to.)

3.† (1872) Ind App (Sup Vol.) 47 (80) (PC). 1926 Mad 936 (938) [A I R V 13] (DB). (Gift to a grandson who may be born within 10 years of the testator's death. A grandson was born within 10 years but the gift to him was invalid under Hindu law being to unborn person. If a grandson was not born within 10 years then there was a gift over. The prior gift failed but not in the manner intended by the testator. Hence the ulterior gift also failed. Note: The Hindu Transfers and Bequests (City of Madras) Act, VIII of 1921, did not apply to the facts of this case.)

(1855) 111 R R 48 (48) : 21 Beav 134, Philpot v. St. George's Hospital.

(1860) 125 R R 99 (111, 112) : 30 L J Ch 65, Wing v. Angrave.

°(1855) 102 R R 316 (326) : 4 Deg M & G 633, Underwood v. Wing. (Property first bequeathed to wife and in case she dies during the lifetime of the testator, the property was gifted to some one — The ulterior gift will be given effect to only on happening of the prior condition.)

4. 1942 Sind 145 (152, 153) [AIR V 29] : I L R (1942) Kar 392. (Bequest to M and on his death to his son or sons.)

5. ('08) 35 Cal 896 (903) : 35 Ind App 118 (PC). (A gift made to a son, to be adopted by the wife of the testator and if the adopted son died without issue in the lifetime of the widow then to the daughters of the testator in equal shares — The adoption was found to be void *ab initio* — Held that the gift over in favour of the daughters would take effect although the contingency upon the happening of which it was to take effect had not happened in the way contemplated by the will.)

1914 Cal 570 (571, 572) [A I R V 1] (DB). (A made a bequest to a minor son and on his death before attaining majority to the widow for life and then to the daughters — Held that the gift to daughters took effect by the death of the widow before the minor son.)

('87) 15 Cal 282 (291) (DB). (A's wife was *enceinte* and A, by his will left his property to the expected son — There was a gift over in case the son died before attaining majority — A's wife gave birth to a daughter — Held that the gift over took effect, though the gift to the son failed in a manner not contemplated by the testator.)

(1882) 30 W R (Eng) 918 (920) : 47 L T 40, Davis v. Davis. (Where the testator gave a property to his wife and provided that if she dies within twelve months of his (testator's) decease it will go over to his sister and the wife died during his lifetime it was held that the contingency guarded against was the wife surviving the testator by twelve months after the testator's death and therefore the gift took effect though the wife had died before the testator and therefore had not strictly died within the twelve months of testator's decease.)

(1867) 15 W R (Eng) 952 (953) : 3 Ch D 296, Craven v. Brady.

(1834) 2 M & K 202 (205, 220) : 39 R R 175, Mackinnon v. Swell.

(1876) 24 W R (Eng) 947 (947) : 3 Ch D 703 (710), Jull v. Jacobs. (Gift to the testator's daughter of real and personal estate during her lifetime, and after decease the property to be equally divided between their children — Held,

3. "Same interest." — This section or the doctrine of acceleration on which it is based does not apply unless the prior and ulterior dispositions refer to the *same* interest.(1).

4. "Shall fail." — The failure of the prior disposition contemplated by this section is the failure of a *valid* disposition. If the prior disposition is void *ab initio*, the subsequent disposition also will fail on the principle embodied in S. 16.(1)

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28. On a transfer of property an interest therein may be created to accrue to any person with the condition superadded that in case a specified uncertain event shall happen such interest shall pass to another person, or that in case a specified uncertain event shall not happen such interest shall pass to another person. In each case the dispositions are subject to the rules contained in sections 10, 12, 21, 22, 23, 24, 25 and 27.

Ulterior transfer conditional on happening or not happening of specified event.

Synopsis

1. Analogous law.
2. Scope of the section.
3. Hindu law.
4. Muhammadan law.
5. "Interest therein may be created."
6. "With the condition superadded."
7. "Specified uncertain event."
8. "Shall pass to another person."
9. Condition subsequent becoming impossible of performance. See Note 5 on Section 29.
10. Several conditions subsequent. See Note 7 on Section 29.
11. Dispositions are subject to rules contained in Ss. 10, 12, etc.

1. Analogous law. — Section 131 of the Indian Succession Act, 1925 runs as follows :

"131. (1) A bequest may be made to any person with the condition superadded that, in case a specified uncertain event shall happen the thing bequeathed shall go to another person or that in case a specified uncertain event shall not happen the thing bequeathed shall go over to another person.

(2) In each case the ulterior bequest is subject to the rules contained in sections 120, 121 122, 123, 124, 125, 126, 127, 129 and 130.

Illustrations

(i) A sum of money is bequeathed to *A*, to be paid to him at the age of 18, and if he shall die before he attains that age, to *B*. *A* takes a vested interest in the legacy, subject to be divested and to go to *B* in case *A* dies under 18.

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the gift to the daughter being void on account of her having attested the will, the gift to the children was accelerated and took effect immediately.)

(1813) 13 R R 104 (110) : 35 E R 338, Murray v. Jones. (Devise to testator's children provided that if testator died leaving but one child the property was to go over to F — Testator died without issue — Held, gift to F took effect.)

(1812) 12 R R 198 (199) : 35 E R 49, Meadows v. Parry. (Thinking that his wife was *enceinte* the testator devised his property to his son and on failure of the son to X — It was discovered that the wife was never *enceinte*—Held that the gift over took effect.)

(1750) 27 E R 1117 (1120) : 1 Ves Sen 420, Avelyn v. Ward. (Facts similar to illustration (a) to the section.)

(1774) 98 E R 956 (958) : (1774) 1 Cowp 40 Statham v. Bell. (Do.)

(1741) 125 E R 1184 (1190) : Willes 303, Roe d' Fulham v. Wickett. (Do.)

(1711) 21 E R 1022 (1022) : 1 Eq Cas Abr 245, Jones v. Westcombe. (Do.)

Section 27 — Note 3

1. 1942 Sind 145 (152) [AIR V 29] : ILR (1942) Kar 392 (418). (Will—Interest on certain sum bequeathed to M and after his death to M's son or sons—*Held* that the bequests were not of the same property.)

Section 27 — Note 4

1. 1942 Bom 155 (158) [AIR V 29] : ILR (1942) Bom 441.

(ii) An estate is bequeathed to *A* with a proviso that, if *A* shall dispute the competency of the testator to make a will, the estate shall go to *B*. *A* disputes the competency of the testator to make a will. The estate goes to B.

(iii) A sum of money is bequeathed to *A* for life and, after his death, to *B*; but if *B* shall then be dead, leaving a son such son is to stand in the place of *B*. *B* takes a vested interest in the legacy, subject to be divested if he dies leaving a son in *A's* lifetime.

(iv) A sum of money is bequeathed to *A* and *B*, and if either should die during the life of *C*, then to the survivor living at the death of *C*. *A* and *B* die before *C*. The gift over cannot take effect but the representative of *A* takes one-half of the money, and the representative of *B* takes the other half.

(v) *A* bequeaths to *B* the interest of a fund for life, and directs the fund to be divided at her death equally among her three children or such of them as shall be living at her death. All the children of *B* die in *B's* lifetime. The bequest over cannot take effect but the interests of the children pass to their representatives."

2. Scope of the section. — A transfer which is absolute in the first instance may be made subject to a condition that it shall be cut down or divested on the happening of a contingency.(1) Such a condition is called *a condition subsequent.* A transfer may also be made subject to a condition that, on the happening of a contingency, the interest created shall not only cease *but that it shall pass to another person.* Such a condition is, so far as the prior interest is concerned, a condition subsequent, but is, so far as the *ulterior transfer* is concerned, a *condition precedent.* Section 31 deals with conditions of the nature referred to in the first class of cases while this section deals with conditions of the nature referred to in the second class of cases. As was observed by Courtney-Terrell C. J.:

> "the Transfer of Property Act, by S. 28, deals with a case in which, on the happening of a specified uncertain event the property transferred *is to pass to a second donee* whereas, S. 31 refers to a mere cesser of the first donee's interest on the happening of a specified uncertain event in which case the property will, in ordinary cases, revert to the donor."(2)

Thus, where a gift deed has provided that the interest is conferred on one person and if a specified uncertain event happened then the interest would pass to another then what is really conferred on the first is only a life estate and the absolute estate would pass to the other person on the happening of the specified uncertain event.(2aa) Where however there is no defeasance of the prior interest, the gift over cannot come into operation.(2a)

Section 28 — Note 2

1. †(1857) 6 Moo Ind App 526 (551, 552) (PC).
1964 S C 587 (592, 593) [AIR V 51 C 76]. (Gift with condition subsequent — Transfer is not postponed to date on which condition is fulfilled but takes effect immediately.)
1960 Andh Pra 509 (514) [AIR V 47 C 168] (DB). (Bequest to daughter with direction that on failure of male issue surviving the property must revert to parent estate—Clause relating to male issue held in the circumstances of the case amounted only to mere words of defeasance in the absolute estate of the daughter.)
1956 Hyd 153 (158) (Pr 17) [AIR V 43 C 58]: ILR (1956) Hyd 107 (DB). (It is competent to a Hindu to make a grant of absolute estate defeasible on the happening of a certain subsequent event.)
1926 Oudh 561 (574) [AIR V 13]: 2 Luck 335 (DB).
(1920) 2 Ch 481 (485): 89 L J Ch 583 (585), In re Ashton; Ballard v. Ashton. (But the contingency must not be so selected as to run counter to the general policy of the law.)

2. 1935 Pat 401 (403) [AIR V 22]: 14 Pat 640 (DB).

2aa. 1960 Ker 183 (185, 186) [AIR V 47 C 84]: ILR (1959) Ker 1040. (Absolute estate created in favour of donee reduced to mere life estate on the non-happening of the event of birth of male child to him and estate went over to other legatees.)
('58) 1958 Ker L T 516 (519, 520) (Pr 4) (DB).
('57) 1957 Ker L T 899 (905).
1956 Punj 45 (46) [AIR V 43 C 21]. (Such a defeasance clause is not opposed to any rule of law.)
1957 Trav Co 167 (169) [AIR V 44 C 53]: ILR (1956) Trav Co 914 (DB).

2a. †1928 Oudh 67 (73) [AIR V 15].

On the happening of the uncertain event on which the interest created is to pass to another person, the prior estate is put an end to and the gift over takes effect.(3)

Illustrations.

(1) A testator bequeathed a fund to his sons *B*, *C* and *D* which was to be paid to them as and when they attained the age of 21 years, subject to the condition that in case any son died before the period of distribution to him of his share, the share was to go to his issue. *B* died before the period of distribution leaving issue, but before he died he made a will bequeathing his share to his wife. It was held that on his death before distribution his estate was divested and passed to his issue and that, therefore, the wife's claim to the property was not sustainable.(4)

(2) *X* transfers property to *A* subject to the condition that if he dies before attaining majority, it shall pass to *B*. *A* dies before attaining majority. The property will pass to *B*.(5)

(3) *A* transfers property to *B*, *C* and *D* with a proviso that if any of them died without leaving a son or a son's son his share should go to the survivors. *B* died without leaving a son or a son's son. *C* and *D* will get the share and not the heirs of *B*.(6)

See also the undermentioned cases.(7)

3. Hindu law. — The last clause of S. 2 prior to its amendment in 1929, provided that, nothing in the second chapter of this Act should be deemed to affect any rule of Hindu law. If, therefore, there was a conflict between a rule of Hindu law and the provisions contained in the second chapter of this Act the rule of Hindu law was to prevail. So far, however, as this section enabled the creation of an interest subject to conditions of defeasance and gift over, it was not opposed to any rule of Hindu law which recognised grants subject to a condition of defeasance with gift over.(1) But the Hindu law prohibited any disposition in favour of unborn persons

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3. 1928 All 699 (702) [AIR V 15] (DB). (This section in fact gives statutory recognition in India to those executing interests which in English law are known as executory devises if contained in a will, and before the Statute of of Uses was repealed, were called springing or shifting uses if such estates were created in real property by deed.)
('12) 14 Ind Cas 708 (710) (DB) (Cal).

4. ✠('84) 6 All 583 (597) (DB).

5. 1914 Cal 570 (571) [AIR V 1] (DB).

6. ('72) Ind App Supp Vol. 47 (70) (PC).

7. 1920 Mad 783 (787) [AIR V 7] (DB). (A defeasance clause in a partition deed of an estate that if a default in making certain payments shall be made the interest of the defaulter shall pass to another person is valid.)
('11) 11 Ind Cas 634 (635) (Cal). (Bequest to N on condition of living in family house, otherwise gift over—Failure to reside—Gift over takes effect.)
('12) 14 Ind Cas 708 (710) (DB) (Cal). (Do.)
('11) 34 Mad 250 (252) (DB). (Razinama providing that the properties to be held and enjoyed in common by A and B and that in the event of A having no issue, the entire properties to belong to B — A dying without leaving issue —Gift over takes effect.)
('97) 24 Cal 646 (656, 657) (DB). (Bequest to A and B, testator's two widows, with a condition that in case A or B does not reside in the family house she is to forfeit her share, which will go over to other heirs—B leaving the house—*Held*, B forfeits her share in property.)

Section 28 — Note 3

1. ('88) 16 Cal 383 (392) : 16 Ind App 29 (PC).
('78) 4 Cal 23 (28) : 5 Ind App 138 (PC).
✠ 1862) 9 Moo Ind App 123 (135) (PC).
(1857) 6 Moo Ind App 526 (551, 552) (PC). (Property willed away to sons and in the event of any of his sons dying without a son, there is a gift over to such of the other sons or son's son.)
† 1935 Pat 401 (407) [A I R V 22] : 14 Pat 640 (DB).
1928 All 699 (702, 703) [AIR V 15] (DB).
1921 Bom 262 (264) [A I R V 8] : 45 Bom 1038 (DB). (But defeasance clause attached again to gift over makes it invalid.)
† 1920 Mad 783 (787) [AIR V 7] (DB). (Stipulation in partition deed that share will be taken away on default of condition is valid.)
('11) 34 Mad 250 (252) (DB). (The absolute estate conferred upon was defeasible in the event of failure of issue and this one followed by a gift over in favour of a person in being is perfectly valid under Hindu law.)
[*See also* 1916 Cal 775 (780) [A I R V 3] (DB). (Where, however, an absolute interest is given and the devisee dies without disposal of his interest, the gift over is void as regards both realty and personalty.)]

and a gift over to such a person would have been opposed to Hindu law.(2) This restriction was removed by the passing of the Hindu Disposition of Property Act, 1916,(3) with the result that the rules of Hindu law were in no way inconsistent with this section.

By virtue of the amendment of S. 2, the second chapter, and consequently this section, directly applies to transfers made by Hindus subject to a condition of defeasance with gift over.

4. Muhammadan law.—The last clause of S. 2 provides that nothing in the second chapter of this Act shall be deemed to affect any rule of Muhammadan law. It has been seen in the Notes on S. 21 that contingent interests are not recognised under the Muhammadan law. A gift over, such as is contemplated by this section, is only a contingent interest and cannot, therefore, be created under that law. This section will not affect the said rule of Muhammadan law.

The section is, however, applicable to Mophalas of north Malabar as they are governed by Marumakkathayam law(1) and not by any rule of Muhammadan law.

5. "Interest therein may be created."—The word "interest" in this section has the same meaning as the "thing bequeathed" in S. 131 of the Indian Succession Act, 1925.(1)

The interest created need not be an *absolute interest* in the property. A life-interest(2) or even a contingent interest(3) may be created subject to a condition that on the happening of a specified uncertain event, it shall pass to another person.

6. "With the condition superadded."—The words "with the condition superadded" make it clear that the condition must be a part of the transfer and must be imposed *at the time of making the transfer.* Where an absolute transfer is made the transferor cannot later on, in a subsequent document, impose a condition defeating the interest created already.(1) Where, however, the deed of gift and the deed of agreement whereby the donor was entitled to revoke the gift upon happening of specified uncertain events mentioned in S. 31, were executed as two separate documents but on the same date, it was held that both formed part of the same transaction and must be read together and the transaction fell within the purview of S. 31.(1a)

The question whether a condition is a precedent one or a subsequent one must depend upon the intention of the transferor. Where such intention is clearly expressed there is, of course, no difficulty. But where from the language employed by the grantor in making the grant, the intention of the grantor cannot be clearly determined, resort should be had to certain well recognised presumptions of law. One such presumption is

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2.† 1933 Bom 34 (36) [A I R V 20] (DB). (There may be a defeasance by gift over, in which case the gift over must be in favour of somebody in existence at the time of the gift.)

3. 1939 Cal 226 (228) [AIR V 26] : I L R (1939) 1 Cal 63.

Section 28 — Note 4

1. ('57) 1957 Ker L T 899 (905).

Section 28 — Note 5

1. 1935 Pat 401 (403) [A I R V 22] : 14 Pat 640 (DB).

2. (1852) 68 E R 597 (600) : 9 Hare 475, Rockford v. Hackman.

3.† (1853) 10 E R 359 (442) : 4 H L C 1, Egerton v. (Earl) Brownlow.
(1870) 5 Ch App 408 (413) : 39 L J Ch 501, In re Harrison's Estate. (Egerton v. Brownlow, (1853) 10 E R 359, Foll.)
(1883) 23 Ch D 158 (164) : 52 L J Ch 420 (421, 422), In re Viscount Exmouth.

Section 28 — Note 6

1. ('83) 6 All 313 (321) : 11 Ind App 44 (PC). (Gift of villages complete by delivery of possession — Subsequently an application to Collector stating the gift to be conditional— Held, application ineffective.)

1a. 1951 All 599 (599, 600) [AIR V 38 C 153].

in *favour of early vesting*.(2) And the other presumption is against the divesting of estates once vested.(3) Where, therefore, a condition is framed in such terms as that it is capable of being construed fairly as a condition subsequent and not a condition precedent, the Court ought to construe it as a condition subsequent.(4) As was pointed out by their Lordships of the Privy Council in *Sifton* v. *Sifton*,(5) "where it is doubtful whether a condition be precedent or subsequent, the Court *prima facie* treats it as being subsequent. *For there is a presumption in favour of early vesting*" As to the condition subsequent itself, unless from the gift over clause, the intention is perfectly unambiguous, clear and definite, that any vested interest whatever shall cease and become divested, the gift over will not be held to have that effect.(6)

7. "Specified uncertain event." — The event on the happening of which a vested estate is to be defeated must be expressed in such clear, definite and unambiguous terms as to enable the Court to predicate with certainty, upon the happening of *what* event it was that the preceding estate was to determine.) In the undermentioned case(1) a legacy was given to such grandchildren of the testator as shall be "educated in England" and it was provided that if any of them was "educated abroad," his share was to go to the others. A grandchild was partly educated in France and partly in England. The question came before the Court as to whether she forfeited her legacy and the gift over took effect. It was held by Kindersley, V. C., that the event "educated in England" was not specific, inasmuch as it was difficult to say whether the testator meant that the legatee should get the whole education in England alone, and as many sets of hypothetical circumstances could be contemplated in which the legatee could be said to have been "educated in England" and also "abroad." He observed: "The contingency should be so expressed as not to leave it in any degree doubtful or uncertain *what* the contingency is which is intended to defeat the prior estate."

The expression "uncertain event" is sometimes used to convey the meaning that the event is "not specified."(2) This, obviously, is not the meaning in which it is used in this section. The uncertainty referred to in the section is uncertainty in the *happening of the event* and not in the language in which it is expressed.(3) (In the case noted below(4) a fund bequeathed to '*K*' was to go over to '*G*' in case '*K*' died before "actually receiving" it from the executors. The event on the happening of which the estate of '*K*' was to be defeated, viz., the death of '*K*' before receiving the fund was specific. Courts could at any time ascertain whether it had happened or not. The element of uncertainty was also there, but it consisted only in the *happening* of it, inasmuch as the actual receipt of the fund by '*K*' depended on the diligence or dilatoriness of the executors. It was possible that '*K*' may receive the legacy during his lifetime if the executors acted diligently or may not receive it at all if the executors

2. 1938 P C 270 (275, 276) [AIR V 25].

3.† 1925 Mad 599 (604) [AIR V 12] (DB).
Also see S. 29, Note 3.

4. (1903) 72 L J Ch 281 (283) : (1903) 1 Ch 749, In re Greenwood; Goodhart v. Woodhead.

5.† 1938 P C 270 (275, 276) [AIR V 25].

6. 1925 Mad 599 (604, 605) [AIR V 12] (DB).
(1883) 57 L J Ch 420 (421, 422) : 23 Ch D 158, In re Viscount Exmouth.

Section 28 — Note 7

1. (1855) 3 Drew 451 (470) : 61 E R 975, Clavering v. Ellison.
[*See also* (1859) 7 H L C 707 (725) : 11 E R 282, Clavering v. Ellison.]

2. (1927) 2 Ch 264 (268) : 96 L J Ch 487, In re Lanyon.

3.† ('84) 6 All 583 (597) (DB). (Following Johnson v. Crook, (1879) 12 Ch D 639.)
(1897) 2 Ch 255 (260) : 66 L J Ch 616, Wainright v. Miller.
[*See also* (1876) 1 App Cas 428 (438) : 46 L J Ch 2, Minors v. Battison.]

4.† (1879) 12 Ch D 639 (654) : 48 L J Ch 777, Johnson v. Crook.

acted otherwise. Thus, it was a case of a specified event uncertain in its happening, and as '*K*' died before he actually received the fund, the Court allowed '*G*' to take it after '*K's* death.

8. "Shall pass to another person."—The gift over must be in favour of a definite person or persons.(1) This, of course, does not mean that the person in whose favour there is a gift over must be mentioned in the grant by *name*. But there must be such description as is sufficient for the Court to ascertain the person.

9. Condition subsequent becoming impossible of performance. — See Note 5 on Section 29.

10. Several conditions subsequent.—See Note 7 on Section 29.

11. Dispositions are subject to rules contained in sections 10, 12, etc.— This section provides that where an interest is created subject to a condition subsequent with a gift over, the rules contained in Ss. 10, 12, etc., referred to in this section, will apply not only to the prior interest created, but to the gift over as well.

Section 10. — Where a transfer is made in favour of *X* subject to a *condition absolutely restraining him from disposing of it* and if *X* dies without issue, then to *Y with a similar restraint on disposition*, the restraint on disposition would under S. 10 be void. Again where a transfer is made in favour of *X* subject to a condition that *if he disposes of it in any way*, it will pass to *Y*, the condition subsequent is under S. 10 void and *X's* interest will not be divested even if he breaks the condition.(1) The gift over in favour of *Y* will not take effect.

Section 12.—Where *A* transfers property to *X* subject to a condition that if he becomes bankrupt or endeavours to transfer his interest, it will pass to *Y*, the condition subsequent is void under S. 12 and consequently *X's* interest will not be divested even if he breaks the condition, and the gift over in favour of *Y* will not take effect. Again where *A* transfers property to *X* and if he dies without issue it is to pass to *Y* subject to a condition that if *Y* becomes bankrupt his interest will cease, this last condition attached to the gift over is void under S. 12, and *Y* will take unconditionally after the death of *X* without issue.

Section 21. — The ulterior transfer referred to in S. 28 is only a contingent interest. On the happening of the contingency which is the condition subsequent, the ulterior transfer will become a vested interest by virtue of Section 21.(2)

Section 22. — Where, under this section, a gift over is made in favour of such members of a class as shall attain a particular age, then, by virtue of S. 22, only those persons who attain that particular age, at the date when the prior interest ceases, will take a vested interest in the property.

Illustration.

A transfers property to *B* and if he dies before attaining the age of 75 then to such of his sons who shall attain the age of 18. *B* has three sons, *C*, *D* and *E*. *B* dies at the age of 70 when *C* and *D* have attained the age of 18 but *E* has not. At the death of *B* only *C* and *D* get a vested interest in the property.

Section 28 — Note 8

1. ('05) 32 Cal 861 (869) (DB).

Section 28 — Note 11

1. (1797) 3 Ves 324 (325) : 4 R R 7, Bradley v. Peixoto.

[*See also* 1926 Mad 648 (650) [AIR V 18] (DB).]

2. † 1933 Mad 80 (83) [AIR V 20]. (Absolute gift to a wife subject to a condition that if she dies without issue the property would pass to other persons living at the date of the gift — Gift in favour of other persons is contingent.)

Section 23. — The gift over, in a case coming under S. 28 is, as has been seen above, a contingent interest which will take effect on the happening of the uncertain event constituting the condition subsequent. By virtue of S. 23, such uncertain event must, if the gift over is to take effect, happen before or at the same time as the prior interest ceases to exist.(2a)

Illustration.

A transfers property to *B* for life with a condition that if *C* marries *D* then it should go to *C*. No time limit is mentioned for *C's* marriage with *D*. If *C* has to take the property his marriage with *D* must take place before or at the death of *B*.

Section 24.—Where *A* transfers property in favour of *X* subject to a condition that on the happening of a contingency it shall pass to *Y* and *Z* equally or the survivor of them, and *Y* dies before the happening of the contingency, *Z* will, under the provisions of S. 24, take the interest on the happening of the contingency.

Section 25. — *A* transfer subject to a *condition precedent* of the nature referred to in S. 25 cannot take effect. *A* "condition superadded" within the meaning of this section is, as has been seen already, a condition precedent *so far as the ulterior interest* created is concerned. It follows by virtue of S. 25 that the ulterior interest will fail if the "condition superadded" is of the nature specified in that section.(3)

Section 27. — Where the "condition superadded" on the fulfilment of which the gift over is to take effect, is *the failure of the prior interest*, the gift over will, by virtue of the provisions of S. 27, take effect even though the failure may not have occurred in the manner contemplated by the transferor. The undermentioned case(4) was a peculiar one. In that case *A* made a bequest to his wife *B* with a gift over to *C* if *B* re-married. *B* went through a ceremony of marriage with the surviving husband of her deceased sister, such marriage being then invalid. The marriage was, however, subsequently validated by the Deceased Wife's Sister's Marriage Act, 1907 (7 Edw. VII, C. 47), and the question was whether the bequest to *B* was divested and passed to *C*. It was held that the Act did not affect prejudicially the estate which *B* had got and that it was not divested.

Fulfilment of condition subsequent.

29. An ulterior disposition of the kind contemplated by the last preceding section cannot take effect unless the condition is strictly fulfilled.

Illustration.

A transfers Rs. 500 to *B*, to be paid to him on his attaining his majority or marrying, with a proviso that, if *B* dies a minor or marries without *C's* consent, the Rs. 500 shall go to *D*. *B* marries when only 17 years of age, without *C's* consent. The transfer to *D* takes effect.

2a. 1966 Pat 40 (45) [A I R V 53 C 11] : 45 Pat 855 (DB). (Legacy bequeathed to *A* for life and after *A's* death to *B* and *C* in equal shares absolutely—Will further providing that if *B* or *C* died issueless, survivor to get property absolutely—*B* died issueless after *A*—Property, held, vested in equal shares in *B* and *C* after *A's* death — As will did not mention time for occurrence of subsequent event i.e., death of *B* or *C* issueless, S. 23 applied — Sub-equent legacy in favour of *C* after *B's* death issueless could not take effect.)

3. (1888) 39 Ch D 116 (129) : 57 L J Ch 936, In re Moore; Trafford v. Maconochie.

(1926) 1 Ch D 842 (851) : 95 L J Ch 528, In re Wilkinson; Page v. Public Trustee.

('83) 6 All 313 (321) : 11 Ind App 44 (PC).

(1912) 2 Ch 471 (478) : 81 L J Ch 800, Neel v. Sandbrook. (Condition that donees who were minors should not be in the custody or guardianship of their father—Condition is void as being against public policy.)

[*See also* (1807) 103 E R 538 (543) : 9 East 170, Perrin v. Lyon. (A condition subsequent with a gift over that the legatee should not marry a Scotchman is valid.)]

4. (1911) 27 T L R 203 (204) : (1911) 1 Ch 310, In re Whitfield; Hill v. Mathie.

Synopsis

1. Analogous law.
2. Scope of the section.
3. Strict construction of defeasance clause.
4. Strict compliance with condition.
4a. Onus of proof.
5. Fulfilment of condition becoming impossible.
6. Knowledge of condition if necessary.
7. Two or more conditions.

1. Analogous law.—This section corresponds to S. 132 of the Indian Succession Act, 1925, which runs as follows :

"*132.* An ulterior bequest of the kind contemplated by S. 131 cannot take effect, unless the condition is strictly fulfilled.

Illustrations.

(i) *A* legacy is bequeathed to *A*, with a proviso that, if he marries without the consent of *B*, *C* and *D*, the legacy shall go to *E*. *D* dies. Even if *A* marries without the consent of *B*, and *C*, the gift to *E* does not take effect.

(ii) *A* legacy is bequeathed to *A*, with a proviso that, if he marries without the consent of *B*, the legacy shall go to *C*. *A* marries with the consent of *B*. He afterwards becomes a widower and marries again without the consent of *B*. The bequest to *C* does not take effect.

(iii) *A* legacy is bequeathed to *A*, to be paid at 18, or marriage, with a proviso that, if *A* dies under 18 or marries without the consent of *B*, the legacy shall go to *C*. *A* marries under 18, without the consent of *B*. The bequest to *C* takes effect."

2. Scope of the section.—It is a well recognised principle that the *law leans in favour of early vesting*.(1) Another equally well-recognised principle is that the *law views with disfavour the divesting of estates once vested*.(2) Section 26 gives effect to the first mentioned principle by providing that a *substantial* compliance is sufficient in the case of conditions precedent, i. e., conditions which have the effect of vesting an estate. The Courts give effect to the second principle by construing divesting clauses strictly(3) and by demanding a *strict* compliance of conditions subsequent, i.e., conditions which have the effect of divesting or defeating an estate once vested.(4)

Now, a condition such as is dealt with in S. 28, is as has been seen in Note 2 thereon, a *condition subsequent* so far as the prior interest is concerned, and a *condition precedent* so far as the ulterior interest is concerned. This section lays down that in such cases, a *strict* and not a *substantial* compliance is necessary if the ulterior interest is to take effect. The English law is the same on the point.(5)

Section 29 — Note 2

1. See Note 6 on Section 28.

2. See Note 6 on Section 28.

[*See also* ('74) 1 Ind App 387 (395) (PC). (A clause in the will providing for cesser of the estate of the persons entitled under it, in the event of non-residence in his Boitakana house.)]

3. 1925 Lah 594 (595) [AIR V 12] (DB).

†(1859) 115 R R 345 (351) : 29 L J Ch 761, Clayering v. Ellison.

(1858) 70 E R 294 (299, 300) : 4 K & J 709, Maddison v. Chapman.

(1856) 26 L J Ch 1 (4): 26 LTCh 1, Kiallmark v Kiaumark. (Clavering v. Ellison, 3 Drew 451; Egerton v. Brownlow, 4 HLC 1 and Frances's case, 8 Rep 19 followed.)

4. (1858) 70 E R 294 (299, 300) : 4 K & J 709, Maddison v. Chapman.

(1800) 31 E R 549 (550) : 5 Ves 207, Harrison v. Foreman. (Bequest to A for life and after her death to B and C equally and in case of the death of either of them in the life of A, the whole to the survivor of them living at her (A's) death. Both B and C died before A. As the contingency did not happen the vested interest of B and C was not divested.)

[*See also* (1819) 20 R R 316 (317) : 4 Madd 411, Sturges v. Pearson.]

5. (1858) 70 E R 294 (299, 300) : 4 K & J 709, Maddison v. Chapman.

(1826) 38 E R 193 (196) : 1 Russ 500, Hollinrake v. Lister.

(1887) 34 Ch D 742 (747) : 35 W R (Eng) 624 (625), Hartlay Steadman v. Dunster. (In a will it was laid down as a condition precedent that before a testator's next of kin gets the bequest he should establish his title within one year of the testator's death and on default there was a gift over. No claim brought by next of kin as required although within the stated period in an administration proceedings an enquiry as to next of kin was made—Held, gift over took effect.)

3. Strict construction of defeasance clause.—It requires clear words to divest an estate once vested.(1) A clause of defeasance, in order to be operative, must contain express words or words of necessary implication of a gift over to a definite person or persons.(2) If it is ambiguous, the general rule is to construe it in such a manner as not to divest an interest already vested.(3) Where there is no ambiguity in the clause, the words of the clause must be construed *literally* according to the plain meaning of the words.(4) In *Hervey-Bathurst* v. *Stanley*(5) where, in dealing with the argument that a divesting clause must be strictly construed, the Master of the Rolls said : "I assent to that so far as this, that it must be construed strictly—whatever the words may mean—and I intend to construe it strictly, and it is only because I construe it strictly, and can only attach one meaning to it, construing it strictly, that I am going to give effect to it. Whether the word "strictly" means anything more or less than this, that the proviso must itself be clear in its terms, that is to say, unambiguous in its meaning, and capable, when fairly construed, of only one meaning, I do not say, but I do not think that it can be carried further than that."

Illustrative cases.

(1) A testator made a bequest in favour of *A*, subject to a proviso that if within a particular period from the death of the testator, *A refused or neglected* to take the name and arms of the testator, then the property was to go over to *B*. *A* was abroad and remained in ignorance of his rights for more than the prescribed period. It was held that the words "refuse or neglect" presupposed the exercise of will on the part of *A* and that a mere "failure" or "omission" due to ignorance did not fall within the compass of the expression "refuse or neglect" and that the bequest was therefore not defeated.(6)

(2) A partition deed between *A* and *B* provided as regards certain land that its usufruct was set apart for the maintenance of their mother and then provided as follows : "We shall divide the properties after defraying the funeral expenses of our mother. The land of the person that does not contribute to the said expenses shall be enjoyed by the person who contributes." *A* did not contribute. It was held by Sundara Aiyar, J., that the clause as to contribution was one of defeasance, that the words "if either of them does not contribute" must be construed as meaning "if either of them refuse to contribute," and that the mere failure of *A* to contribute did not divest him of his vested interest.(7).

4. Strict compliance with condition.—Where a transfer is made in favour of *A* subject to a condition that he shall do a particular thing or that a certain event shall happen, on *failure of which*, the interest is to pass to *B*, the strict fulfilment required by this section, has reference only to the *failure to do the thing or the failure of the event*. Where the thing is, *in substance*, done by *A*, it cannot be said strictly that there has been a failure to do it, and the gift over will not take effect. Similarly where the event may be said to have *in substance* happened, it cannot be said strictly that the event did not happen and the gift over cannot take effect. Thus, where a gift was made with a condition that if the donee did not reside in the house given, the house should pass to another person, it was held by their Lordships of the Privy Council

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Section 29 — Note 3

1. (1887) 12 Bom 137 (147).

2. (1905) 32 Cal 861 (869) (DB).

3. 1925 Mad 599 (605) [AIR V 12] (DB). (A gift over clause must indicate a clear, unambiguous and definite intention of the testator to divest the estate.)
Also see S. 28, Note 6.

4. 1925 Mad 599 (604) [AIR V 12] (DB).
(1920) 36 T L R 674 (675): (1920) 2 Ch 469 (473), In re Evan's Contract. (A will declared that a person entitled under the will shall within specified time assume the surname and arms of the testator, without providing for gift over on failure to do so—Held, it was merely expression of a desire of the testator and not a conditional limitation.)

5. (1876) 4 Ch D 251 (258) : 46 L J Ch 162 (164).

6. (1926) 1 Ch 992 (1006) : 42 T L R 681 (682), Re Quintin Dick, Cloncurry v. Frenton.

7. ('11) 12 Ind Cas 256 (257) (DB) (Mad).

that residence, simply and without definition, did not mean exclusive residence, and that, in such cases, an occasional use of the house and keeping an establishment in it with the intention of again using it as residence, was a *sufficient* fulfilment of the direction as to residence, and that the gift over did not therefore take effect.(1) See also the undermentioned cases to the similar effect.(2) In the undermentioned case(3) a bequest was made to *A* on condition that if she should have no legitimate children, then the property was to pass to *B*. *A* had one legitimate child born alive who died before her. It was held, that since *A* had a child though subsequently dead, the event contemplated happened and that the gift over did not take effect. *A* had the estate absolutely.

In *Partridge* v. *Partridge*,(4) a gift was made in favour of *A*, a minor, with the condition that if *A* should "refuse or neglect" to reside in the mansion-house, it shall go over to *B*. It was held that an infant could not "refuse or neglect' to reside in a particular place, if the persons who have the legal custody or care of him do not choose that he should do so. The clause of forfeiture was held not to apply to the minor during his infancy.(4a)

A testator bequeathed property to *A* with condition that if *A* did not marry with the consent of the executors, the property was to pass to *B*. *A* married during the lifetime of the testator with *his* consent. It was held that having regard to the object of the testator in safeguarding the interests of *A*, the condition so far as *A* was concerned was, in effect, struck out by reason of the marriage during the lifetime of the testator with his consent. The gift over did not take effect.(5) See also the under-mentioned cases.(6) In the case noted below(7) a farm was given to *A* on condition that he should not part with it but should dwell there, and that on failure to do so the farm was to go over to *B*. *A* mortgaged the farm to *C* and confessed judgment in a suit by *C* on the mortgage, and the farm was sold. It was held that on such sale the gift over took effect as the condition was broken.(8)

Section 29 — Note 4

1. ('74) 1 Ind App 387 (398, 399) (PC).

2. (1884) 53 L J Ch 474 (475) : 25 Ch D 605 (610), In re Moir.
(1823) 24 R R 136 (140, 141) : 37 E R 1204 : (1823) Turn & Rwss, 530, Fillingham v. Bromley.

3. (1810) 33 E R 1041 (1042) : 10 R R 212, Wall v. Tomlinson.

4. (1894) 63 L J Ch 122 (124, 125) : (1894) 1 Ch 351 (359). (No distinction can be drawn from the tender years of infant, e.g., infant of two years or ten years.)

4a. (1910) 79 L J Ch 281 (284) : (1910) 1 Ch 541 (551). In re Edwards. (Forfeiture clause in respect of bearing arms and surname of the testator. Partridge's case (1894) 63 L J Ch 122, followed.)

5. (1910) 79 L J Ch 502 (504, 505) : (1910) 2 Ch 322 (325, 327), In re Park.

6. (1919) 1 Ch 249 (258) : 88 L J Ch 96. In re Grove. (A bequest to A subject to a condition that A should within three months from testator's death transfer other property of his to certain persons — Even prior to the date of the will, A had already with the testator's consent transferred the property to third persons—Held that A was exempt from the condition under the circumstances.)
(1899) 1 Ch 642 (649) : 48 L J Ch 324 (327), Re Pickeworth. (A bequest to A for life and then to B and C to be paid and divided among them equally — If either of the sisters B and C were then dead, to be held in trust for the survivor absolutely — B and C died during the lifetime of A—B and C took a vested estate and it was not divested by their death before the death of A.)
(1818) 56 E R 503 (504) : 18 R R 230, Aislabie v. Rice. (Gift to A for life if she should remain unmarried or if she should marry with the consent of X — X dying — Condition becoming impossible of performance — Estate for life not cut down.)

7. (1802) 2 East 481 (487) : 102 E R 453, Dock Duke of Norfolk v. Howke.

8. *See also* ('11) 11 Ind Cas 634 (635) (DB) (Cal). (A house was bequeathed to 'N' on condition that he should reside in the house—Otherwise he will cease to have any interest in the house which would go to somebody else—'N' sold the house and made it impossible for himself to reside in the house—Held, condition was broken.)

4a. Onus of proof.—The onus of proof that there has been a breach of a condition subsequent is on the party alleging it and the other side cannot be called upon to prove a general negative.(1)

5. Fulfilment of condition becoming impossible. — Where a condition, such as is referred to in S. 28, becomes impossible of fulfilment through no act or default of the person who has to perform it, it will be treated as void, and the gift over will not take effect,(1) and the transferee of the prior interest will take the estate absolutely.(2) As was observed in *Graydon* v. *Hicks*,(3) "it is the constant rule of law in the case of conditions subsequent, that if the performance becomes impossible by the act of God, then it is absolutely void."

Illustrations.

(1) *A* transfers property to *X* subject to a condition that she should marry *B* at or before she attains the age of 21, and that if she does not do so then to *Y*. *B* dies before *X* attains 21 years of age. *X* takes the property absolutely and the gift over fails.(4)

(2) *A* bequeaths a fund to *X* to be paid to her at the age of 21 years or on her marriage, whichever shall first happen, provided she marries by or with the consent of the executors under the will; but if she dies before the fund becomes payable on the conditions aforesaid, then to *Y*. The executors die before *X* attains 21 years of age, and she marries without their consent. *X* takes the property absolutely and the gift over fails.(5)

(3) *A* transfers property to *B* subject to a condition that on his failure to perform a particular act it shall pass to another person. *B* is not able to do the thing by reason of duress or imprisonment. The non-performance of the act will not divest the estate and the gift over does not take effect.(6)

6. Knowledge of condition if necessary.—The general rule is that want of knowledge of the condition on the part of the transferee does not exclude the fulfilment of the directions, on the failure of which the property is to pass to another person.(1) But a person who would *otherwise have title to the property*, either as heir

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Section 29 — Note 4a

1. (1862) 10 W R (Eng) 681 (681, 682), Wilkinson v. Dyson.

Section 29 — Note 5

1. (1866) 147 R R 180 (182, 183) : 35 Beav 312, Collett v. Collett. (Gift to daughter with a condition of marriage with the consent of her mother. Mmother dying, it was held performance became impossible.)
(1877) 26 W R (Eng) Dig 265 (265) : 38 L T (NS) 125 (127), Booth v. Meyer.
See also the cases cited in foot-notes (2) to (6).

2. 1925 Lah 594 (495) [AIR V 12] (DB).
†1924 All 625 (638) [AIR V 11] : 46 All 575 (DB).
(1739) 26 E R 407 (408) : 2 Atk 16, Graydon v. Hicks.
(1903) 72 L J Ch 281 (283) : (1903) 1 Ch 749 (756), In re Greenwood.
(1818) 18 R R 230 (233) : 56 E R 503, Aislabie v. Rice.

3. (1739) 26 E R 407 (408) : 2 Atk 16.

4. (1694) 91 E R 157 (157) : 1 Salk 170, Thomas v. Howell.

5. (1739) 26 E R 407 (408) : 2 Atk 16, Graydon v. Hicks.
(1731) 24 E R 889 (889) : 2 P Wms 626, Peyton v. Bury.
[*See also* (1866) 147 R R 180 (183) : 35 Beav 312, Collett v. Collett.
(1876) 2 Ch D 753 (755, 762) : 45 L J Ch 519, Dawson v. Oliver Massey. (Condition that donee should marry with consent of parents — One parent dying.)]

6. ('93) 20 Cal 15 (17) (DB).
(1859) 7 H L C 707 (743) : 11 E R 282, Clavering v. Ellison.

Section 29 — Note 6

1. (1868) 86 E R 135 (138) : 1 Vent 199, Porter v. Fry.
(1873) 42 L J Ch 452 (454) : 16 Eq 92, Re Hodge's Legacy.
(1874) 22 W R (Eng) 629 (629) : 18 Eq 243, Powell v. Rawle.
(1874) 22 W R (Eng) 620 (621) : 18 Eq 290, Astley v. Essex (Earl).
[*See also* (1904) 53 W R (Eng) 393 (394) : (1904) 2 Ch 656, Lewis v. Lewis. (A legacy with a condition subsequent —An executor who takes beneficial interest is not bound to give notice of the condition to the legatee.)]

or in some other way, if there were no such deed as that which contains the conditions, is not answerable or liable to lose his estate by reason of the non-performance of the condition unless he has *notice* of the deed which contains it.(2)

7. **Two or more conditions.** — Where a transfer is made to a person with a gift over on the happening of two or more conditions, *all* the conditions must be strictly fulfilled before the gift over takes effect. Thus, where a devise of lands was made to *A* and if *A* died before he attained 21 years of age *and* without issue, then to *B*, it was held that the gift over would not take effect if *A* attained 21 but died subsequently without issue.(1)

Prior disposition not affected by invalidity of ulterior disposition.

30. If the ulterior disposition is not valid, the prior disposition is not affected by it.

Illustration

A transfers a farm to *B* for her life, and, if she do not desert her husband, to *C*. *B* is entitled to the farm during her life as if no condition had been inserted.

Synopsis

1. Analogous law.
2. Scope of the section.
3. Failure of gift over on condition which subsequently becomes impossible.

1. **Analogous law.** — Section 133 of the Indian Succession Act, 1925 runs as follows:

"*133.* If the ulterior bequest be not valid the original bequest is not affected by it.

Illustrations

(i) An estate is bequeathed to *A* for his life with condition superadded that, if he shall not on a given day walk 100 miles in an hour, the estate shall go to *B*. The condition being void, *A* retains his estate as if no condition had been inserted in the will.

(ii) An estate is bequeathed to *A* for her life and, if she does not desert her husband, to *B*. *A* is entitled to the estate during her life as if no condition had been inserted in the will.

(iii) An estate is bequeathed to *A* for life, and, if he marries, to the eldest son of *B* for life. *B*, at the date of the testator's death, had not had a son. The bequest over is void under section 105 and *A* is entitled to the estate during his life."

2. **Scope of the section.** — The effect of the failure of a prior disposition under certain circumstances, on the ulterior disposition has been dealt with under Ss. 16 and 27. The present section deals with the effect of the invalidity of the ulterior disposition on the prior one, and it states that the prior disposition is not affected by such invalidity.

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2. (1838)112 E R 1033 (1037) : 8 A & E L 779, Doode Taylor v. Crisp. ((1809) 103 E R 1160, followed.)

(1809) 103 E R 1160 (1162) : 11 R R 307, Doe d. Kanrick v. Lord Beauclerk.

Section 29 — Note 7

1. (1810) 104 E R 113 (115): 11 R R 380, Doe d, Usher v. Jessep.

(1857) 10 E R 1216 (1227) : 26 L J Ch 473, Grey v. Pearson.

(1860) 28 Beav 440 (445) : 54 E R 435, Secomb v. Edwards.

(1870) 10 Eq 501 (503) : 19 W R (Eng) Dig 130, Finch v. Lane.

(1871) 11 Eq 514 (522) : 40 L J Ch 355, Reed v. Braithwaite.

[But see (1856) 1 Eq 675 (684) : 14 W R (Eng) 576, In re Sander's Trusts. (Legacy was to pass to remaining children in case the eldest son died unmarried and without issues. Eldest son dies widower who never had issues; held that gift over took effect—'Unmarried' means 'without leaving a widow'.)]

An ulterior disposition may be invalid either because such a disposition is not one recognised by law, or the condition on which it is to take effect is invalid. Thus, a gift to *A* for life and then to an unborn person was, under the rules of Hindu law, invalid so far as the ulterior disposition was concerned.(1) Similarly, a transfer to *A* for life with a subsequent disposition which amounts to altering the legal course of inheritance would be invalid so far as the subsequent disposition is concerned.(2) Again an ulterior disposition on the happening of a condition which is invalid for any reason, e.g., under Ss. 10 to 15, 17 and 25, would not take effect.(3) In all the above cases, the prior disposition is not affected.

3. **Failure of gift over on condition which subsequently becomes impossible.** — Where prior disposition is subject to a condition of defeasance with a gift over and the condition is valid at the time of the transfer but becomes subsequently impossible of fulfilment, the ulterior disposition fails. The prior disposition is not only not affected by it, but becomes absolute and free of the condition.(1)

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31. Subject to the provisions of section 12, on a transfer of property an interest therein may be created with the condition superadded that it shall cease to exist in case a specified uncertain event shall happen, or in case a specified uncertain event shall not happen.

Condition that transfer shall cease to have effect in case specified uncertain event happens or does not happen.

Illustrations

(a) *A* transfers a farm to *B* for his life, with a proviso that, in case *B* cuts down a certain wood, the transfer shall cease to have any effect. *B* cuts down the wood. He loses his life-interest in the farm.

Section 30 — Note 2

1. 1928 P C 156 (158, 161) [AIR V 15]: 50 All 375 : 55 Ind App 180.
('88) 16 Cal 383 (396) : 16 Ind App 29 (PC).
('72) Ind App Sup Vol 47 : 18 Suth W R 359 (366) (PC). (The donee must be a person in existence capable of taking at the time when the gift takes effect.)
('95) 20 Bom 450 (464) (DB).
Note. — The disability is removed by the Hindu Disposition of Property Act, 1916.

2. 1931 P C 179 (181) [AIR V 18] : 58 Ind App 270 : 59 Cal 152. ((1872) Ind App Sup Vol 47 (PC) followed.)
('89) 16 Cal 383 (392, 396) : 16 Ind App 29 (PC).
('83) 9 Cal 952 (958) : 10 Ind App 51 (PC). (Bequest by Hindu testator to his nephews and after them to their descendants in the male line — The latter bequest is invalid as being an attempt to alter the course of succession under the Hindu law by confining succession to males.)
('72) Ind App Sup Vol 47 : 18 Suth W R 359 (364, 365) (PC). (All estates of inheritance created by gift or will so far as they are inconsistent with general law of inheritance are void.)
1933 Bom 34 (36) [A I R V 20] (DB). (Creating series of absolute estates defeasible in succession on happening of an uncertain event is repugnant to Hindu law.)
1926 Cal 561 (561, 563) [AIR V 13] : 53 Cal 251. (Directions altering line of shebaits held void and inoperative.)
1921 Bom 262 (265) [AIR V 8] : 45 Bom 1038 (DB).
('02) 4 Bom L R 893 (904).

3. 1935 All 1042 (1046) [AIR V 22] : 58 All 467. (Condition void for repugnancy to absolute estate created —Section 11.)
('99) 4 Cal W N 671*n* (671*n*). (Accumulation.)
(1855) 20 Beav 541 (544) : 52 E R 712, Gerrard v. Butler. (Condition infringing rule against perpetuity.)
(1908) 77 L J Ch 265 (266) : (1908) 1 Ch 383, In re Beard. (Condition against public policy.)
(1840) 2 Beav 352 : 48 E R 1217, Ring v. Hardwick. (Gift over too remote.)
[*See also* ('12) 14 Ind Cas 708 (710) (DB) (Cal). (Ultimate gift over in favour of an agnate or a Brahmin is void for uncertainty — But this does not affect validity of earlier bequests.)
(1844) 7 Beav 437 (442, 443) : 64 R R 111, Ridgway v. Woodhouse.)]

Section 30 — Note 3

1. See Notes on Section 29.
1924 All 625 (638) [AIR V 11]: 46 All 575 (DB).
[*See also* (1813) 3 Mad 256 (260) : 56 E R 503, Aislabie v. Rice.]

(b) *A* transfers a farm to *B*, provided that, if *B* shall not go to England within three years after the date of the transfer, his interest in the farm shall cease. *B* does not go to England within the term prescribed. His interest in the farm ceases.

Synopsis

1. Analogous law.
2. Scope of the section.
3. This section and section 126.
4. "Subject to the provisions of section 12."
5. "Condition superadded." See S. 28, Note 6,
6. Effect of condition, if can be relieved against.
7. Contracts to transfer property.

1. Analogous law. — Section 134 of the Indian Succession Act, 1925, corresponds to this section and runs as follows:

"*134.* A bequest may be made with the condition superadded that it shall cease to have effect in case a specified uncertain event shall happen, or in case a specified uncertain event shall not happen.

Illustrations

(i) An estate is bequeathed to *A* for his life, with a proviso that, in case he shall cut down a certain wood, the bequest shall cease to have any effect. *A* cuts down the wood. He loses his life interest in the estate.

(ii) An estate is bequeathed to *A*, provided that, if he marries under the age of 25 without the consent of the executors named in the will, the estate shall cease to belong to him. *A* marries under 25 without the consent of the executors. The estate ceases to belong to him.

(iii) An estate is bequeathed to *A*, provided that, if he shall not go to England within three years after the testator's death, his interest in the estate shall cease. *A* does not go to England within the time prescribed. His interest in the estate ceases.

(iv) An estate is bequeathed to *A*, with a proviso that, if she becomes a nun, she shall cease to have any interest in the estate. *A* becomes a nun. She loses her interest under the will.

(v) A fund is bequeathed to *A* for life, and, after his death, to *B*, if *B* shall be then living, with a proviso that, if *B* shall become a nun, the bequest to her shall cease to have any effect. *B* becomes a nun in the lifetime of *A*. She thereby loses her contingent interest in the fund."

2. Scope of the section. — This section declares that a transfer subject to a condition that it shall cease on the happening, or the not happening, of a specified uncertain event is a lawful method of grant.(1) The distinction between this section and S. 28 is that, while the latter deals with a case in which, on the happening of a contingency, the first transferee's interest ceases *and passes to a second transferee*, this section refers to a mere cesser of the transferee's interest on the happening of a contingency, in which case the property will, in ordinary cases, revert to the donor.(2) The specified

Section 31 — Note 2

1. 1964 S C 587 (592, 593) [AIR V 51 C 76].
†1936 P C 24 (26) [A I R V 23] : 63 Ind App 26 : 15 Pat 127. (Sale-deed contained a clause that on failure to pay the balance to creditors of vendor within particular time the deed was to become cancelled—Held, not a condition subsequent but an integral condition of a contract of a sale.)
('74) 1 Ind App 387 : 22 Suth W R 377 (379) (PC). (Principle recognised even prior to T. P. Act.)
1939 Cal 226 (228) [AIR V 26] : ILR (1939) 1 Cal 63 (DB). (Gift over is not the essence of a defeasance clause.)

2. See Note 2 on Section 38.

Also see the followimy cases:
1927 P C 123 (127) [A I R V 14]. (Condition to pay maintenance allowance to donor not observed by donee—Held, property gifted could be recovered by donor—It was restored to the owner in this case.)
('09) 36 Cal 311 (322) : 36 Ind App 1 (PC). (Gift to daughter with a condition that if she died childless, the property would revert to the donor.)
1956 Hyd 153 (158) [AIR V 43 C 58] : ILR (1956) Hyd 107 (DB). (It is competent to a Hindu to make a grant of absolute estate defeasible on the happening of a certain subsequent event.)
1939 Cal 226 (228) [AIR V 26] : ILR (1939) 1 Cal 63 (DB).
1928 All 699 (702) [AIR V 15] (DB). (Hindu law —Gift—Donor can bestow absolute estate and add defeasance clause — Consent of donee unnecessary for validity of the clause.)
('73) 5 N W P H C R 5 (7) (DB). (A gift of a house was made in favour of a person with the

event contemplated by the section, as clearly suggested by the illustrations, must be definite and specific. Thus a clause in a lease which stipulated that the lease would stand cancelled if the lessor took up any other business or manufacture without the written consent of the landlord was held to be very vague to satisfy the test of a specified event contemplated by the section.(3)

Where the transfer has already been effected and the condition subsequent, on the unfulfilment of which the transfer is to cease, is fulfilled later on, the transfer is effective as from its original date and not from the date on which the condition subsequent is fulfilled. Thus where *A* transferred his shares in a company to *B* on 10-12-1947 in consideration of his forthcoming marriage with *B* and the marriage took place subsequently, it was held that the transfer was effective from 10-12-1947.(4)

3. This section and section 126. — As has been seen in Note 14 on S. 10, the words in S. 126 "the donor and donee *may agree*" show that section refers to *covenants* superseding or revoking a gift and not to *conditions* annexed to the transfer. This section not only deals with gifts but with other transfers as well, and permits the creation of interests subject to a *condition* that it shall cease on the happening of a particular event. On the happening of the event, the interest will cease. The fact that the transferee has alienated the property to a purchaser for value without notice will not prevent losing his interest on the happening of the condition. An *agreement* referred to in S. 126 cannot, on the other hand, be enforced against such a purchaser. (See last paragraph of S. 126.) In the undermentioned case(1) there are observations to the effect that a provision for defeasance of an estate is subject to the limitation that the rights of transferees for value without notice are not to be affected. It is submitted that so far as this section is concerned the observations cannot be accepted as correct. The actual decision itself seems to have been mainly based on the view that S. 126 is the section that is applicable to the case.

4. "Subject to the provisions of section 12." — The condition superadded must, of course, be a *valid* condition. Section 32 provides a test for finding out whether and when such a condition is valid. It states that a condition would be valid as a condition subsequent if the event to which it relates can constitute a valid condition precedent; and S. 25 shows what events cannot constitute valid conditions precedent.

Now, there seems to be nothing in S. 25 to prevent the event of *bankruptcy* of a person constituting a valid condition *precedent*, and, but for the words "subject to the provisions of S. 12," such an event would, by virtue of S. 32, constitute a valid condition subsequent, with the result that this section would be inconsistent with S. 12 which declares that such a condition is void. The words "subject to the provisions of S. 12" avoid this possible inconsistency.

5. "Condition superadded." — See S. 28, Note 6.

6. Effect of condition, if can be relieved against. — It does not follow that because a condition subsequent may be validly imposed under this section, therefore,

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conditions that the donee should pay up some debt of the donor and also should maintain the donor as long as she lived—Held, that the donor was entitled to cancel the gift when the donee failed to perform the two conditions of the gift in his favour, and to get property back.)

3. 1957 Orissa 25 (37) [AIR V 44 C 12] (DB).

4. 1964 S C 587 (592, 593) [A I R V 51 C 76] : (1964) 2 S C R 480.

Section 31 — Note 3

1. 1923 Mad 67 (68, 69) [AIR V 10] (DB).

the Court is bound to enforce it in every case. In *Popham* v. *Bamfield*,(1) the Lord Chancellor observed :

> "Of subsequent conditions, there is this difference to be observed (for against *all* conditions subsequent, this Court cannot, nor ought to relieve), when the Court can in any case compensate the party in damages for the non-precise performance of the condition, there it is just and equitable to relieve, as if a man's estate be upon condition to pay money at a certain day, and he fails of payment ; but where the party cannot be compensated in damages, it would be against conscience to relieve."

This view has been followed in India also.(2)

7. Contracts to transfer property. — The section has no application to *contracts* to transfer property.

In the undermentioned case(1) *A* executed a document in favour of *B* to the following effect:

> I sell property *x* to you. I have received consideration as follows : I have kept Rs. 29,072-3-0 in deposit with you for payment to my creditor *B* and have received the balance Rs. 1,927-13-0 in cash. You should go with me to *B*. I shall request *B* for remission and if he reduces it, you should pay *B* the reduced sum and the balance to me. *If you fail to pay B as aforesaid by 30th December 1925 this sale-deed shall stand cancelled.*

It was held by their Lordships of the Privy Council that the document contained both a *contract of sale* and an act of transfer of the property, that the last clause was part of the *contract of sale* and not of the transfer of property, and that S. 31 of the Transfer of Property Act which merely declares that a limitation upon a condition subsequent is a lawful method of grant, did not exclude the right of the Court to give relief to the purchaser who fails to make payment of the price by the date agreed upon in the contract of sale.

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32. In order that a condition that an interest shall cease to exist may be valid, it is necessary that the event to which it relates be one which could legally constitute the condition of the creation of an interest.

Such condition must not be invalid.

Synopsis

1. Analogous law.
2. Scope of the section.
3. Condition void for uncertainty.
4. Condition as to residence.
5. Condition subsequent, opposed to public policy.
6. Conditions in restraint of marriage.
7. Immoral conditions subsequent.
8. Provisions void for repugnancy.
9. Defeasance clause and repugnant clause — Distinction between.
10. Condition, fulfilment of which is impossible.
11. Effect of condition subsequent being illegal.
12. Hindu and Muhammadan law.

1. Analogous law.—Section 135 of the Indian Succession Act, 1925, runs as follows :

> "135. In order that a condition that a bequest shall cease to have effect may be valid, it is necessary that the event to which it relates be one which could legally constitute the condition of a bequest as contemplated by section 120."

Section 31 — Note 6

1. (1682) 23 E R 325 (326) : 1 Vern 80, Fry v. Porter. (1670) 86 E R 898 followed.)
2. † 1933 Oudh 291 (294, 295) [AIR V 20] : 8 Luck 707 (DB). (Condition subsequent by way of defeasance is valid but Court is not bound to enforce it in all cases.)

Section 31 — Note 7

1. 1936 P C 24 (25, 26) [AIR V 23] : 63 Ind App 26 : 15 Pat 127.

2. Scope of the section. — The general principle is that it is open to the owner of property to make any disposition of his property, however unreasonable or whimsical it may appear to others, provided it is *within legal limits.*(1) This principle is found enacted in S. 7 which provides that a person can transfer his property either wholly or in part, and either absolutely or *conditionally* in the circumstances, to the extent and in the manner *allowed and prescribed by any law* for the time being in force. A *conditional* transfer may be either one subject to a *condition precedent*, or one subject to a *condition subsequent.*

There is no positive provision as to what conditions precedent are *valid*, but S. 25 shows what conditions precedent are *invalid.* All conditions precedent would, therefore, be valid except those specifically declared to be invalid. This section provides a test for finding what conditions *subsequent* are valid. All conditions subsequent would be valid if the event to which it relates could legally constitute a condition *precedent.* In *Cook* v. *Turner*,(2) Baron Rolfe said :

> "The question, whether this proviso is a proviso void as being contrary to the policy of the law, may well be tested by considering how the case would have stood if, instead of a condition subsequent, it had been made, as in substance it might have been made, a condition precedent ..... there would be no doubt of the validity of such a condition as a condition precedent, and if so it must be good as a condition subsequent: for where a condition is bad on grounds of public policy, it must obviously be bad whether it be precedent or subsequent."

3. Condition void for uncertainty.—A condition subsequent which is vague and uncertain is void. The reason is that it is impossible to fulfil a condition without knowing definitely the event constituting the condition. The test therefore to see whether a condition subsequent is void for uncertainty is whether the condition is such that it can be seen from the very beginning, precisely and distinctly upon the happening of what event it is that the precedent vested interest is to determine. The leading case on the point is *Clavering* v. *Ellison*(1) decided by the House of Lords in 1859. In that case a devise was made to certain persons on the condition that they should be educated in England, failing which the grant was to cease. In holding that the condition was void for uncertainty, Lord Cranworth observed :

> "I consider that, from the earliest times, one of the cardinal rules on the subject has been this: that where a vested estate is to be defeated by a condition on a contingency that is to happen afterwards, the condition must be such that the Court can see from the beginning, precisely and distinctly, upon the happening of what event it was that the preceding vested estate was to determine."

In *Viscount Exmouth* v. *Pread*,(2) Fry J., observed :

> "The condition must be clear and certain. That requisite certainty, I hold to include not only certainty of *expression* in the creation of the limitation, but also certainty in point of operation. It must be such a limitation that, at any given moment of time, it is ascertainable whether the limitation has or has not taken effect."

The principles above stated were applied by their Lordships of the Privy Council in *Sifton* v. *Sifton.*(3) In that case a testator devised a certain income to X but added a clause that the payment of the income should be made only so long as X should "continue to reside in Canada." It was held that the condition was void for

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Section 32 — Note 2

1. (1927) 96 L J Ch 487 (490): (1927) 2 Ch 264, Lanyon v. Lanyon.
2. (1846) 71 R R 808 (815) : 153 E R 1044.

Section 32 — Note 3

1. (1859) 11 E R 282 (289) : 7 H L C 707.
2. (1883) 31 W R (Eng) 515 (546) : 23 Ch D 158.
3. 1938 P C 270 (275) [A I R V 25]. (In cases of doubt whether the condition is precedent or subsequent, it should be treated as subsequent as presumption is in favour of early vesting.)

uncertainty as it was impossible, in the particular case, for the Court to determine with any accuracy what future conduct of the donee would fall within the terms of the will. A condition that if the legatees "should live with their father" they should forfeit the legacy, is void for uncertainty as the expression "live with father" is extremely vague.(4) Where a legacy is given to *N* on condition he remains obedient to *B*, the condition imposed on *N* is not void for uncertainty.(5) Such a condition can legally constitute a condition subsequent. For other instances, see the undermentioned cases.(6)

4. Condition as to residence. — A condition subsequent as to residence is a valid condition(1) except where there is *uncertainty* about it in which case it will be void for uncertainty. (See Note 3). The meaning of the words 'reside' and 'residence' depends upon the context in which the words are used.

> "A condition, for instance, attached to the demise of a house that the devisee should reside in the house for at least six months in the year, can present no difficulty. In some contexts the word 'reside' may clearly denote what is sometimes called 'being in residence' at a particular house. In other contexts it may mean maintaining a house in a fit state for residence."(2)

Where a will devised property to certain female members of the family, and provided that "if any of them live in any other than a holy place for more than three months she will be deprive l of all my properties," it was held that what was contemplated was a wilful, deliberate and intentional leaving, and that it did not cover the case of a *minor* member who was remove l to another place with the assistance of the police and kept there.(3)

A clause of forfeiture in the event of the devisee not making the mansion house "his usual and common place of abode and residence" is not void for uncertainty.(4)

5. Condition subsequent, opposed to public policy.—As to the meaning of the expression "opposed to public policy," see Note 9 on S. 25. It has been seen in that Note that a condition *precedent* is void if it is opposed to public policy. By virtue of this section, a condition *subsequent* would also be void if it is opposed to public policy.

Illustrations.

(1) An attempt to create an estate of inheritance not known to law is against public policy,(1) and, consequently, a condition subsequent which has the effect of altering

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4. (1912) 81 L J Ch 800 (804): (1912) 2 Ch 471, (478), In re Sandbrook.

5. 1944 Bom 196 (197) [AIR V 31]. (Bequest to B for life and on her death to N if he remained obedient to B.)

6. 1921 Lah 11 (16) [AIR V 8]: 2 Lah 175 (DB). (Gift over of what may not be required by the first donee of the absolute interest, is void for uncertainty.)
1916 Cal 775 (788) [AIR V 3] (DB). (An absolute interest given to the first taker followed by a gift over of what may not be required by him —The gift over, though couched in most direct and precise words, is void for uncertainty.)
('53) 1953-1 All E R 308 (313) : 1952-2 W L R 244, Re Allen; Faith v. Allen.
[*See also* 1925 Lah 122 (122) [A I R V 12] (DB). (An absolute gift to a widow can only be reduced to a limited estate by clear and unambiguous words cutting down the first bequest.)]

Section 32 — Note 4

1. (1857) 53 E R 423 (425) : 116 R R 178, Wynne v. Fletcher.
2. 1938 P C 270 (275) [AIR V 25].
3. ('91) 20 Cal 15 (17) (DB).
4. 1916 Cal 654 (656) [AIR V 3] (DB). (Restriction in a will as regards residence is no indication of the creation of life-interest.)
('11) 11 Ind Cas 634 (635) (DB) (Cal).
†('12) 14 Ind Cas 708 (710) (DB) (Cal).
('97) 24 Cal 646 (655, 656) (DB).

Section 32 — Note 5

1. †('72) Ind App Supp Vol 47: 18 Suth W R 359 (364, 365) (PC).
1915 Mad 1191 (1193) [AIR V 2] (DB). (An arrangement to alter the line of succession by means of a provision for the devolution of the

the legal course of inheritance, as where a series of absolute estates are created which are defeasible in succession on the happening of an uncertain event, would be void as being opposed to public policy.(2)

(2) Property was given to Lord *A* with a proviso that if the donee died without having acquired the title of a Duke or Marquis of *B* the interest granted should cease. It was held by the House of Lords that the proviso was opposed to public policy and void.(3)

(3) *A*, a testator, gave property to his nephew *H*, on condition that if *H* entered into the naval or military services of the country, the property was to go over to *F*, another nephew of the testator. It was held that the condition was void as being against public policy it being contrary to the public good and welfare of the community.(4)

(4) Conditions which tend to separate the husband from the wife or the parents from their children are opposed to public policy. *A* condition that the donee, a woman, should cease to reside at *X* where the husband resided,(5) or a condition that the legacy will be defeated if the infant donees should live with their father,(6) or a condition that the infant donees should reside only in a particular place, wherever the parents may be(7) is void as being opposed to public policy.

(5) A condition, making an estate granted to a person defeasible in the event of failure of issue living at the time of her death, is not opposed to Hindu law and is valid.(8)

(6) *A*, who was under a sentence of transportation for life, transferred property to *B* subject to the condition that in the event of *A*, returning after serving his sentence, the property shall revert to him; it was held by the Madras High Court that the condition did not have the effect of altering the legal course of inheritance and was legal and enforceable.(9)

(7) *A* gave property to her children in certain shares with a proviso that "if any child should marry a person who was not a born Jew or a person who does not profess the Jewish religion, he or she should forfeit the interest granted." It was held that the condition was not bad as being against public policy.(10)

(8) A transfer of property to the wife "so long as she shall continue the cohabiting wife or the widow" of the husband with gift over in case the marriage is dissolved, is not opposed to public policy. The condition is rather in favour of securing the continuance of cohabitation than to encourage a severance.(11)

See also the undermentioned case.(12)

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estate on the death of one of the members without male issue is void.)

† 1939 Cal 226 (231) [AIR V 26] : I L R (1939) 1 Cal 63 (DB). (Will in one clause conferring absolute interest on sons—Subsequent clause providing that if any son dies without son, his widow and daughters would not inherit but would only get maintenance — Subsequent clause is void.)

1926 Cal 993 (995) [AIR V 13] : 53 Cal 816 (DB). (After the grant of a permanent heritable interest, the grantor and the grantee cannot validly enter into a covenant that a certain class of heirs shall not be entitled to succeed to the property.)

1924 All 461 (463, 464) [AIR V 11] : 46 All 525 (DB).

1922 All 293 (294) [AIR V 9]. (Provision to alter rules of succession cannot be enforced.)

2. 1931 P C 179 (181, 182) [AIR V 18] : 58 Ind App 270 : 59 Cal 142. (Condition attempting to alter legal course of succession is void — Gift over fails.)

† 1933 Bom 34 (36) [A I R V 20] (DB). (Series of absolute estates defeasible on happening of uncertain event is repugnant to Hindu Law — The first donee takes absolute estate and subsequent bequests fail.)

† 1921 Bom 262 (265) [A I R V 8] : 45 Bom 1038 (DB). (A series of absolute estates defeasible in succession on the happening of uncertain event —The gift over fails.)

3. (1854) 94 R R 1 (48) : 10 E R 359, Egerton v. Brownlow (Earl).

4. (1908) 24 T L R 225 (226) : (1908) 1 Ch 383 (387, 388), In re Beard.

5. (1871) 40 L J Ch 242 (244) : 12 Eq 604 (608), Wilkinson v. Wilkinson.

6. (1922) 91 L J Ch 250 (253) : (1922) 1 Ch 75 (83), In re Boulter.

7. (1912) 81 L J Ch 800 (804) : (1912) 2 Ch 471, Noel v. Sandbrook.

8. ('78) 4 Cal 23 (28) : 5 Ind App 138 (PC).

9. 1923 Mad 67 (69) [AIR V 10] (DB). (Defeasance clause not infringing provisions of Hindu law and safeguarding *bona fide* transferees is enforceable.)

10. (1879) 27 W R (Eng) 545 (547) : 11 Ch D 959 (966), Hodson v. Halford.

11. (1904) 20 T L R 282 (283) : (1904) 1 Ch 470 (478), In re Hope Johnstone.

12. 1932 Cal 350 (351) [AIR V 19] : 59 Cal 102 (DB). (Condition that if the legatee leads an

6. **Conditions in restraint of marriage.**—A condition subsequent in *general* restraint of marriage would be void as being opposed to public policy. But a grant *until* marriage is not a grant subject to a condition subsequent that if the grantee marries, the grant is to be defeated: it is a *limitation* and not a condition.(1) A condition subsequent causing a forfeiture in the event of marriage *without the consent of some persons named* is not opposed to public policy and is valid.(2)

A condition in restraint of marriage is not absolutely but only *prima facie* void. If the intention of the transferor is to promote, not celibacy, but some other lawful object, the condition may be good. Where *X* bequeathed to a woman *Y* who was living under his protection £ 1,200 a year subject to a condition that if she should marry after his death she should be paid £ 800 a year, the balance of £ 400 to be applied for the benefit of *X's* son by the woman, it was held that the intention of the testator in imposing the condition was to provide for the child in the event of marriage and the condition was not void.(3)

A condition restraining marriage with a *particular person* is not bad. The restraint in such a case is not total but *partial*.(4) In the undermentioned case(5) a legacy was given to *X* on condition that it was to cease if he married "a relation by blood." It being difficult to say whether any woman was or was not a blood relation, the restraint practically amounted to a general prohibition of marriage and was therefore void.

A condition subsequent that a person should not *re-marry* is not void.(6)

See also the undermentioned case.(7)

7. **Immoral conditions subsequent.**—A condition subsequent which the Court regards as immoral is void and will not defeat the estate granted. The question whether the Court will regard any particular condition as immoral will depend upon the facts and circumstances of the case. Where *H* gave certain property to *W* who was his mistress but who lived with him as his wife "on condition of her continuing to be his wife and remaining obedient to him, 'her husband'," it was held that the object of the condition, on the facts of the case, was rather her continuing to remain and discharge her duties to the children she had by him than anything personal, and that the condition was therefore not immoral.(1)

8. **Provisions void for repugnancy.**—It has been seen in Note 2 on S. 11 that where an absolute transfer is made by a person, but at the same time, a clause is

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unchaste life the grant should cease was held to be valid.)

4. (1925) 95 L J Ch 37 (40): (1925) 1 Ch 377 (382), In re Bathe. (Jenner v. Turner, (1880) 16 Ch D 188, Foll.)
(1880) 16 Ch D 188 (196, 197): 50 L J Ch 161, Jenner v. Turner.

5.† (1927) 96 L J Ch 487 (490, 492): (1927) 2 Ch 264 (274), In re Lanyon.

6. (1693) 2 Vern 308 (309): 23 E R 800 (801), Barton v. Barton.
(1875) 45 L J Ch 310 (312): 24 W R (Eng) 306, Allen v. Jackson.

7. 1932 Cal 350 (351) [A I R V 19]: 59 Cal 102 (DB). (Case under Ss. 127 and 134 of Indian Succession Act.)

Section 32 — Note 6

1. (1848) 41 E R 1114 (1115): 2 Ph 701, Webb v. Grace.
(1847) 163 E R 1147 (1148): 1 Rob Eccl 593, Godfrey v. Hughes.
[*See also* (1876) 45 L J Q B 166 (169): 1 Q B D 279, Jones v. Jones. (Condition reserves to the donor: limitation makes the gift pass over to other persons.)]

2. (1905) 53 W R (Eng) 293 (295): 74 L J Ch 207, Re Whiting's Settlement.

3. (1918) 1 Ch 458 (468, 469): 87 L J Ch 209, In re Hewett.
[*See also* (1855) 24 L J Ch 488 (489): 3 W R (Eng) 266, Potter v. Richards.]

Section 32 — Note 7

1. ('79) 2 All 433 (436) (DB).

added which is inconsistent with the legal incidents flowing from the absolute character of the transfer, the inconsistent provision is to be disregarded. The reason is that it is against the policy of the law to allow an individual to place restrictions on the legal incidents flowing from the absolute character of a grant made by him, and the restrictions will, consequently, be treated as void. Thus, where property was given to *A* absolutely but a clause was added that if *A* died without making a will, the property was to go over to *J*, it was observed by Lord Macnaghten :

> "Real estate must descend according to the ordinary rule of real property. You cannot give a real estate *in fee* and say that on the death of the owner intestate it shall go over to his next-of-kin."(1)

In *Ross* v. *Ross*(2) where property was transferred to *A* absolutely, but if he did not dispose it of, then over to *B*, it was held that the disposition over was void; the Master of the Rolls said :

> "If you give absolute property to a person, you cannot subject it for his life to a proviso, that if he does not spend it, his interest shall cease. One of the consequences would be, that if he had not spent it, and were to die indebted to any amount, his creditors would be excluded from it. It is quite a novel attempt to separate the devolution of property from the property itself."

In *Holmes* v. *Godson*,(3) where *A* gave property to *B* absolutely, and a subsequent clause was added that, if *B* should die under 21 or should die after attaining 21 years of age but without having made a will, the property was to go over to other persons, Lord Justice Turner said :

> "The law, which is founded on principles of public policy for the benefit of all who are subject to its provisions, has said that in the event of an owner in fee dying intestate, the estate shall go to his heir, and this disposition (namely that if the grantee died without making a will the property was to go over) tends directly to contravene the law and to defeat the policy on which it is founded. On principle, therefore, I think the disposition bad."

See also the undermentioned case.(4)

The above principles have been followed in cases arising in this country. Where a testator after conferring absolute estate on his sons, said in a subsequent clause that if any son died without leaving a son, his widow or daughters should not inherit the property, it was held by the Calcutta High Court that the clause was void for repugnancy.(5) In a similar case, the High Court of Madras took the same view.(6) So also

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Section 32 — Note 8

1. (1887) 57 L J Q B 83 (96) : 12 App Cas 672 (691), Attorney-General v. Ailesbury.

2. (1819) 37 E R 331 (336) : 20 R R 263.

3. (1856) 44 E R 317 (350) : 25 L J Ch 317.

4. (1920) 89 L J Ch 583 (585) : (1920) 2 Ch 481 (486), In re Ashton. (Gift over in the event of the original absolute donee dying mentally unfit to manage his own affairs is repugnant and void as tending to contravene the law by providing different devolution of the property from that prescribed by law in the event of an absolute owner dying intestate.)

5. 1939 Cal 226 (231) [AIR V 26] : I L R (1939) 1 Cal 63 (DB). (Clause which does not completely destroy heritability of estate but merely modifies it or interferes with course of succession cannot operate as defeasance clause.)

6. ('91) 17 Mad 150 (155) (DB). (Portion of an impartible zamindari granted absolutely, the instrument of grant providing that in case of failure of self-begotten male issue in the grantee's line, the property to be put in possession of the grantor's line — Held, that the provision to create a special right of reversion in case of failure of male issue was inoperative.)
[*See* 1938 Mad 6 (7) [A I R V 25]. (Gift by Hindu father to daughter on her marriage — Clause making an exception against the passing of estate to other heirs than donee's descendants — Contention that the clause must be regarded as condition repugnant to absolute estate already conferred or as amounting to a defeasance on an indefinite failure of issue — Held, clause was not an attempt to lay down a different rule of succession from the ordinary law in respect of devolution of absolute estate, but an attempt to indicate that the daughter should take a heritable estate only if she had descendants of her own body to inherit the estate—Clause related to period of her ownership and did not involve condition or limitation intended to be indefinitely imposed — Clause therefore was perfectly valid.)]

where the testator gave absolutely to his wife certain properties, but provided that whatever she did not dispose of during her lifetime should go for the education of the Anglo-Indian community, it was held by the Madras High Court that the proviso was void for repugnancy.(7)

Where an absolute gift was made by *A* to *B*, but subsequently, in a petition by *A* to the Collector for *dakhil kharij* between the parties *A* stated certain "conditions" as being attached to the gift, their Lordships of the Privy Council observed as follows:

> "Their Lordships are of opinion that the gift is in fact unconditional, because, as it was complete at the time when the actual transfer took place, the parties could not afterwards import a condition; and the petition must be treated as inefficacious for that purpose."(8)

Where a property was conveyed absolutely with all rights to a Theosophical Society for the use and benefit of the Society, with a condition that in the event of the property not being required for the above purposes, it would revert to the donor on his paying to the Society the then estimated value of the building, it was held that the reverter clause was not one of repugnancy to the absolute estate, but was, if at all, one of defeasance.(9)

9. **Defeasance clause and repugnant clause — Distinction between.**—*A* makes a transfer in favour of *B*, but adds a subsequent clause that the estate granted is to be defeated on the happening of a contingency. If the two parts of the document can be reconciled, and it can be gathered that *A* intended by the first portion of the document to make the transfer *subject* to the second clause, the latter is a *defeasance* clause, and the transfer, a *conditional* one. But if, on the other hand, it is clear that *A* intended by the first portion of the document to make an absolute transfer to *B*, and the subsequent clause cannot be reconciled with it, then the subsequent clause is only a *repugnant* clause and has not the effect of operating as a condition defeating the estate. In *Golak Behari* v. *Suradhani Dassi*,(1) the Calcutta High Court observed as follows:

> "Where the intention of the donor or testator is to maintain the absolute estate conferred on the donee but he adds some restrictions in derogation of the incidents of such absolute ownership, the clause is a repugnant one and is therefore void. If, however, the intention expressed, or to be necessarily implied, is to extinguish the absolute estate on the happening of a contingency and where the effect of the termination of the said estate would not be the violation of any rule of law, the clause is a defeasance clause and would operate according to its tenor."

In *Jagmohan Singh* v. *Sheoraj Kuar*,(2) Stuart, C. J., stated the distinction in the following words:

> "In a case such as this in which the testator has devised what is on the face of it an absolute estate and has subsequently added a clause, which has the appearance of reducing the powers of an owner of an absolute estate, it is necessary to decide what were his real intentions. *Did he mean to grant an absolute estate?* If he has done so, he cannot reduce the powers of the owner; and an attempt to reduce those powers will be repelled on the ground of the repugnancy of the restraint. But if, on the other hand, it appears that his full intention has been directed towards restriction it will have to be held, if the restriction is good, that the estate is not absolute. This is the law both in England and in India."

See also the undermentioned cases.(3)

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7. ('89) 13 Mad 379 (382). (Attempted disposition of 'whatever may remain' would be void for indefiniteness.)

8. ('83) 6 All 313 (321): 11 Ind App 44 (PC).

9. 1951 Mad 798 (799) [AIR V 38 C 271].

Section 32 — Note 9

1 ✠ 1939 Cal 226 (228) [AIR V 26]: ILR (1939) 1 Cal 63 (DB). (AIR 1933 Mad 80 Rel. on.)

2.† 1928 Oudh 49 (51) [AIR V 15]: 3 Luck 19 (FB).

3. 1956 Punj 45 (46) [AIR V 43 C 21].

10. Condition, fulfilment of which is impossible.—A condition subsequent, the fulfilment of which is impossible, is void and will not cause a forfeiture. In the undermentioned case,(1) a testator gave an annuity to his wife on condition that she should live in the family dwelling house to be thereafter built by him or by his executors, and not in her father's house. The family house was never built as intended, and the widow lived in her father's house. It was held by the Calcutta High Court that she did not, under the circumstances, forfeit the annuity granted to her.

11. Effect of condition subsequent being illegal. — Where a condition *precedent* is void, the transfer itself, which depends upon that condition, fails and the transferee takes nothing under the transfer.(1) But where a condition *subsequent* is illegal, the transfer does not fail but takes effect, the condition being disregarded. In other words, the transfer takes effect as if it had been made without any condition whatever.(2) Where a condition is both a condition precedent and a condition subsequent as in the case of gifts over on the happening of a condition, the prior dispositions becomes absolute and the ulterior disposition fails. See Notes on section 28.

12. Hindu and Muhammadan law. — Before the amendment of the Act in 1929, this chapter, and therefore this section did not apply to cases governed by Hindu(1) and Muhammadan law. The amendment of section 2 now renders the section applicable to cases governed by Hindu law. But the section does not still govern cases governed by the Muhammadan law.

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33. Where, on a transfer of property, an interest therein is created subject to a condition that the person taking it shall perform a certain act, but no time is specified for the performance of the act, the condition is broken when he renders impossible, permanently or for an indefinite period, the performance of the act.

Transfer conditional on performance of act, no time being specified for performance.

Synopsis

1. Analogous law.
2. Scope of the section.

1935 Pat 401 (406) [AIR V 22] : 14 Pat 610 (DB). (Absolute estate conferred on each of daughters on condition that if any of the daughters dies issueless, surviving daughters to be absolute proprietresses in equal shares —:*Held* that they took only life-interest — AIR 1933 Mad 80 Rel. on.)

1933 Mad 80 (81, 82) [AIR V 20]. (An absolute gift to the wife by the husband subject to the condition that if she dies without issue the property would pass to other persons living at the date of gift is valid in favour of third person on the fulfilment of the condition.)

Section 32 — Note 10

1. 1918 Cal 463 (464) [AIR V 5] (DB).

Section 32 — Note 11

1. See Section 25 and Notes thereon.

2. ('83) 6 All 313 (321) : 11 Ind App 44 (P C).

1926 Cal 561 (563) [AIR V 13] : 53 Cal 251. (If direction in a will changing a line of shebaits amounts to condition subsequent, the condition is void, and the offending provisions can be expunged without affecting the validity of the dedication.)

†1925 All 437 (439) [AIR V 12] : 47 All 619 (DB). (But where the gift is in consideration of future illicit intercourse the gift itself is void.)

1916 Cal 295 (301) [AIR V 3] (DB).

†(1888) 57 L J Ch 936 (937) : 39 Ch D 116 (129), Re Moore.

Section 32 — Note 12

1. 1923 Mad 67 (68, 69) [AIR V 10] (DB).

1. Analogous law.—This section corresponds to S. 136 of the Indian Succession Act, 1925, which runs as follows :

"136. Where a bequest is made with a condition superadded that, unless the legatee shall perform a certain act, the subject-matter of the bequest shall go to another person, or the bequest shall cease to have effect but no time is specified for the performance of the act ; if the legatee takes any step which renders impossible or indefinitely postpones the performance of the act required, the legacy shall go as if the legatee had died without performing such act.

Illustrations.

(i) A bequest is made to *A*, with a proviso that, unless he enters the Army, the legacy shall go over to *B*. *A* takes Holy Orders, and thereby renders it impossible that he should fulfil the condition. *B* is entitled to receive the legacy.

(ii) A bequest is made to *A*, with a proviso that it shall cease to have any effect if he does not marry *B's* daughter. *A* marries a stranger and thereby indefinitely postpones the fulfilment of the conditions. The bequest ceases to have effect."

Another provision that may be referred to as being analogous to this section is S. 34 of the Indian Contract Act, 1872. That section runs as follows :

"34. If the future event on which a contract is contingent is the way in which a person will act at an unspecified time, the event shall be considered to become impossible when such person does anything which renders it impossible that he should so act within any definite time, or otherwise than under further contingencies.

Illustration.

A agrees to pay *B* a sum of money if *B* marries *C*. *C* marries *D*. The marriage of *B* to *C* must now be considered impossible, although it is possible that *D* may die and that *C* may afterwards marry *B*."

2. Scope of the section. — The section appears to have reference only to conditions *subsequent*. The reason is that S. 25, under which an interest fails if it is dependent upon a condition precedent which is or becomes(1) impossible, will cover the case of an impossibility brought about by the transferee himself, and that this section, if it is assumed to apply to a condition precedent also would, to that extent, be a redundant provision. The analogous provision of the Indian Succession Act referred to in Note 1 also seems to show that this section applies only to condition subsequent.

Where an interest was created in land in favour of the grantee subject to a condition that he shall plant a grove on the land but no time was specified for planting the grove, it was held that the condition was not broken unless the grantee rendered the plantation impossible either permanently or for an indefinite period.(2)

Where a testator gave property to his daughter's son *X*, conditional on his living in the family house after the death of the widow of the testator, with a gift over on his failure so to reside, and the daughter's son subsequently joined the widow in selling the house, it was held that *X* was deprived of the interest given to him as he had by his own act rendered the condition of residence impossible of fulfilment.(3)

The second illustration to S. 136 of the Indian Succession Act and the illustration to S. 34 of the Contract Act(4) do not harmonise with the English law. In *Randall* v. *Payne*,(5) where a transfer was made to *X* which was dependent upon a condition precedent that *X* shall marry *Y*, and *X* married a stranger, it was held that

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Section 33 — Note 2

1. See Note 3 on Section 25.

2. 1915 All 216 (217) [AIR V 2].

3. ('12) 14 Ind Cas 708 (710) (DB) (Cal). (Case under S. 123, Succession Act, 1865, which corresponds to S. 136 of the Succession Act, 1925.)

4. See Note 1.

5. (1779) 1 Bro C C 55 : 28 E R 980.

this did not render the fulfilment of the condition impossible, for the stranger may die and *X* might marry *Y*.

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34. Where an act is to be performed by a person either as a condition to be fulfilled before an interest created on a transfer of property is enjoyed by him, or as a condition on the non-fulfilment of which the interest is to pass from him to another person, and a time is specified for the performance of the act, if such performance within the specified time is prevented by the fraud of a person who would be directly benefited by non-fulfilment of the condition, such further time shall as against him be allowed for performing the act as shall be requisite to make up for the delay caused by such fraud. But if no time is specified for the performance of the act, then, if its performance is by the fraud of a person interested in the non-fulfilment of the condition rendered impossible or indefinitely postponed, the condition shall as against him be deemed to have been fulfilled.

Transfer conditional on performance of act, time being specified.

Synopsis

1. Analogous law.
2. Scope of the section.
3. "Fraud."
4. Time specified for performance of condition—Computation of time.

1. **Analogous law.** — Section 137 of the Indian Succession Act, 1925, is similar in terms to this section, and runs as follows :

> "*137.* Where the will requires an act to be performed by the legatee within a specified time, either as a condition to be fulfilled before the legacy is enjoyed, or as a condition upon the non-fulfilment of which the subject-matter of the bequest is to go over to another person or the bequest is to cease to have effect, *the act must be performed within the time specified*, unless the performance of it *be prevented by fraud*, in which case such further time shall be allowed as shall be requisite to make up for the delay caused by such fraud."

The main points of difference between this section and S. 137 of the Indian Succession Act are as follows :

(1) Section 137 of the Indian Succession Act does not deal with the question as to what is to happen where no time is specified for the performance of the condition, and such performance is rendered impossible by the fraud of the person interested in the non-fulfilment of the condition.

(2) There is no provision in this section, such as is found in S. 137 of the Indian Succession Act, that "the act must be performed within the time specified." It has not been inserted, apparently, on the ground that it is a general and obvious proposition of law, that where a transfer is made with a condition to be performed within a particular time, the condition must be performed within that time before the transfer can take effect.

(3) Section 137 of the Indian Succession Act does not, as this section does, provide expressly that the fraud must be that of the person benefited by or interested in the non-fulfilment of the condition.

2. Scope of the section. — Where a transfer is made subject to a condition the *breach* of the condition will, if the condition is a *precedent* one, prevent the transfer taking effect, and if the condition is a *subsequent* one, defeat the interest created. Where the fulfilment of the condition becomes *impossible*, can it be said that the condition has been *broken*? Section 33 and this section deal with this question. Under S. 33 the condition would be considered broken when the person who is to perform the condition, *himself* renders such performance impossible. But the position would be different where the fulfilment of the condition is prevented or is rendered impossible by the *fraud of a third party* interested in such non-fulfilment. The condition is *not* considered broken in such a case, so far as the guilty third party is concerned. Under this section further time is to be granted for the performance of the act, or if the performance has become impossible or has been indefinitely postponed, the condition is to be deemed to hove been fulfilled.

The section is based on the rule as expressed in the maxim *fraus et dolus nemini patrocinari debent* (fraud and deceit ought not to benefit any person). And this rule is itself derived from the well recognised rule enunciated by the maxim *nullus commodum capere potest de injuria sua propria* (no one can take advantage of his own wrong).(1)

The section deals with two classes of cases :

(1) Where a *time is specified* for the performance of the act constituting the condition of the transfer and the fulfilment of the condition is *prevented* by the fraud of the person directly benefited by the non-fulfilment of the condition.

(2) Where *no time is specified* for the performance of such act, and the fulfilment of the condition is *rendered impossible or is indefinitely postponed* by the fraud of the person *interested* in the non-fulfilment of the condition.

In the former case such *further time* shall, as against such person, be allowed, for the performance of the act, as shall be requisite to make up the delay caused by such fraud. In the latter case, the condition, as against him is to be *deemed fulfilled*.

The section does not provide, in express terms, for cases where a *time is specified* for the performance of the act constituting the condition and such performance is, before the expiry of the period fixed, rendered impossible by the fraud of the person interested in, or benefited by, such non-fulfilment. It is conceived, however, that, independent of this section, the same result would follow from the general principles on which the section itself is based, and that the condition would be deemed to be fulfilled as against the person guilty of the fraud. As seen in Note 2 on Preamble to the Act, this act is not exhaustive and does not provide for all possible classes of cases, but defines and amends *certain parts* of the law relating to transfer of property. The absence of provision for the case stated above cannot, therefore, be taken as indicating that in such cases, the condition must be taken as broken.

The section uses the words "directly benefited" in the first part thereof and the word "interested" in the second part thereof, in referring to the person guilty of fraud. It is not easy to see what the point of the distinction is. A person "directly,

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Section 34 — Note 2

1. See Broom, A Selection of Legal Maxims, 10th Edn., 1939, Pages 91 and 198.
(1888) 57 L J Ch 843 (849) : 39 Ch D 190, In re London Celluliod Co.

[*See also* ('66) 10 Moo Ind App 540 (557, 558) (PC). (Fraud vitiates the most solemn proceedings of Courts of justice.)]

benefited" in the non-fulfilment of the condition is certainly "interested" in its non-fulfilment, though the contrary may not always be true. But there does not seem to be any principle why, in the application of the rule that a man cannot take advantage of his own wrong, any distinction should be made between a guilty party who is "interested" in the non-fulfilment and one who is "directly benefited" thereby.

3 **"Fraud."** — The word "fraud" has not been defined in this Act. It is in fact not possible to lay down a definition completely comprehending fraud. It is infinite in variety, and were the Courts to define it or prescribe any invariable rule as to the relief which they will give or the class of cases in which they will relieve their decrees would be continually eluded.(1) But it may be noted that a necessary element in fraud is *deception* or *deceit* and getting somebody to believe something that is really not correct.(2)

There are two principal varieties of fraud, namely, *actual* or *positive* fraud and *constructive* fraud. The former may be said to be an act or thing done or omitted *purposely and with a view* to doing an injury to some one. The latter may be said to be such acts as although not originating in any actual design or contrivance to perpetrate a positive fraud or injury upon other persons, are yet, by their tendency to deceive or mislead other persons or to violate private or public confidence or to impair or injure public interests, deemed equally reprehensible as positive frauds.(3) The fraud contemplated by this section is *actual* fraud as is indicated by the words "is prevented by the fraud" and "is by the fraud of a person interested in the non-fulfilment of the condition rendered impossible."

There are two varieties of *actual* fraud. The first is where a party intentionally misrepresents a material fact and so produces a false impression (*suggestio falsi*), and the second is the concealment of a material fact from the knowledge of a person (*suppressio veri*). But it is not every concealment of a material fact which will entitle a party to equitable relief: the concealment must, in order to be actionable, amount to the suppression of facts which the one party is *bound in legal duty* to disclose to the other party.(4)

The meaning of the word "fraud" has been given in S. 17 of the Indian Contract Act, 1872 which may be usefully considered in this connection. The section has been extracted in Note 32 on section. 6.

The *onus* of proof of fraud is on the person alleging it.(5) It is not discharged by proving merely suspicious circumstances; strict proof thereof is necessary (6)

The only ground on which the effect of the non-fulfilment of the condition is relieved against, under this section, is *fraud* of the party directly benefited or interested

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Section 34 — Note 3

1. Snell, Principles of Equity, 11th Edn., Page 467.

2. See the A I R Commentaries on the Indian Limitation Act, 4th (1964) Edition, Section 17 Note 4.

3. Snell, Principles of Equity, 11th Edition, Pages 468, 482.

4. Snell, Principle of Equity, 11th Edition, Pages 468, 471.

5. (1839) 2 Moo Ind App 181 (244) (PC).
('79) 5 Cal 363 (388) (DB).
('76) 25 Suth W R 133 (134).

6. 941 P C 93 (95) [AIR V 28]. (Fraud must be established beyond all reasonable doubt—Finding of fraud cannot be based on suspicion and conjecture.)
(1839) 2 Moo Ind App 181 (246) (PC). (Gross fraud is not to be imputed upon suspicion only.)
('75) 23 Suth W R 141 (144) (DB).
(1855) 21 Beav 621 (623): 111 R R 228 (230), Dean v. Thwaite.
[*See also* ('73) 19 Suth W R 149 (159) (PC). (Fraud is not to be presumed but must be proved by satisfactory evidence.)]

in the non-fulfilment of the condition. The mere fact that the party bound to perform the act constituting the condition, was *ignorant* of the condition imposed upon him and therefore did not perform it will not prevent the condition from taking effect against him.(7)

4. Time specified for performance of condition—Computation of time.— Where a transfer is made subject to a condition, and a period is specified for the performance of the condition, the question whether in reckoning such period the day on which the transfer was made should be included or added would seem to depend upon the facts and circumstances of the particular case. In *Lester* v. *Garland*(1) a bequest of residue was made, "in trust in case A shall, within six calendar months after the testator's decease, give security not to marry B, then and not otherwise, to pay to the children of A; with a proviso to go over, if she shall refuse or neglect to give such security." The Master of the Rolls observed that it was not necessary to lay down any general rule upon the subject but that upon technical reasoning it would be more easy to maintain that the day of an act done, or an event happening, ought in all cases to be excluded, than that it should in all cases be included. He observed, "our law rejects fractions of a day more generally than the civil law does. The effect is to render the day a sort of indivisible point: so that any act, done in the compass of it, is no more referable to any one, than to any other portion of it; but the act and the day are co-extensive; and therefore the act cannot properly be said to be passed, until the day is passed."

Election

35. Where a person professes to transfer property which he has no right to transfer, and as part of the same transaction confers any benefit on the owner of the property, such owner must elect either to confirm such transfer or to dissent from it; and in the latter case he shall relinquish the benefit so conferred, and the benefit so relinquished shall revert to the transferor or his representative as if it had not been disposed of, subject nevertheless,

Election when necessary.

where the transfer is gratuitous, and the transferor has, before the election, died or otherwise become incapable of making a fresh transfer,

and in all cases where the transfer is for consideration,

to the charge of making good to the disappointed transferee the amount or value of the property attempted to be transferred to him.

Illustrations.

The farm of Sultanpur is the property of *C* and worth Rs. 800. *A* by an instrument of gift professes to transfer it to *B*, giving by the same instrument Rs. 1,000 to *C*. *C* elects to retain the farm. He forfeits the gift of Rs. 1,000.

In the same case, *A* dies before the election. His representative must out of the Rs. 1,000 pay Rs. 800 to *B*.

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7. (1874) 22 W R (Eng) 620 (621) : 18 Eq 290 (297), Astley v. Earl of Essex. (Absence from the country and ignorance of rights does not prevent the operation of the forfeiture clause.) (1873) 21 W R (Eng) 558 (559) : 16 Eq 92 (96), In re Hodge Legacy.

Section 34 — Note 4

1. (1808) 15 Ves 248(256, 259):10 RR 68 (72, 73). [*See also* (1841) 10 L J Ch 161 (161, 162) : 11 Sim 434, Gorst v. Lowndes. (1867) 36 L J Ch 339 (340) : L R 2 Ch 143, Austin v. Tawney.]

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The rule in the first paragraph of this section applies whether the transferor does or does not believe that which he professes to transfer to be his own.

A person taking no benefit directly under a transaction, but deriving a benefit under it indirectly, need not elect.

A person who in his one capacity takes a benefit under the transaction may in another dissent therefrom.

Exception to the last preceding four rules.—Where a particular benefit is expressed to be conferred on the owner of the property which the transferor professes to transfer, and such benefit is expressed to be in lieu of that property, if such owner claim the property, he must relinquish the particular benefit, but he is not bound to relinquish any other benefit conferred upon him by the same transaction.

Acceptance of the benefit by the person on whom it is conferred constitutes an election by him to confirm the transfer, if he is aware of his duty to elect and of those circumstances which would influence the judgment of a reasonable man in making an election, or if he waives enquiry into the circumstances.

Such knowledge or waiver shall, in the absence of evidence to the contrary, be presumed, if the person on whom the benefit has been conferred has enjoyed it for two years without doing any act to express dissent.

Such knowledge or waiver may be inferred from any act of his which renders it impossible to place the persons interested in the property professed to be transferred in the same condition as if such act had not been done.

Illustration.

A transfers to *B* an estate to which *C* is entitled, and as part of the same transaction gives *C* a coal-mine. *C* takes possession of the mine and exhausts it. He has thereby confirmed the transfer of the estate to *B*.

If he does not within one year after the date of the transfer signify to the transferor or his representatives his intention to confirm or to dissent from the transfer, the transferor or his representatives may, upon the expiration of that period, require him to make his election; and, if he does not comply with such requisition within a reasonable time after he has received it, he shall be deemed to have elected to confirm the transfer.

In case of disability, the election shall be postponed until the disability ceases, or until the election is made by some competent authority.

Synopsis

1. Analogous law.
2. Scope of the section.
3. Hindu law.
4. Muhammadan law.
5. Grants from the Government.
6. Property transferred must belong to another.
7. "Professes to transfer property."
8. "Confers any benefit on the owner."
9. "As part of the same transaction."
10. "Such owner must elect."
11. "Shall revert to the transferor."
12. Charge in favour of the disappointed donee.

13. Rule may be excluded by express terms in the transfer.
14. Election by a party binds his representative but not others.
15. Rule cannot be applied to cure an illegality.
16. Election against transfer does not render cancellation necessary.
17. "Does or does not believe."
18. No election where the benefit is derived indirectly.
19. Person taking under two capacities.
20. Benefit expressed to be in lieu of property transferred — Exception.
21. Acceptance of benefit.
22. Presumption of election from two years' enjoyment.
23. Impossibility of restoring status quo.
24. Time limit for election.
25. Election by a person under a disability.
26. Transferor's disability and election.
27. Election under power of appointment.
28. Ratification is not election.

1. Analogous law. — This section corresponds to Ss. 167 to 177, both inclusive (excepting S. 170) of the Indian Succession Act, 1865 which have now been replaced by Ss. 180 to 190, both inclusive (except S. 183) of the Indian Succession Act, 1925.

2. Scope of the section.—Briefly stated, the doctrine of *election*, which is the same thing as what, in Scotland, is known as *approbate* and *reprobate*,(1) is that where a deed or will professes to make a general disposition of property for the benefit of a person named in it, such person cannot accept the benefit under the instrument without, at the same time, conforming to all its provisions and renouncing every right inconsistent with them.(2) The doctrine is based upon three broad principles. The *first* is that every man who affects by a legal instrument to dispose of property must be taken to intend all that he has expressed and that such intention must be given effect to.(3) The *second* is enunciated by the maxim *allegans contraria non est audiendus*,

Section 35 — Note 2

1. Broom, A Selection of Legal Maxims, 10th Edn., 1939, page 109.
1965 S C 241 (246) [AIR V 52 C 43] : (1964) 5 S C R 836.
1954 Mad 556 (559) [AIR V 41 C 207].
(1918) 1 Ch 300 (303) : 87 L J Ch 143 (144), In re Macartney.
(1908) 1908 App Cas 224 (232) : 77 L J P C 64 (65, 66), Douglas Menzies v. Umphelby.
(1819) 4 E R 1 (9) : 1 Bli 1, Kerr v. Wauchope.
(1920) 1920 App Cas 860 (870, 879) : 89 L J P C 195 (204), Brown v. Gregson.

2. Broom, A Selection of Legal Maxims, 10th Edn., 1939, page 109.
1965 S C 241 (246) [A I R V 52 C 43] : (1964) 5 S C R 836.
('60) ILR (1960) 1 Punj 70 (72, 73). (Transaction of sale with a condition of repurchase.)
1956 Pat 223 (226) [AIR V 43 C 58] (DB). (Overruled on another point in A I R 1958 Pat 630 (FB).)
1954 Mad 556 (559) [AIR V 41 C 207].
1928 Oudh 67 (82) [AIR V 15].
(1875) 45 L J Ch 660 (665, 666) : 7 H L 854, Codrington v. Codrington.
Also see the following cases :
(1873) 42 L J Ch 526 (528) : 3 Ch A 578, Codrington v. Lindsay.
(1819) 4 E R 1 (8) : 1 Bli 1 (22, 25, 26), Kerr v. Wauchope.
(1796) 30 E R 963 (965) : 3 Ves 191 (194), Wilson v. Mount.
(1908) 1908 App Cas 224 (233) : 77 L J P C 64 (66), Douglas Menzies v. Umphelby.
(1857) 44 E R 645 (649) : 1 De G & J 62 (70), Stephens v. Stephens.
(1800) 31 E R 555 (556) : 5 Ves 218 (220), Wallen v. Tanner.
(1884) 28 Ch D 124 (135) : 54 L J Ch 244 (246), In re Vardon's Trusts.
(1800) 31 E R 710 (712) : 5 Ves 515 (517), Blount v. Bestland.
(1796) 30 E R 676 (678) : 2 Ves Jun 367 (370), Whitler v. Webster.
(1792) 30 E R 464 (469) : 1 Ves Jun 514 (523), Blake v. Banbury.
(1743) 26 E R 774 (775) : 2 Atk 627 (629), Morris v. Burrows. (Election is not a question of custom.)
(1706) 23 E R 978 (978) : 2 Vern 582 (582), Noys v. Mordaunt. (The word "condition" was used in this case instead of the word "obligation" — This gave rise to a difficulty as to whether the non-performance of the "condition" involved a forfeiture — Later cases doubted the correctness of the use of the word "condition" in relation to the doctrine of election.)
(1735) 25 E R 724 (727) : (1735) Cas T Talb 176 (183), Streatfield v. Streatfield. (The word "condition" is used in this case instead of the word "obligation.")

3. (1875) 44 L J Ch 6 (14) : L R 7 H L 53, Cooper v. Cooper.

which expresses, in technical language, the trite saying of Lord Kenyon, that a man shall not be permitted to "blow hot and cold" with reference to the same transaction, or insist at different times, on the truth of each of two conflicting allegations, according to the promptings of his private interest.(4) The *third* is enunciated by the maxim *qui sentit commodum sentire debet et onus* (he who derives the advantage ought to sustain the burden).(4a) Thus, suppose *A* purports to transfer property *x* owned by *B* to *C*, and by the same transaction gives a benefit to *B*. Applying the first principle, *B* must, if he wishes to take the benefit under the instrument, give effect to *all* that the transferor has expressed and this would involve his giving up the property *x* to *C*. The same result is arrived at by applying the second principle. *B* cannot both affirm and disaffirm the transaction and thus "blow hot and cold" with reference thereto. If he takes the benefit given, he affirms the transaction and must, therefore, be taken to affirm the transfer of property *x* to *C*, and this again would involve his giving up property *x* to *C*.(4b) The principle of the doctrine of election is explained by Lord Hatherley, in *Cooper* v. *Cooper*(5) as follows :

> "The main principle was never disputed, that there is an obligation on him who takes a benefit under a will or other instrument to give full effect to that instrument under which he takes a benefit, and if it be found that that instrument purports to deal with something which it was beyond the power of the donor or settlor to dispose of, but to which effect can be given by the concurrence of him who receives a benefit under the same instrument, the law will impose on him who takes the benefit the obligation of carrying the instrument into full and complete force and effect."(6)

The doctrine of election and the principles on which it is based all rest on considerations of what is fair and just.(7) The doctrine has been described as a "rule of conscience"(8) as one proceeding from the highest principles of equity,(9) as one resting upon plain and fair dealing(10) and as one enabling a Court to secure a just distribution of property in substantial accordance with the terms of the instrument.(11)

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4. Broom, A Selection of Legal Maxims, 10th Edn., 1939, page 103.

4a Broom, A Selection of Legal Maxims, 10th Edn., 1939, page 482.

1967 Ker 190 (192) [AIR V 54 C 77]. (Partition of properties by *T* and two others, who were lineal descendants in female line of *X* and *Y* who were sisters belonging to Thala Nair Community — *P* and *V*, brothers of *T* not made parties to partition deed under erroneous impression that descendants in female line alone were entitled to properties of women among Thala Nairs — *T* gifting properties to *P* and *V* for their maintenance on the ground that they had no right to properties under partition deed — One of the gifted items an item taken by *T* under partition and the other his self-acquired property — *P* and *V* cannot without surrendering the gifted items claim shares in the property taken under partition by *T*.)

4b. 1938 Mad 1:6 (140) [A I R V 25] (DB). (Minors getting benefit under father which cannot be retained by them if they repudiate the will — They must elect to stand by will or to repudiate it.)

(1887) 34 Ch D 160 (163, 164) : 56 L J Ch 82 (84), In re Brooksbank; Beauclerk v. James.

5. (1874) 44 L J Ch 6 (14) : 7 H L 53.

6. *See also the following cases to the same effect :*

(1818) 36 E R 422 (437) : 1 Swanst 359 (403), Dilon v. Parker.

(1915) 84 L J Ch 578 (580) : (1915) 1 Ch 450 (455, 456), In re Williams, Cunliffe v. Williams. (Where by reason of an election to take under the instrument property has been set free to pass under the instrument, that property becomes subject to all the incidents it would have been subject to, had it been throughout the property of the donor.)

(1920) 89 L J P C 195 (199) : (1920) App Cas 860 (863), Brown v. Gregson.

7. 1954 Mad 556 (559) [A I R V 41 C 207]. (Doctrine is not peculiar to English or Scottish law or any other law.)

(1920) 89 L J P C 195 (206) : (1920) A C 860 (883), Brown v. Gregson. (Per Viscount Cave.)

8. (1819) 4 E R 1 (8) : 1 Bli 1 (22), Kerr v. Wauchope.

9. (1874) 30 L T (NS) 409 (410) : 44 L J Ch 6, Cooper v. Cooper.

10. (1908) 77 L J P C 64 (66) : (1908) App Cas 224 (232), Douglas Menzies v. Umphelby.

11. (1920) 89 L J P C 195 (198) : 1920 App Cas 860 (868), Brown v. Gregson. (Per Viscount Haldane.)

The doctrine of election applies to all kinds of property and all interests in property. It applies to all persons claiming property in any character. In applying the doctrine no distinction is made between a personal estate and a real estate, between a specific legatee and residuary legatee, or between legatees and the next of kin of the intestate.(12)

The doctrine will apply to wills as well as to deeds.(13) Sections 180 to 190 both inclusive of the Indian Succession Act, 1925, deal with the application of the doctrine to wills and this section deals with the doctrine as applied to transfers of property.(14)

In order that the section may apply, it is essential that—

(1) there should be a property not belonging to the transferor, i.e., property to which he has no right to transfer (See Note 6) ;

(2) the transferor must profess to transfer such property (See Note 7); and,

(3) as part of the same transaction of transfer, the transferor must confer some benefit on the owner of such property (See Note 8).

3. Hindu law. — The principle, that a party shall not at the same time both affirm and disaffirm the same transaction (i.e., affirm it as far as it is to his benefit, and disaffirm it as far as it is to his prejudice), which is the basis of the rule of election, is not peculiar to English law. The principle is based on rules of justice and is, as such common to all systems of law. It was, therefore, applied to Hindus, even before this Act was enacted.(1) In *Shah Mukhunlal* v. *Babu Shrikrishna Singh*,(2) their Lordships of the Privy Council observed as follows :

> "The principle, so just and reasonable in itself, and often expressed in the terms that you cannot both approbate and reprobate the transaction, has been applied by their Lordships in this Committee to the consideration of Indian appeals, as one applicable also in the Courts of that country, which are to administer justice according to equity and good conscience. The maxim is founded, not so much on any positive law, as on the broad and universally applicable principles of justice. The case of *Forbes* v. *Ameeroonissa Begum*(3) furnishes one instance of this doctrine having been so applied, where it is said in the judgment of their Lordships,..... "The respondent cannot both repudiate the obligations of the lease, and claim the benefit of it"."

When this Act was passed in 1882 it was provided by S. 2 that nothing in the second chapter of the Act should effect any rule of Hindu or Muhammadan law. This section did not, therefore, affect any rule of Hindu law. But there was no rule of Hindu law contrary to the principles laid down in the section and consequently the said principles were applied to transactions by Hindus also.(4) The amendment of S. 2

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12. (1873) 40 L J Ch 5 (7) : 6 Ch 15 (21), Cooper v. Cooper.
(1802) 32 E R 194 (197) : 7 Ves 480 (488), Webb v. Earl of Shaftesbury. (Remote and contingent interest.)

13. (1794) 30 E R 846 (848) : 2 Ves 693, Wilson v. (Lord) Townshed. (Applies to interest of married woman — Whether immediate, remote, contingent, of value or of no value.)
(1795) 30 E R 768 (776) : 2 Ves Jun 544 (560), Darlington v. Pultney. (Applies to all kinds of interest of married woman.)
(1873) 42 L J Ch 526 (528) : 8 Ch App 578 (587), Codrington v. Lindsay. (Case law discussed.)
(1789) 29 E R 539 (540) : 3 Bro C C 285*n*, Bigland v. Huddlestone. (Election under a marriage settlement.)
(1884) 26 Ch D 358 (363) : 53 L J Ch 571 (574), Griffiths Boscawen v. Scott. (Election under deed of settlement.)
(1816) 34 E R 662 (663) : 19 Ves Jun 665 (668), Green v. Green. (Marriage settlement.)
(1820) 37 E R 656 (660) : 2 Jac & W 334 (345), Cumming v. Forrester.

14. 1954 Mad 556 (559) [AIR V 41 C 2[illegible].
1941 Mad 430 (431) [A I R V 28] : I L R (1941) Mad 551 (DB).

Section 35 — Note 3

1. (1846) 4 Moo Ind App 1 (103) (PC).
2. ('67) 12 Moo Ind App 157 (186) (PC).
3. ('66) 10 Moo Ind App 340 (356) (PC).
4. 1925 Mad 164 (166) [AIR V 12] (DB)

in 1929 by the omission of the word "Hindu" therefrom now makes the section directly applicable to transactions by Hindus.

4. Muhammadan law. — By virtue of S. 2, nothing in Chapter II of this Act shall be deemed to affect any rules of Muhammadan law. But there is no rule of Muhammadan law inconsistent with the principles underlying the section which is therefore applicable even to transactions by Muhammadans. In the undermentioned ( ) the doctrine was applied by their Lordships of the Privy Council to a case between Muhammadans.

5. Grants from the Government.—The doctrine of election does not extend to the grants from the Government, as such grants are saved from the operation of this Act by S. 2 of the Government Grants Act, 1895, which runs as follows:

> "Nothing in the Transfer of Property Act, 1882, contained shall apply or be deemed ever to have applied to any grant or other transfer of land or of any interest therein heretofore made or hereafter to be made by or on behalf of the Government to, or in favour of, any person whomsoever; but every such grant and transfer shall be construed and take effect as if the said Act had not been passed."

It has been held in England also that the doctrine of election does not extend to grants from the Crown.(1)

6. Property transferred must belong to another. — No case for election would arise unless the property transferred is one which the transferor has no right to transfer.(1) For if the transferor had a right to transfer the property, the property will pass to the transferee independent of any election by the person to whom a benefit is given by the same instrument. As has been observed in *Wollaston* v. *King*,(2) it is necessary for the application of the doctrine of election that there should be a claim *under* the instrument and also a claim *dehors* the instrument. Where a person claims only *under* an instrument the fact that he is claiming under several clauses of the same instrument will not raise a question of election.

See also Note 10.

7. "Professes to transfer property." — The second essential is that the transferor should have *professed to transfer* property, which as a fact, did not belong to him. A *surrender* by a Hindu widow to her immediate reversioners is not a transfer of property (see S. 5 Note 4); the section has no application to such cases.(1)

A person is *prima facie* presumed to have transferred only what is his own, and not what belongs to other persons. Where, therefore, a property does not, in fact, belong to a person, his intention to transfer it must be clear and manifest on the face of the deed of transfer.(1a). Such intention may be expressed in clear

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'1922 Mad 357 (358) [AIR V 9] (DB).
1919 Mad 464 (466) [AIR V 6] (DB). (Judgment based on English decisions.)
('99) 22 Mad 289 (290, 291) (DB).
[*See also* ('89) 14 Bom 438 (440) (DB). (Doctrine of election applies to wills made in India.)]

Section 35 — Note 4

1. 1916 P C 27 (37) [AIR V 3] : 38 All 627 : 43 Ind App 212 : 19 Oudh Cas 192.

Section 35 — Note 5

1. (1820) 37 E R 656 (660) : 22 W R (Eng) 157, Cumming v. Forrester.

Section 35 — Note 6

1. 1941 Mad 430 (431) [AIR V 28] : ILR (1941) Mad 551 (DB).
2. (1869) L R 8 Eq 165 (174) : 38 L J Ch 392 (395).

Section 35 — Note 7

1. 1941 Mad 430 (431) [AIR V 28] : ILR (1941) Mad 551 (DB), Venkatarayudu v. Narayana.
1a. (1760) 27 E R 259 (260] : Amb 388 (390), Forrester v. Cotton.
(1856) 44 E R 537 (541) : 111 R R 159, Wintour v. Clifton. (Testator having limited interest in the property.)

terms.(2) or if it is implied in the terms of deed, it must be so plain by demonstration and by implications that it should appear utterly improbable that the transferor could mean anything otherwise.(3) The use of general words will raise no case of election(4) and particularly so, where the transferor has a partial interest in the property transferred, as the general words apply equally to his own interest and do not imply an intention to dispose of any other property than his own.(5) But where the transferor is a co-owner and transfers "whole" of the property specifically conferring some [illegible] upon the other co-owner, the necessary intention is clear from the deed and [illegible] owner is put to election.(6) In *Blake* v. *Burnbury*,(7) Lord Commissioner [illegible] observed as follows:

> "This putting a devisee to his election, however reasonable and just it may be, was certainly a strong operation of a Court of Equity; and I agree, the intention of the testator to dispose of that, which is not his, ought to appear upon the will, with such explanation however of the *prima facie* appearance as the law admits; and that it ought to appear by declaration plain or necessary conclusion from the circumstances; and no man ought under pretence of this rule to be spelt or conjectured out of his property. But as on one hand we are not to do it by conjecture, so on the other we are not to refuse our assent to that moral certainty and demonstration, which in such cases as the present the general object of both instruments, the nature of the subject, the scope and purview of the will, the observations upon the particular clauses, and the force of the expressions, construed according to their natural import, may produce."

It is not necessary that the transferor should intend *to put the party to election*. Such an intention presumes knowledge of the equitable doctrine of election on the part of the transferor which is usually absent. The intention which the Courts require is to give property which the transferor has no right to give and to give a benefit to the person who is the owner of the property. Once these two intentions are clear from the deed, the Court draws the conclusion that there should be an election.(7a)

The onus of proving that there is such an intention rests on those who contend for a case of election.(8) But where the intention is clear on the face of the deed to pass the whole property and thus to raise a case of election, the burden of proving that the transferor meant to transfer only what was left with him and not more, lies on those who oppose election.(9) The intention of the transferor must, however, appear on the face of the deed. No extrinsic evidence, *dehors* the deed is admissible to show that the transferor had an intention to pass what was not his and thus to raise a question of election.(10)

(1736) 26 E R 724 (727) : 1 Swan 436n, Streatfield v. Streatfield.

[*See* (1827) 5 L J Ch 99 (103) : 27 R R 176, Attorney-General v. Earl Lonsdale. (Intention imperfectly expressed—Not effectuated by any device—No election.)]

[*See also* (1792) 30 E R 475 (478, 479) : 1 Ves Jun 534 (541), Finch v. Finch. (Intention must appear from the circumstances taken together.)

(1811) 18 Ves 27 (41) : 34 E R 227, Lord Dashwood v. Peyton. (Expression of a condition with reference to one individual is not a sufficient proof that there is no intention to raise a case of election in favour of another.)]

2. (1792) 30 E R 464 (469) : 1 Ves Jun 514 (523), Blacke v. Bunbury.

3. (1818) 3 E R 1428 (1438) : 19 R R 36, Rancliffe v. Parkyns.

4. (1760) 27 E R 259 (260) : Amb 388 (390), Forrester v. Cotton.

5. (1863) 33 L J Ch 511 (512) : 10 L T 255, Miller v. Thurgood.

6. (1863) 33 L J Ch 511 (512) : 10 L T 255, Miller v. Thurgood.

(1871) 40 L J Ch 253 (254) : 6 Ch App 339, Willkinson v. Dent.

(1860) 54 E R 426 (428) : 28 Beav 420 (421), Fritzsimons v. Fritzsimons.

7. (1792) 30 E R 464 (469) : 1 Ves Jun 514 (523, 524).

7a. (1875) 44 L J Ch 6 (16) : 7 H L 53, Cooper v. Cooper.

8. (1818) 3 E R 1428 (1438) : 6 Dow 149 (179), Rancliffe v. Parkins.

9. (1792) 30 E R 464 (470) : 1 Ves Jun 514, Blake v. Bunbury.

10. (1791) 30 E R 346 (346) : 1 Ves Jun 285 (285), Stratton v. Best.

(1833) 39 E R 944 (949) : 2 Myl & K 262 (274, 275), Dummer v. Pitcher.

8. "Confers any benefit on the owner."—The doctrine of election does not apply unless a *benefit is conferred* on the owner of the property which is professed to be transferred.

Illustrations.

(1) *A* had a power to appoint property *x* to his child *B* who was also entitled to it in default of appointment. *A* appointed a *portion* of the property *x* to *B* and the remainder to *C* who was not an object of the power. *A* did not give any of his own property to *B*. It was held that the appointment in *C's* favour was invalid as he was not an object of the power, and that as no part of *A's* own property was given to *B*, the latter was not under a duty to elect. The Lord Chancellor observed: "In all cases there must be some free disposable property given to the person which can be made compensation for what the testator takes away."(1)

(2) *A* had a power to appoint certain property to *children*, who were also entitled to it in default of appointment. He appointed the property to *grandchildren*, but gave the children certain legacies. It was held that the children were bound to elect.(2)

Section 183 of the Indian Succession Act, 1925, provides that, for the purposes of election, a bequest for a person's benefit is the same thing as a bequest made to himself and the following illustration is given :

Illustration.

"The farm of Sultanpur Khurd being the property of *B*, *A* bequeathed it to *C* and bequeathed another farm called Sultanpur Buzurg to his own executors with a direction that it should be sold and the proceeds applied in payment of *B's* debts. *B* must elect whether he will abide by the will, or keep his farm of Sultanpur Khurd in opposition to it."

The benefit conferred upon the owner should not, however, be coupled with such a condition as would imply an intention on the part of the transferor to exclude an election. Thus, a benefit conferred upon a married woman in England, with a restraint on anticipation, is such a benefit as cannot be parted with and hence there cannot be any election by her.(3)

The doctrine of election does not become inapplicable by reason of the fact that a *part* of the benefit granted fails. The owner will be put to his election in respect of the part which takes effect.(4)

9. "As part of the same transaction." — The principle underlying this section being, as has been seen in Note 2, that a person cannot "blow hot and cold" in respect of the *same transaction*, the operation of the section is expressly limited to cases where a person professes to transfer property which he has no right to transfer and *as part of the same transaction* confers a benefit upon the owner of the property so transferred.(1) In other words the section is applicable only where the benefit and the

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(1836) 48 E R 325 (328) : 1 Keen 309 (316), Clementson v. Gandy.
[*See also* (1816) 3 E R 1091 (1100) : 4 Dow 65 (93), Doe v. Chichester.]
[See however (1776) 30 E R 1141 (1141) : 3 Ves 529, Pulteney v. (Lord) Darlington. (Steward's accounts and settlement to show the circumstances.)]

Section 35 — Note 8

1. (1794) 30 E R 660 (667) : 2 R R 235, Bristow v. Warde.
[*See also* (1859) 54 E R 142 (143) : 27 Beav 362 (366), In re Fowler's Trusts.]

2. 1967 S C 1153 (1155, 1156) [AIR V 54 C 240]: (1967) 2 S C R 448. (A, a Mithakshara father, disposing of joint family property by will giving only the residue to his son P—P gets no benefit under the will as he is already entitled to the property as a member of the joint family —Hence no question of putting P to election can arise.)
(1796) 30 E R 676 (678) : 2 Ves Jun 367 (370), Whistler v. Webster.

3. (1884) 27 Ch D 606 (612) : 54 L J Ch 201 (203), In re Wheatley; Smith v. Spence.

4. (1783) 28 E R 1073 (1074) : 1 Bro C C 186 (187), Newman v. Newman.

Section 35 — Note 9

1. 1922 Mad 357 (358) [AIR V 9] (DB).

burden come directly from the 'same source' or the same transaction.(2) If the property belonging to a third person is disposed of by one transaction and a benefit is conferred on him by another transaction both being *independent* of each other, such person is not bound to elect. Thus, where a Hindu widow gave away some immovable property in excess of her powers of transfer, by a gift deed, and by a will executed later on, she conferred on her reversioner some other benefit and it was found that the gift was not the subject of the will, it was held that no question of election could arise and that the present section did not bar the reversioner from repudiating the previous gift merely by reason of his acceptance of the benefit under the will.(3)

In *Sardar Muhammad Afzal Khan* v. *Nawab Ghulam Kasim Khan*,(3a) *X* granted *Y*, his second son, a village for maintenance. After the death of *X*, the Government also granted *Y*, a portion of the cash allowance allowed to his father *X*. The question arose whether *Y* could be put to election in respect of these two grants. It was held by their Lordships of the Privy Council that no question of election could arise as the grants were independent and derived from different sources.

The section, however, does not require that both these things should be done by *the same instrument* of transfer. It is sufficient for the purpose of this section that they are the parts of the *same transaction* even though they are effected by two separate documents. Thus, in *Bacon* v. *Cosby*,(4) there were two deeds of antenuptial settlement, one dealing with realty and the other with personalty. One deed disposed the property which did not belong to the settlor while the other conferred a benefit upon the owner of the property. It was held that both the deeds formed the same transaction, "for all intents and purposes, as if contained in the same deed." Similarly in *Douglas Menzies* v. *Umphelby*,(5) two separate wills of the same testator were held to form only one testamentary scheme for the purpose of putting a legatee to election.

10. "Such owner must elect."—The words "confers any benefit on the *owner* of the property" and "such *owner* must elect" show that a case for election arises only where a person transfers property *belonging to another* and at the same time confers a benefit on him.(1) It is clear, therefore, that unless a person is the "owner" of the property professed to be disposed of by the transferor, he is under no obligation to elect.(2) Thus where a person calls upon an heir to pass property which belongs to him only in the character of his heir and not otherwise he is calling upon his heir to convey only what belongs to himself and not what belongs to the heir. There will be no election in such a case even if the heir receives any other benefit under the will and

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2. 1954 Mad 556 (559) [AIR V 41 C 207].
† 1917 Oudh 210 (211) [AIR V 4] : 20 Oudh Cas 243 (DB).
[*See* ('60) I L R (1960) 1 Punj 70 (73, 74). (Sale and condition of repurchase being part of same transaction.)]

3. 1922 Mad 357 (358) [AIR V 9] (DB).

3a. ('03) 30 Cal 843 (864) : 1903 Pun Re No. 67: 30 Ind App 190 (PC).

4. (1851) 64 E R 824 (825) : 4 De G & Sm 261 (264).

5. (1908) 1908 App Cas 224 (233) : 77 L J P C 64 (66). (As it was manifest that the two wills formed a coherent scheme of intention.)

Section 35 — Note 10

1. (1870) 6 Ch 15 (20) : 40 L J Ch 5 (7), Cooper v. Cooper.
(1860) 54 E R 426 (427) : 28 Beav 417 (420), Fitzsimons v. Fitzsimons.
† (1805) 32 E R 976 (980) : 10 Ves 597 (609), Broome v. Monck.

2. † 1928 Oudh 67 (82) [AIR V 15].
('09) 1 Ind Cas 573 (583) (DB) (Cal).
(1792) 30 E R 485 (488) : 1 Ves Jun 555 (561), Crosbie v. Marray.
(1861) 70 E R 831 (837) : 1 J & H 470 (482), Maddison v. Chapman.
(1691) 23 E R 758 (759) : 2 Vern 245 (247), Clarges v. Albemarle. (Owner having life-estate only, not making claim for election during life-time. Her administrator cannot claim election.)

the property will pass from heir because of the intention expressed in the will and not by election.(3) Similarly, where a Hindu testator disposed of by his will certain ornaments described as "my own and my wife's ornaments" and it was found that he had other ornaments worn by her over which he had a disposing power, it was held that the said words did not include the wife's "*stridhan*" ornaments and that therefore she was not put to election as regards her "*stridhan*" ornaments and other benefits under the will.(4)

The term "owner" in the section is used in a very wide sense and includes persons who have not only vested, but contingent rights, and reversionary and remote as well as immediate interest in the property.(5) The following illustrations from S. 182 of the Indian Succession Act, 1925, applying the rule of election to remote and contingent interests may usefully be referred to :

Illustrations

(1) "*A* bequeaths to *B* 1,000 rupees, and to *C* an estate which will, under a settlement, belong to *B* if his elder brother (who is married and has children) shall leave no issue living at his death. *B* must elect to give up the estate or to lose the legacy."(6)

(2) "*A*, a person of the age of 18, domiciled in India but owning real property in England, to which *C* is heir-at-law, bequeaths a legacy to *C* and, subject thereto, devises and bequeaths to *B* "all my property whatsoever and wheresoever," and dies under 21. The real property in England does not pass by the will. *C* may claim his legacy without giving up the real property in England."(7)

The principle of election does not apply to the creditors of the owner of property transferred as they have no specific right or interest in such property. The only right they have is to have their debts paid and the estate applied so far as is necessary, for that purpose.(8)

The ownership referred to in this section is the ownership *at the time when the liability to elect arises.* A person sought to be put to election must be the owner of the property at the time when the obligation to elect arises. If he is not the owner at that time he cannot be put to his election merely because he receives a benefit under the transfer. Even an acquisition of interest in the property by him *after* the time will be of no avail, because the equities of the parties to election must be determined according to the state of circumstances existing when the duty to elect arises. An acquisition of interest afterwards cannot give rise to any new or additional equity against the party. Thus where a testator purports to devise land *x* belonging to *A* to *B* who does not take any other interest under the will, and also bequeaths a legacy to *C*, *C* will not be put to election by reason of the fact that subsequent to the testator's death he acquired an interest in *x*.(9)

11. **"Shall revert to the transferor."**—This section differs from the English law as to the effect of the donee of the benefit electing to *dissent* from the transfer. Under the English law, the person on whom the benefit is conferred does not, by his

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3. (1805) 32 E R 976 (983) : 10 Ves 597 (617), Broome v. Monck.

4. (1889) 15 Bom 443 (452).

5. †1928 Oudh 67 (82) [AIR V 25].

6. Illustration (iii), Section 182, Indian Succession Act, 1925.

7. Illustration (iv), ibid.

8. (1806) 33 E R 55 (59, 61) : 12 Ves 136 (154, 158), Kidney v. Coussmaker.
(1874) 44 L J Ch 6 (15) : 7 H L 53, Cooper v. Cooper.
[*See also* (1795) 30 E R 768 (777) : 2 Ves Jr 544 (562), Cavan (Lady) v. Pultney.)

9. (1886) 31 Ch D 466 (476, 477): 55 L J Ch 401 (404, 406, 407), In re Chesham (Lord); Cavendish v. Dacre.
(1869) 7 Eq 291 (295) : 17 W R (Eng) 438 (439), Orissel v. Swinhoe.

dissent from the transfer, *forfeit in its entirety* the benefit conferred on him but only to the extent necessary to compensate the disappointed transferee. Thus, where *A* transfers property *x* belonging to *C* and worth Rs. 1,000, to *B*, and by the same transaction confers a benefit worth Rs. 1,500 on *C*, and *C* elects to dissent from the transfer and retain his property, he will, under the English law, have to give up *only* Rs. 1,000 out of the benefit conferred on him for compensating *B*, but can retain the balance of the benefit worth Rs. 500. In other words, under the English law the doctrine of election is only a doctrine of *compensation* and not of *forfeiture*.(1)

Under this section, however, the doctrine of election is regarded, so far as the owner of the property is concerned, as one of forfeiture and not of compensation. In the illustration referred to above, *C* will, under this section, forfeit the entire benefit. The balance out of Rs. 1,500, after compensating *B*, will *revert to the transferor or his representatives*. This principle has been adopted also in S. 182 of the Indian Succession Act, 1925, illustration (i) to which runs as follows :

> "The farm of Sultanpur was the property of *C*. *A* bequeathed it to *B*, giving a legacy of 1,000 rupees to *C*. *C* has elected to retain his farm of Sultanpur, which is worth 800 rupees. *C forfeits* his legacy of 1,000 rupees, of which 800 rupees goes to *B*, and the remaining 200 rupees *falls into the residuary bequest, or devolves according to the rules of intestate succession*, as the case may be."

12. **Charge in favour of the disappointed donee.** — Where the owner of the property transferred elects to dissent from the transfer, the disappointed transferee is entitled to compensation—

(1) in *all* cases where the transfer is for consideration, and

(2) where the transfer is gratuitous, *only when the transferor dies or becomes otherwise incapable of making a fresh transfer, before the election takes place.*

The principle underlying the claim of the disappointed transferee has been stated by Sir George Jessel in *Pickersgil* v. *Rodger*(1) as follows :

> "The disappointed legatee may say to the devisee, 'you are not allowed by a Court of Equity to take away out of the testatrix's estate that which you would otherwise be entitled to, until you have made good to me the benefit she intended for me.' That means that no one can take the property which is claimed under the will without making good the amount ; or, in other words, as between the devisees and legatees claiming under the will, the disappointed legatees

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Section 35 — Note 11

1. (1813) 35 E R 290 (291) : 2 Ves & B 187 (190, 191), Welby v. Welby.
(1792) 30 E R 464 (469) : 1 Ves Jun 514 (523), Blake v. Bunbury.
(1877) 25 W R (Eng.) Dig 328 (324): 5 Ch D 163, Pickersgill v. Rodger.
(1908) 1908 App Cas 224 (234) : 77 L J P C 64 (66), Douglas Menzies v. Umphelby.
(1804) 32 E R 644 (648) : 9 Ves 369 (379), Rich v. Cockell.
(1796) 30 E R 676 (678) : 2 Ves Jun 367 (372) Whistler v. Webster.
(1818) 36 E R 422 (430) : 1 Swans 359 (381), Dillon v. Parker.
(1819) 4 E R 1 (9) : 1 Bli 1 (25, 26) Ker v. Wauchope.
(1892) 61 L J Ch 220 (223) : (1892) 1 Ch 396, Hamilton v. Hamilton.
†(1795) 30 E R 768 (776) : 2 Ves Jr 544 (560) Cavan (Lady) v. Pultney.
(1819) 36 E R 443 (447) : 1 Swan 409 (424, 440), Gretton v. Haward.
(1920) 1920 App Cas 860 (867) : 89 L J P C 195 (199), Brown v. Gregson.
†1919 Mad 464 (466) [AIR V 6] (DB). (The case was one between Hindus — The section did not in terms apply to them and therefore the English law was applied.)
[*See also* (1886) 31 Ch D 466 (475) : 55 L J Ch 401 (405), In re Chelshan (Lord); Govendish v. Dacre. (No compensation where the donee takes under the deed.)]
[See however (1874) 44 L J Ch 6 (14) : 7 H L 53, Cooper v. Cooper.
(1816) 34 E R 659 (661, 662) : 19 Ves Jun 658 (663), Tibbits v. Tibbits.
(1816) 34 E R 662 (663) : 19 Ves 665 (668), Green v. Green.

Section 35 — Note 12

1. (1876) 5 Ch D 163 (173) : 25 W R (Eng) Dig 324. (Cited in (1918) 87 L J Ch 143.)

are entitled to sequester or to keep back from the other devisees or legatees the property so devised and bequeathed until compensation is made. Thence arises the doctrine of an equitable charge or right to realize out of that property the sum required to make the compensation."

But the difference between the English law and the present section is that while under the English law the remedy of the disappointed transferee for compensation is *against the owner of the property transferred*(2) the remedy under the present section is against the *transferor or his representatives*. This difference is a consequence of the view taken in England that the doctrine of election is not one of forfeiture but of compensation only. (See Note 11.)

The extent of the compensation to be received by the disappointed donee is the amount or the value of the property that is attempted to be transferred to him under the deed.(3) Thus, suppose *A* transferred property *x* belonging to *B* to *C* and gives *B* property *y*. *B* dissents from the transfer. *C* would, under this section, be entitled to claim from *A* or his representative only the value of the property *x*. Such value is to be a charge upon property.(4)

The date at which the amount of compensation is to be ascertained is the date on which the *liability to elect arises* and not the date on which the election is *actually made*. Thus, where a party taking under a will elected to take against the will after about two years after the death of the testator, it was held that the amount of compensation was to be ascertained as at the date of the testator's death and not as at the date of actual election.(5)

(13) **Rule may be excluded by express terms in the transfer.** — As has been seen in Note 2 the rule of election is based on the presumed general intention of the transferor that effect should be given to every part of the instrument of transfer. A rule of law which depends for its operation on the intention of the transferor may be rendered inapplicable by a declaration by the transferor of a contrary intention. It has been held in England that the rule of election is subject to such a limitation. In *In re Vardan's Trusts*,(1) Fry L. J. observed as follows :

"This general and presumed intention is not to be repelled by showing that the circumstances which in the event give rise to the election were not in the contemplation of the author of the instrument. But, on principle, it is evident that it may be repelled by the declaration in the instrument itself of a particular intention inconsistent with the presumed and general intention. For example, if the settlement in question had contained an express declaration that in no case should the doctrine of election be applied to its provisions, there seems to be no reason why such a declaration should not have full effect given to it."

Thus, where a testator purported to give away property belonging to a married woman and conferred upon her a benefit with a restraint on anticipation, it was held that there could be no election as the restriction placed on anticipation was in itself a declaration of a particular intention inconsistent with the idea of election.(2)

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2. (1864-65) 11 E R 1461 (1468) : 11 H L C 588 (603), Spread v. Morgan.

3. † (1908) 1908 App Cas 224 (234) : 77 L J P C 64 (67), Douglas Menezies v. Umphelby. (1864-65) 11 E R 1461 (1469) : 11 H L C 588 (606), Spread v. Morgan.
(1813) 35 E R 290 (291) : 2 V & B 187 (191), Welby v. Welby.

4. (1876-77) 3 Ch D 688 (689) : 25 W R (Eng) Dig 321 (321), Rogers v. Jones.

5. † (1905) 1 Ch 16 (20) : 74 L J Ch 69 (71), In re Hancock; Hancock v. Powson.

Section 35 — Note 13

1. (1885) 55 L J 259 (262) : 31 Ch D 275.

2. (1885) 55 L J Ch 259 (262) : 31 Ch D 275, In re Vardon's Trusts.
(1892) 1 Ch 396 (405) : 61 L J Ch 220 (224, 225), Hamilton v. Hamilton.
(1884) 27 Ch D 606 (612) : 54 L J Ch 201 (204, 205), In re Wheatley; Smith v. Spence.

The present section does not state in terms that the rule is subject to the expression of a contrary intention. But on the principle stated above, it is conceived that its operation may be excluded by express terms in the transfer showing a contrary intention. The exception, referred to in the section, also shows that the transferor can, by appropriate expression of intention, limit the operation of the rule to a particular benefit conferred.

14. Election by a party binds his representative but not others. — An election when made by a party is binding not only on himself but also on his representatives. Thus, in *Tribhowandas* v. *Smith*,(1) a Hindu father elected to take under his father's will and for that purpose gave a release of ancestral property belonging to the family. It was held that his sons were bound by his act and could not claim any interest in the property so released.

But apart from his representatives, an election by one person is not binding on any other person. Thus, where there are several persons interested as *co-owners* in the property disposed of by the transferor and all of them receive benefit under the transfer, every one of them has a separate right of election. An election by one does not bind the others nor does an election by the majority of them bind the rest.(2) Similarly, where one person is interested in the property as a tenant for life and the other as a remainderman, an election by the former does not bind the latter.(3) See also the undermentioned case.(4)

15. Rule cannot be applied to cure an illegality. — The rule of election cannot be so applied as to enable the transferor to evade any rule of law. Thus, where *A* confers a benefit on *B* and professes to transfer the latter's property in such a way as to offend the rule against perpetuities, *B* cannot be compelled to make an election.(1) See also the undermentioned case.(1a)

See also the undermentioned English cases(2) where the professed transfer was invalid in law and it was held that no question of election was raised thereby.

Section 35 — Note 14

1. ('96) 20 Bom 316 (337). (Reversed in 21 Bom 349 on another point.)

2. (1868) L R 7 Eq 494 (496) : 17 W R (Eng) Dig 189, Fytch v. Fytch.

3. (1799) 31 E R 321 (323) : 4 Ves 623 (626), Ward v. Baugh.

4. 1967 S C 1153 (1156) [AIR V 54 C 240) : (1967) 2 S C R 448. (A Mithakshara father disposing of joint family property by will giving only the residue to his son P — P who is entitled to the property even otherwise as a member of the joint family derives no benefit under will and hence no question of putting him to election arises — Fact that P has taken probate of the will cannot change the joint family character of the property in his hands— Hence, even on the assumption that P's act of obtaining probate amounts to election his son who has right of birth in the property is not bound by it.)

Section 35 — Note 15

1. 1959 Mad 131 (136) [A I R V 46 C 42] (DB). (Release of right by Muhammadan presumptive heir before inheritance opens — It cannot be supported on basis of estoppel or election.)

1953 Mad 161 (163, 164) [AIR V 40 C 50]. (Gift invalid under Muhammadan law—Acceptance of benefit —No question of election can arise.)

(1905) 1 Ch 191 (199) : 74 L J Ch 62 (67), In re Oliver's Settlement. (1902-1 Ch 436 not followed.)

(1905) 1 Ch 256 (259) : 74 L J Ch 67 (68, 69), In re Beales Settlement; Barrett v. Beales. (Do.)

(1869) L R 8 Eq 165 (175) : 38 L J Ch 392 (395), Wollaston v. King.

1a. 1931 Pat 442 (448) [AIR V 18] : I L R 10 Pat 352 (DB). (Widow transferring to R the then living reversioner an item of property in return for his relinquishing his rights over other properties in favour of widow — R predeceasing widow — His son who was the actual reversioner at the time of widow's death cannot be said to have elected to affirm the arrangement because he took the benefit of the arrangement— To hold otherwise would amount to supporting the transfer of his expectancy by R.)

2. (1803) 32 E R 441 (447) : 8 Ves 481 (497), Sheddon v. Goodrick. (Will of real estate without three witnesses — Owner is not put to election.)

16. Election against transfer does not render cancellation necessary.— The fact that the owner of the property transferred elects to dissent from it does not render it necessary that the document of transfer should be cancelled.(1)

17. "Does or does not believe." — If the transferor *professes* to transfer property which, as a *matter of fact*, does not belong to him, and confers a benefit on the owner of the property, a case of election will be raised, irrespective of the question whether the transferor *believed* that the property was or was not his own.(1) In *Padbury* v. *Clark*,(2) *A* being entitled in fee to one moiety of a house, devised the entire house to *X* and conferred a benefit on the owner of the other moiety of the house. The Lord Chancellor observed :

> "If he (i.e., the testator) intended by the words used to include and give the whole, it is immaterial from what cause that intention proceeded, whether he forgot or misunderstood his rights."

In *Whistler* v. *Webster*,(3) the Master of the Rolls held that the duty to elect was "without reference to the circumstance whether the testator had any knowledge of the extent of his power or not," and observed :

> "Nothing can be more dangerous than to speculate upon what he would have done, if he had known one thing or another. It is enough for me to say, he had such intention, and I will not speculate upon what he would have intended in different cases put."

An assumption of power to give what the transferor knows not to belong to him is at least as much a ground of election as a disposition of what he has mistakenly conceived to be his own.(4)

18. No election where the benefit is derived indirectly. — The third paragraph of this section corresponds to S. 184 of the Indian Succession Act, 1925, which contains the following illustration :

Illustration.

"The lands of Sultanpur are settled upon *C* for life, and after his death upon *D*, his only child. *A* bequeaths the lands of Sultanpur to *B*, and 1,000 rupees to *C*. *C* dies intestate shortly after the testator, and without having made any election. *D* takes out administration to *C*, and as administrator elects on behalf of *C's* estate to take under the will. In that capacity he receives the legacy of 1,000 rupees and accounts to *B* for the rents of the lands of Sultanpur

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(1806) 33 E R 273 (278) : 13 Ves 209 (223), Thellusson v. Woodford. (Will of real property without three witnesses — Heir not put to election — But as regards after purchased property heir is put to election.)
(1846) 67 E R 870 (873) : 5 Hare 163 (169, 170), Allen v. Anderson. (Incompetency to pass lands in foreign countries.)
(1918) 1 Ch 492 (500) : 87 L J Ch 363 (371), In re Ogilvie. (Do.)
(1852) 42 E R 1048 (1051): De G M & G 705 (714), Maxwell v. Maxwell. (Do.)
(1866) 2 Eq 834 (839) : 14 W R (Eng) 958 (959), Dewar v. Maitland. (Where the will is unattested the heir of an English freehold cannot be compelled to elect but this rule does not apply to heirs of copyholds or of Scotch or colonial estates.)
[But see (1750) 28 E R 8 (10) : 2 Ves 12 (16), Boughton v. Boughton. (Case of express condition of forfeiture—Heir put to election.)

Section 35 — Note 16

1. (1834) 4 L J Ch 39 (40), Weale v. Rice.

Section 35 — Note 17

1. †(1806) 33 E R 273 (277) : 13 Ves Jun 209 (222), Thellusson v. Woodford.
(1869) 9 Eq 519 (522, 523) : 39 L J Ch 649 (650), Coutts v. Acworth.
(1871) 6 Ch 339 (341) : 40 L J Ch 253 (254), Wilkinson v. Dent.
[But see (1760) 27 E R 259 (260) : Amb 388 (390), Forrester v. Cotton. (It should appear that the testator knowing that he had no right to dispose of lands, yet takes upon himself to do it.)]

2. (1859) 42 E R 115 (117): 2 Mac & G 298 (304, 305).

3. (1794) 30 E R 676 (678) : 2 Ves 367 (370).

4. (1813) 35 E R 290 (294, 295) : 2 Ves & B 187 (199), Welby v. Welby. (Heir put to election between estates devised to him and descended; the devisor having been tenant in tail of some, and tenant for life with reversion in fee of others.)

which accrued after the death of the testator and before the death of *C*. In his individual character he retains the lands of Sultanpur in opposition to the will."

A person is not put to his election merely because he receives a benefit under a transfer but because the benefit he takes is accompanied by an obligation to give effect to the other part of the transfer by parting with his own estate. In the above illustration, *D* does not take any benefit directly under the will. It is *C* who takes a direct benefit and *C's* life interest is subject to the obligation to elect. Had *C* elected in his lifetime and accepted the benefit, *D*, as his *heir*, would have derived it from him without the burden of election. *D's* acting as an administrator does not make any difference ; the effect is the same as it would have been if *C* himself had elected.

19. Person taking under two capacities. — The rule stated in the fourth paragraph corresponds to S. 185 of the Indian Succession Act, 1925, which contains the following illustration :

Illustration.

"The estate of Sultanpur is settled upon *A* for life, and, after his death, upon *B*. *A* leaves the estate of Sultanpur to *D*, and 2,000 rupees to *B*, and 1,000 rupees to *C*, who is *B's* only child. *B* dies intestate, shortly after the testator, without having made an election. *C* takes out administration to *B*, and as administrator elects to keep the estate of Sultanpur in opposition to the will, and to relinquish the legacy of 2,000 rupees. *C* may do this and yet claim his legacy of 1,000 rupees under the will."

C, in the above illustration, takes the legacy of 1,000 rupees in his individual capacity while in making the election, he acts as an administrator of *B*. These are two distinct capacities and hence he can accept the benefit in one capacity and repudiate the transfer in another. In *Grissel* v. *Swinhoe*(1) it was held that a person could claim *against* the will as an administrator of his wife and also *under* the will, as a legatee, in his individual capacity.

In *Deputy Commissioner of Pratapgarh* v. *Ram Sarup*(2) a person was a trustee under an endowment and as such received benefit under it. He claimed another estate against the trust in the capacity of an owner. It was held that he could do so as these capacities were different and no question of election could arise merely because both the capacities merged in one person.

20. Benefit expressed to be in lieu of property transferred—Exception.—The exception corresponds to S. 186 of the Indian Succession Act, 1925, which runs as follows :

"*186.* Notwithstanding anything contained in Ss. 180 to 185, where a particular gift is expressed in the will to be in lieu of something belonging to the legatee which is also in terms disposed of by the will, then, if the legatee claims that thing, he must relinquish the particular gift, but he is not bound to relinquish any other benefit given to him by the will.

Illustration.

Under *A's* marriage-settlement his wife is entitled, if she survives him, to the enjoyment of the estate of Sultanpur during her life. *A* by his will bequeaths to his wife an annuity of 200 rupees during her life, in lieu of her interest in the estate of Sultanpur, which estate he bequeaths to his son. He also gives his wife a legacy of 1,000 rupees. The widow elects to take what she is entitled to under the settlement. She is bound to relinquish the annuity but not the legacy of 1,000 rupees."

The doctrine of election rests, as has been seen in Note 2, upon the presumption of a general intention on the part of the author of a transaction that effect shall

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Section 35 — Note 19

1. (1869) 7 Eq 291 (295) : 17 W R (Eng) 438 (439).
2. 1917 Oudh 210 (211) [AIR V 4] : 20 Oudh Cas 243 (DB).

be given to every part of it and no single part of it shall be claimed in contradiction to another. The presumption will not apply when the transferor expressly states that a *particular benefit* is granted in lieu of a *particular property* belonging to the owner. The particular intention expressed in such a case will prevail over the general intention. The transferor, by such expression of intention, will be taken to have meant to exclude only that particular benefit if that part of the transaction is not given effect to and nothing more. The other benefits are not within this particular intention and hence can be accepted. In *East* v. *Cook*,(1) Lord Hardwicks states this principle in the following words :

> "Several cases have been, and several more may be, in which a man by his will shall give a child, or other person, a legacy or portion in lieu and satisfaction of particular things expressed, which shall not exclude him from another benefit, though it may happen to be contrary to the will: for the Court will not construe it as meant in lieu of everything else, when he has said a particular thing."

21. Acceptance of benefit. — The election contemplated by this section is a *conscious choice* by the owner between two inconsistent rights. The sixth paragraph of this section, corresponding to S. 187 of the Indian Succession Act, 1925,(1) accordingly provides that the acceptance of the benefit will operate as an election only if—

(1) the owner is aware of his duty to elect, and
(2) he is aware, of all those circumstances which would influence the judgment of a reasonable man in making the election.

The English law is also to the same effect.(1a)

Duty to elect.

It is to be noted, that, though the duty to elect under certain circumstances is imposed by *law* and every man is presumed to know the law, the owner of the property transferred is not, by virtue of this paragraph, to be presumed to have knowledge of it, except as provided by the next two paragraphs of this section. The

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Section 35 — Note 20

1. (1750) 28 E R 21 (22) : 2 Ves 30 (35).

Section 35 — Note 21

1. Section 187 runs as follows:

"187. Acceptance of a benefit given by a will constitutes an election by the legatee to take under the will, if he had knowledge of his right to elect and of those circumstances which would influence the judgment of a reasonable man in making an election, or if he waives inquiry into the circumstances.

Illustrations.

(i) *A* is owner of an estate called Sultanpur Khurd, and has a life-interest in another estate called Sultanpur Buzurg to which upon his death his son *B* will be absolutely entitled. The will of *A* gives the estate of Sultanpur Khurd to *B*, and the estate of Sultanpur Buzurg to *C*. *B*, in ignorance of his own right to the estate of Sultanpur Buzurg, allows *C* to take possession of it, and enters into possession of the estate of Sultanpur Khurd. *B* has not confirmed the bequest of Sultanpur Buzurg to *C*.

(ii) B, the eldest son of *A*, is the possessor of an estate called Sultanpur. *A* bequeaths Sultanpur to *C*, and to *B* the residue of *A's* property. *B* having been informed by *A's* executors that the residue will amount to 5000 rupees, allows *C* to take possession of Sultanpur. He afterwards discovers that the residue does not amount to more than 500 rupees. *B* has not confirmed the bequest of the estate of Sultanpur to *C*."

1a. (1818) 36 E R 422 (430) : 1 Swan 359 (381), Dillon v. Parker.
(1833) 6 E R 930 (936) : 1 Cl & Fin 303 (318), Dillon v. Parker. (Affirming the decision in (1818) 1 Swans 359).
†(1864-65) 11 E R 1461 (1472) : 11 H L C 588 (616), Spread v. Morgan. (Per Lord Chelmsford.)
(1855) 24 L J Ch 773 (775) : 52 E R 527 (530), Worthington v. Wiginton.
(1824) 147 E R 1153 (1154) : 13 Price 782 (786), Edwards v. Morgan. (Party is not bound by election if he was not fully apprised of the nature and extent of his own rights as well as those of the person claiming against him.)
(1850) 42 E R 115 (118) : 2 Mac & G 298 (307), Padbury v. Clark.
[*See also* (1813) 35 E R 290 (295) : 2 V & B 187 (200), Welby v. Welby. (Merely having suffered a recovery is not making an election.)]

fact that he was aware of his duty to elect at the time of his acceptance of the benefit must be proved as a fact. In *Spread* v. *Morgan*,(2) Lord Cranworth, after stating that knowledge by a person of his duty to elect may be implied when such duty is expressly referred to in the deed, observed as follows :

> "But when no such condition is expressed, if in fact he is ignorant of the rule of equity which implies it, can the Court treat him as if he had known it, and say that he has made an election which he did not intend to make? I think not. It is true that he knows, or may know, the state of his title, and that title may be such as imposes on him the duty of electing. But unless he is acquainted with the rule of equity which obliges him to elect, I do not see how it is possible to say with truth that he has made an election; he cannot have done that, if he was unaware that he was under any obligation to do it. The injustice of holding a party to have made an election in such a case might be extreme in cases where the difference in value between two properties is very great."

Circumstances influencing judgment in making election.

A party is not to be taken to have made an election by acceptance of benefit unless he had knowledge of the circumstances of the transferor and of his own rights.(3) Where a testator made a provision, out of his real and personal estate, for his widow, expressly stating that it was in lieu and in satisfaction of any estates or interest to which she might be entitled as his widow, and she enjoyed the benefit of the provision for ten years, but in ignorance of her right to dower, it was held that she was not bound by her acts and was allowed to make a fresh election.(4) A knowledge of the relative value of the estates transferred and conferred by the instrument of transfer is an important consideration in making an election. An election made under a mistaken idea as to the value of the estates is invalid and not binding on the party.(5) Where, however, a party, with full knowledge of his rights, makes an election and derives the benefits under a transaction, he will not be allowed to revoke.(6)

Waiver of enquiry.

A *waiver of enquiry* into the circumstances is regarded as having the same effect as knowledge of those circumstances. See section 3.

22. **Presumption of election from two years' enjoyment.** The seventh paragraph of the section corresponds to clause (1) of S. 188 of the Indian Succession Act, 1925. It raises a presumption that a person who has enjoyed the benefit under a transfer for the period of two years, without any expressed act of dissent, must have been doing so with the knowledge of his duty to elect and of the circumstances necessary to make an election or must have waived enquiry into the circumstances. The period of two years is taken from the ruling of Lord Chancellor Hardwicke in *Crabtree* v. *Bramble*(1) in which he observed as follows :

> "She (the person taking benefit under a will) on the mother's death entered on the land and from that time *continued in possession for two years*, received the rents, made no applica-

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2. (1864-65) 11 E R 1461 (1471) : 11 H L C 588 (611, 612).

3. (1791) 30 E R 372 (373) : 1 Ves Jun 335 (336), Wake v. Wake.
(1864-65) 11 E R 1461 (1472) : 11 H L C 588 (615), Spread v. Morgan.
(1806) 33 E R 53 (59) : 12 Ves 136 (153), Kidney v. Coussmaker. (Election under mistaken impression that creditors would not be entitled to make any claim against the estate.)
(1861) 54 E R 879 (881) : 30 Beav 235 (240), Sopwith v. Maughan.

4. (1861) 54 E R 879 (881) : 30 Beav 235 (240), Sopwith v. Maughan.

5. (1734) 24 E R 1081 (1083) : 3 P Wms 315 (321), Pusey v. Desbouvrie.
(1794) 30 E R 676 (678) : 2 Ves Jun 367 (371), Whistler v. Webster.

6. ('88) 12 Cal 60 (62) (DB).

Section 35 — Note 22

1. (1747) 26 E R 1191 (1195) : 3 Atk 680 (688).

tion to trustees to sell, nor brought a bill against them to sell, though she had a right to apply to them to sell, and, as *cestui que trust*, might have contracted for selling, and bound the trustees."

The presumption under the rule is, however, a rebuttable one and can be repelled by evidence to the contrary.(2) Thus, where a person put to election was a *pardanashin* lady and there was no evidence that the will was ever explained to her or that she was ever called upon to make an election, the Court refused to draw the presumption of knowledge from the fact of the receipt of money under the will.(3) Similarly, in a case where a widow had enjoyed a provision under her husband's will for ten years and it was found that she did so in ignorance of her right to dower, her own statement that she did not elect was taken to be a strong *prima facie* evidence of her not having made an election and she was allowed to elect after sixteen years of the testator's death.(4)

23. Impossibility of restoring status quo. — The eighth paragraph of the section corresponds to cl. (2) of S. 188, Indian Succession Act, 1925, and provides that the knowledge or waiver referred to in the sixth paragraph may be *inferred* from any act of the party bound to elect, which renders it impossible to place the persons interested in the property professed to be transferred in the same condition as if such act had not been done.

C, in the illustration to this paragraph, is the party put to election. By his taking possession of the mine and exhausting it, he renders it impossible to place the parties in the same position as they were before he took possession and exhausted the mine. He may, therefore, under this paragraph be taken to have elected to confirm the transfer.

The difference between the rule in the previous paragraph and the present one is that under the former, a presumption *must* be drawn whereas the latter merely *permits* the inference to be drawn.(1)

Mere receipt of money is not such an act as would render it impossible to place the parties in the same condition as if the money had not been taken.(2)

24. Time limit for election.—The ninth paragraph of this section corresponds to S. 189, Indian Succession Act, 1925, and prescribes a time limit for election. Though a presumption that a person has elected to confirm the transfer can be drawn from his enjoyment of the benefit under the transfer for a period of two years, the transferor or his representative need not wait till that period. They can require the party to make the election if he does not signify his intention to confirm or dissent from the transfer within one year of the date of transfer and if he fails to comply with the requisition within a reasonable time he will be *deemed* to have elected to confirm the transfer.

In this respect the section differs from the English law. Under that law there is no such time limit prescribed for election. If the party is neither required to elect, nor does any acts from which election can be inferred, his right to elect will remain open until it becomes inequitable to assert it.(1) In *Sopwith* v. *Maughan*(2) a widow

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2. 1925 Cal 724 (729) [AIR V 12] (DB).
3. 1925 Cal 724 (729) [AIR V 12] (DB).
4. (1861) 54 E R 879 (880) : 30 Beav 235 (239), Sopwith v. Maughon.

Section 35 — Note 23

1. †1925 Cal 724 (729) [AIR V 12] (DB).
2. 1925 Cal 724 (729) [AIR V 12] (DB).

Section 35 — Note 24

1. Halsbury, Laws of England, 1912 Edn., Vol. 13, Page 125; Snell, Principles of Equity, 11th Edn., Page 227.
2. (1861) 54 E R 879 (880) : 30 Beav 235 (239, 240).

enjoyed the benefit under her husband's will for sixteen years, but without the knowledge of the right to dower and the question arose whether she was bound by the lapse of time. Sir John Romilly, M. R., held that she was not so bound and allowed her to elect, observing :

> "When is a widow bound to make her election? It certainly is not necessary that she should do so within twenty-four hours after the testator's death, and if the matter had come before the Court it would have given her some reasonable time to consider. It is also perfectly clear that the parties interested under the will might have called on her categorically to elect, and the Court might not consider twelve months after the testator's death an unreasonable time."

Where the property is enjoyed by the person who has to elect in a particular mode and in recognition of certain rights, the Court will be slow to disturb what has been settled by a long course of enjoyment.(3) So also where a party, instead of communicating his intention to elect, suffers his own property to be specifically enjoyed by others until it becomes inequitable to disturb their possession, he will be taken to have confirmed the election.(4) But where a time has been limited for election, and the party put to election does not signify his intention to elect within that time he will be considered to have elected against the transfer.(5)

25. Election by a person under a disability.—The last paragraph of the section corresponds to S. 190, Indian Succession Act, 1925. In the case of a *minor* who is under a duty to elect, the election is, under this paragraph, postponed until he attains majority or until the election is made by a lawful guardian or other competent authority. In England, if the person required to elect is an infant, the time for election is postponed, generally until six months after attaining majority(1) or the Court may elect for him immediately if there is sufficient material before it,(2) or after directing an enquiry as to what is for the infant's benefit.(3)

As regards a married woman in England, her capacity to elect depends upon whether she has a disposing power over her property which is attempted to be disposed of by the transferor, or over the benefit granted to her under the transfer. It is necessary that both of these must be free from any restraint on anticipation. If her own property is subject to a restraint on anticipation, she cannot part with it and is thus rendered unable to confirm the transfer. If again, the benefit given to her by the transfer is burdened with the restraint on anticipation, it is tantamount to the expression of an intention on the part of the transferor that there should be no election.(4) A restraint on anticipation is effective to prevent election even if the woman discovers it at the time of election.(5) As regards her separate property a married woman can

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3. (1866) 2 Eq 834 (838, 839) : 14 W R (Eng) 958 (959), Dewar v. Maitland.

4. (1816) 34 E R 659 (662) : 19 Ves Jun 656 (663, 664), Tibbits v. Tibbits.

5. (1735) 25 E R 724 : Cas T Talb 176, Streatfield v. Streatfield.

Section 35 — Note 25

1. (1905) 1 Ch 16 (19, 20) : 74 L J Ch 69 (71), Hancock v. Pawson.
(1735) 25 E R 724 (728) : Cas T Talb 176 (183), Streatfield v. Streatfield.
[*See* (1750) 28 E R 8 (10) : 2 Ves Jun 12 (16), Boughton v. Boughton. (Infant put to election —Interest dependent on many contingencies —*Held*, Court could not elect and hence postponed till infant attained majority.)]

2. (1856) 26 L J Ch 148 (153) : 3 Jur (NS) 195, Blunt v. Lock.
(1896) 1 Ch 549 (553) : 65 L J Ch 372 (374), Re Montague; Faber v. Montague.

3. (1820) 56 E R 839 (839) : 5 Madd 117 (117), Ebrington v. Ebrington.
†(1840) 59 E R 796 (796) : 17 Sim 59 (66), Seton v. Smith.
(1784) 29 E R 539 (540) : 3 Bro C C 285n, Bigland v. Hudelestone.

4. (1884) 27 Ch D 606 (612) : 54 LJ Ch 201 (205), In re Wheatly; Smith v. Spence.
(1886) 31 Ch D 275 (280) : 55 L J Ch 259 (262), In re Vardon's Trusts. (Decision in (1884) 28 Ch D 124, Reversed.)

5. (1901) 1 Ch 361 (370) : 70 L J Ch 302 (304), Haynes v. Foster.

elect as if she were a *feme sole*. If she cannot elect outside the Court, a Court in an appropriate proceeding will direct an enquiry and elect on her behalf(6) or if the matter is plain, will elect without making any enquiry.(7)

Where the person under disability is a lunatic, the Courts in England will make an election on his behalf in the exercise of their lunacy jurisdiction.(8) Under the Indian Lunacy Act (Act IV of 1912), the Courts have jurisdiction to control all the matters concerning a lunatic and his estate and though a power to elect on his behalf is not specifically mentioned therein, the Court or the manager with approval of the Court, may, it is conceived, make election on his behalf.

26. Transferor's disability and election.—The doctrine of election presupposes that the transferor is legally competent to transfer, but that what he transfers is not his property. Thus, the basis of the rule is not the personal disability of the transferor but the *general inability* which precludes every one from disposing of what does not belong to him. A transfer, therefore, by a person who is under a legal disability cannot give rise to a case of election.(1)

In *Mangaldas* v. *Ranchoddas*(2) *A*, a Hindu widow, bequeathed by her will a legacy of Rs. 2000 to *B* and all the immovable property inherited from her husband, to *C*. Both *B* and *C* were heirs of her husband. After *A's* death *B*, suing as heir, contended that *A* had no disposing power over her husband's immovable property and as such, claimed half of it in contravention of the will. He also claimed Rs. 2000 as legacy under the will. The Bombay High Court held that a Hindu widow's inability to dispose of her husband's immovable property *does not amount to a legal disability*. It was only a limitation on her power of disposition imposed for some special purposes. *A's* will was, therefore, held as validly giving rise to a case of election and *B* was put to election between his legacy of Rs. 2000 and half the share of the immovable property.

27. Election under power of appointment.—It has been seen in Note 1 on S. 5 that the words "transfer of property" include the appointment of property to a person in the exercise of a power of appointment. Where, therefore, the donee of a power to appoint a property to a particular person exercises the power in favour of a stranger and grants, as part of the same transaction, a benefit to the person entitled in default of the appointment, a case for election arises and the latter is bound to elect.

Illustration.

X having a power to appoint to *A* a fund, which in default of such appointment is to go to *B*, exercises the power in favour of *C* who is a stranger, and grants to *B* some benefit; *X* in this case, is the donee of the power, *A*, the object of the power, and *B*, the person who takes in default of appointment. The exercise by *X* of the power in favour of *C*, a stranger, is bad in

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[*See also* (1892) 1 Ch 396 (405) : 61 L J Ch 220 (225), Hamilton v. Hamilton.]

6. (1795) 30 E R 768 (776) : 2 Ves Jr 544 (560), Cavan (Lady) v. Pultney.

7. (1794) 30 E R 846 (848) : 2 Ves 693 (697), Wilson v. John Townshend (Lord).
See also Williams and Eastwood, Principles of the Law of Real Property, 1933 Edn., Page 335.

8. (1898) 2 Ch 378 (391) : 67 L J Ch 518 (523), Re Sefton (Earl).
(1882) 22 Ch D 263 (269) : 52 L J Ch 141 (143), Wilder v. Pigott. (Court has jurisdiction to bind the equitable interests of lunatics, not so found by inquisition, when it appears to be for their benefit.)
See also Williams and Eastwood, Principles of the Law of Real Property, 1933 Edn., Pages 334, 335.

Section 35 — Note 26

1. † ('11) 12 Ind Cas 591 (592) (Cal). (Doctrine of election did not apply as the widow had no power of disposal in Bengal over moveable as well as immovable property.)
2. (1890) 14 Bom 438 (440, 441) (DB).

> law, and therefore, *B* is entitled to the fund as if there is no appointment. But as *B* is granted other benefits by the same transaction, he cannot accept the benefit as well as retain the fund. He is, therefore, put to election.(1)

Thus, the material fact necessary to give rise to election is the *failure of the appointment* made by the donee of the power. This failure may be due even to the fact that the power itself does not exist.(2) But if the failure is due to the fact that the appointment is in contravention of a rule of law it has been held that it does not give rise to an election. Thus, a failure of appointment on the ground that it infringes the rule against perpetuities will not give rise to an election. The reason is that the rule of election is a rule of equity and cannot be applied to evade the rules of law.(3)

A case for election does not arise, as a general rule, if the *object of the power* receives the benefits instead of the fund, because he has no interest in the fund until he is appointed by the donee of the power and therefore there is no property belonging to him that passes to the stranger. One exception to this general rule is that where the object of the power is also the person entitled in default of the appointment and he receives benefit under the exercise of power in favour of a stranger, he will be put to election;(4) but this is not because he is an object of the power but because he is the person entitled in default of appointment.

There is also another exception to the general rule. Where an absolute appointment is made in favour of the object of the power and a direction or a condition is superadded to the effect that the property shall be settled upon a trust in favour of certain other persons, and such direction is not invalid in itself but is one which the law in its ordinary course will allow, a question of election may arise when the object of the power is also granted a benefit by the donee of the power. In *Blacket* v. *Lamb*,(5) Romilly, M. R., observed as follows :

> "The question I have to determine resolves itself into this: whether these words amount to direct appointment in favour of the grandchildren. If they do amount to such an appointment, there is not, I think, any doubt, but that a case of election is raised ..... But if, on the other hand, these precatory words are to be treated as anything short of an actual appointment, that is, if they do not form a portion of the appointment executed by the testator, in that case, as was well observed by Mr. Nalder, they must be treated as a condition, or something extraneous to the appointment superadded to it: and if so, and if this superadded condition be inconsistent with the power, it is merely void, and no case of election will arise."

28. Ratification is not election.—Where *A* purports to act on behalf of *B*, *B* may either ratify it or disown it. *B's* act is sometimes spoken as an "election" to ratify or disown *A's* act.(1)

Section 35 — Note 27

1. (1884) 27 Ch D 606 (611) : 54 L J Ch 201 (203), In re Wheatly; Smith v. Spence.

2. (1887) 34 Ch D 160 (165) : 56 L J Ch 82 (84), In re Brooksbank; Beauclerk v. James.

(1874) 44 L J Ch 6 (10) : 7 H L 53, Cooper v. Cooper.

3. † (1905) 1 Ch 191 (198) : 74 L J Ch 62 (67), In re Oliver Settlement. (Dissenting from the decision of Kakewich J., in In re Bradshaw, (1902) 1 Ch 436 : 71 L J Ch 230.)

(1905) 1 Ch 256 (259) : 74 L J Ch 67 (68), In re Beales Settlement. (Do.)

(1869) L R 8 Eq 165 (175) : 38 L J Ch 392, Wollaston v. King.

(1884) 26 Ch 208 (219) : 53 L J Ch 787, In re Warren's Trusts.

4. (1796) 30 E R 676 (678) : 2 Ves Jun 367 (370), Whistler v. Webster. (Power to appoint among children in default equally among children — Power exercised in favour of grandchildren, granting legacies to children—Children put to election.)

5. (1851) 51 ER 371(373): 14 Beav 482(487, 488).

Section 35 — Note 28

1. 1918 P C 196 (202) [AIR V 5] : 42 Mad 523 : 46 Ind App 72.

Really, however, a ratification has nothing to do with the doctrine of election referred to in this section.(2) It, however, proceeds from the same principle which underlies this section, namely, that a person cannot "blow hot and cold" in respect of the same transaction(3) and must, in order to be valid, be made with knowledge of all circumstances.(4)

It has been held that the act of accepting or affirming, by a particular reversioner, the validity of a transaction made by a limited owner is loosely called ratification, though strictly speaking it is a rule of election.(5)

Apportionment

36. In the absence of a contract or local usage to the contrary, all rents, annuities, pensions, dividends and other periodical payments in the nature of income shall, upon the transfer of the interest of the person entitled to receive such payments, be deemed, as between the transferor and the transferee, to accrue due from day to day, and to be apportionable accordingly, but to be payable on the days appointed for the payment thereof.

Apportionment of periodical payments on determination of interest of person entitled.

Synopsis

1. Apportionment.
2. Principle of section, if applies to cases not within the terms of the section.
3. "In the absence of a contract or local usage to the contrary."
4. "Rents."
5. "Annuities."
6. "Dividends."
7. "Other periodical payments in the nature of income."
8. "Payable on the days appointed."

1. Apportionment. — Apportionment is a division of a whole into parts (usually unequal) proportioned to the rights of more claimants than one.(1) As said by Lord Coke, " 'apportion' signifieth a division or partition of a rent, common, etc., or a making of it into parts."(2) Mr. Swanston, in his note appended to the case of *Ex parte Smyth*,(3) observed, referring to Lord Coke's definition: "The definition seems incomplete. Apportionment frequently denotes not division, but distribution; and in its ordinary technical sense, the distribution of one subject *in proportion to another previously distributed*." Thus, suppose *A* leases his land to *B* for one year on a rent of Rs. 300 payable at the end of the year, and after eight months, transfers his interest to *C*. On the principle of apportionment, *A* will be entitled to Rs. 200 and *C*, the remaining Rs. 100 of the rent payable by *B*. This is called apportionment *as to time*, and is dealt with in this section. The next section deals with apportionment *as to estate*.

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2. 1939 Oudh 145 (152, 153) [AIR V 26] : 14 Luck 595 (DB).

3. † (1846-50) 4 Moo Ind App 1 (103) (PC).
[*See* 1930 Bom 373 (375) [AIR V 17]. (Transfer by a Hindu widow A to a reversioner B with the consent of C who was the only other reversioner on the condition that B should maintain C — C received maintenance for 15 years — *Held*, C could not subsequently challenge the transfer.)]

4. ('98) 25 Cal 1 (9) : 24 Ind App 164 (PC).
† (1846) 4 Moo Ind App 1 (103) (PC).

1939 Cal 387 (393) [AIR V 26] : ILR (1938) 2 Cal 492 (DB).
1925 All 190 (192) [AIR V 12].
(1864-66) 2 Bom H C R 301 (304, 305).

5. 1956 Cal 211 (213) [AIR V 43 C 70].

Section 36 — Note 1

1. Wharton, Law Lexicon, 14th Edn., 1938, p. 70, *sub voce* Apportionment.

2. ✢(1819) 1 Swan 337 (357) : 36 E R 412, Ex parte Smyth.

3. (1819) 1 Swan 337 (357) : 36 E R 412.

Under the old English Common law apportionment as to time was not recognised in the absence of an express stipulation to that effect.(4) The basis of the rule against apportionment was that an *entire contract* could not be apportioned. The rule applied, however, only to *periodical payments becoming due at fixed intervals*, and not to sums accruing *de die in diem* such as interest which, even though reserved at fixed periods, has always been regarded as becoming due *de die in diem* for forbearance of the principal, which the creditor is entitled to recall at pleasure.(5) In equity, however, certain exceptions were recognised to the Common law rule against apportionment. Thus, certain kinds of annuities, *e.g.*, an annuity for the maintenance of infants or of married women living separate from their husbands were held to be apportionable, the reason being that it would be difficult for such persons to find credit for necessaries if the payment depended on their living to the end of the period in which it falls due.(6) Various statutes also had, from time to time, been passed to remedy some of the mischiefs and inconveniences arising from the Common law rule against apportionment.(7) Even these were found insufficient to remedy all the inconveniences resulting from the rule, and consequently in the year 1870, the Apportionment Act (33 & 34 Vict., c. 35) was passed in order "to make provision for the remedy of all such mischiefs and inconveniences." The object of the Act, as was stated in *Jones* v. *Ogle*,(8)

> "was to obliterate technical distinctions between different kinds of fixed income recurring from time to time at stated periods, and which on account of their nature, those in receipt of income would rely on for their maintenance and their ordinary arrangements in life."

Sections 2, 3 and 7 of the Apportionment Act, 1870 (33 & 34 Vict., c. 35), which are material for the purpose of this commentary, are as follows :

> "2. From and after the passing of this Act all rents, annuities, dividends, and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise) shall, *like interest on money lent*, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly.
>
> "3. The apportioned part of any such rent, annuity, dividend, or other payment shall be payable or recoverable in the case of a continuing rent, annuity, or other such payment when the entire portion of which such apportioned part shall form part shall become due and payable and not before, and in the case of a rent, annuity, or other such payment determined by reentry, death, or otherwise when the next entire portion of the same would have been payable if the same had not so determined, and not before.
>
> "7. The provisions of this Act shall not extend to any case in which it is or shall be expressly stipulated that no apportionment shall take place."

See the undermentioned cases(9) bearing on the interpretation of this Act.

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4. Wharton, Law Lexicon, 14th Edn., 1938, page 70, *sub voce* Apportionment.

1923 PC 171 (174) [AIR V 10] : 47 Bom 790 : 50 Ind App 276. (Did not apply to sums accruing *de die in diem*.)

(1819) 1 Swan 337 (357) : 36 E R 412, Ex parte Smyth. (Swanston's note thereto.)

5 (1819) 1 Swan 337 (357) : 36 E R 412, Ex parte Smyth. (Swanston's note appended thereto.)

(1806) 13 Ves 135 (136) : 33 E R 245, Banner v. Lowe.

6. (1819) 1 Swan 337 (357) : 36 E R 412, Ex parte Smyth. (Swanston's note appended thereto.)

[*See also* 1923 P C 171 (173) [AIR V 10] : 47 Bom 790 : 50 Ind App 276.]

7. See Wharton, Law Lexicon, 14th Edn., 1938, Page 70, *sub voce* Apportionment.

See also the Preamble to the Apportionment Act, 1870, (33 & 34 Vict., c. 35.)

8. (1872) 42 L J Ch 334 (336) : 28 L T 245 (247). [*See also* (1863) 32 L J Ch 333 (337), In re Maxwell's Trusts.]

9. (1906) 75 L J Ch 743 (747) : (1906) 2 Ch 513 : 95 L T 602, Bishop of Rochester v. Le Fanu. (Act affects not only right of recipients to rents *inter se*, but also to apportion the liability to pay the rent between the different occupiers of the premises during the currency of the period.)

(1893) 62 L J Q B 628 (632) : 10 M B R 219, In re Wilson; Ex parte Lord Hastings. (Do.)

(1895) 64 L J Q B 454 (457) : 1 Q B 844, Re Howell.

(1881) 50 L J Ch 446 (447) : 17 Ch D 161, Re South Kensington Co-operative Stores.

(1865) 14 W R (Eng.) (Dig) 8 (8) : L R 2 Eq 27, Llewellyn v. Rous.

This section is based upon the said provisions of the Apportionment Act, 1870,(10) but is limited to cases where *property has been transferred inter vivos*.(11) The English Act is *general* and makes rents and other periodical payments accrue from day to day, in all cases, whether property has been transferred or not.

The section applies as between the transferor and the transferee and has no application as between one of the parties to the transfer and a third party.(12)

The apportionment contemplated by the section is one following the transfer of interest of the person entitled to receive the payments referred to in the section and not of the person liable to make such payments.(13)

2. **Principle of section, if applies to cases not within the terms of the section.** — There has been a difference of opinion on the question whether apportionment can be made in cases not falling within the terms of the section or in cases to which the section has not been made applicable by section 2, cl. (d). On the one hand it has been held that the rule embodied in this section is one of justice, equity and good conscience and is, as such, applicable to such cases. Thus, it has been applied to cases of devolution of interest by succession,(1) to cases of assignment by the *lessee* of his interest to another,(2) and to conveyances of interest in execution of decrees.(3) See also the undermentioned cases.(4) On the other hand it has also been held that

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10. † (1900) 14 C P L R 84 (85). (Village profits on a share in a village are not apportionable not being periodical payments.)

11. 1959 Ker 208 (211) [AIR V 46 C 74] (DB).

12. 1954 S C 470 (486) [AIR V 41 C 113] : 1955 S C R 313. (There is no room for the application of the provisions of the section as between the subject and the Crown.)

13. 1964 Pat 258 (260) [AIR V 51 C 69] (DB). (Lease by Sugar Mills Company providing for payment of yearly rent in two instalments — —Company going in liquidation—Sale of Mills under order of Court—First instalment for the year falling due before date of sale — Official Liquidator held entitled to recover the instalment though no crushing of sugarcane was done during the period—S. 36 did not apply to the case.)

Section 36 — Note 2

1. 1959 Ker 208 (211) [AIR V 46 C 74] (DB). (So far as the right to the rent or profits of the property is concerned, voluntary transfers, execution sales and devolution of interest by succession stand on the same footing.)

† 1937 Mad 219 (220, 222) [AIR V 24] : ILR (1937) Mad 589 (595) (DB). (Zamindari estate—Death of zamindarini in middle of fasli — Apportionment of rents between personal heirs and reversioners to estate.)

1924 Pat 451 (451) [AIR V 11] : 3 Pat 367 (DB). (Owner of impartible estate dying—Apportionment of rent due between personal heirs and successors to estate.)

† 1935 Cal 39 (58, 59) [AIR V 22] : 61 Cal 711. (Do.)

1934 All 453 (454) [AIR V 21]. (Lessor having life-estate dying — Rent is to be apportioned between his heirs and the reversioners.)

('02) 26 Mad 540 (542, 543) (DB). (Do.)

1927 Oudh 605 (606, 607) [AIR V 14] (DB). (All rents shall be deemed to accrue from day to day.)

2. † 1916 Mad 768 (769) [AIR V 3] : 38 Mad 86 (DB). (An assignee of a lease from a lessee can claim as against the lessor an apportionment of rent accruing due after the date of his assignment according to the period before and after the assignment and the rent can be deemed accruing from day to day as between him and the lessor.)

[*See also* 1940 Mad 21 (22) [A I R V 27]. (Quaere.)]

3. 1959 Ker 208 (211) [AIR V 46 C 74] (DB). (Right to rent or profits — Execution sales — Principle of S. 36, applies.)

1918 Mad 557 (558) [AIR V 5] : 41 Mad 370 (SB). (Principle of S. 36 applies to execution sales.)

1944 Mad 568 (568, 569) [AIR V 31]. (Where a receiver appointed pending a mortgage suit leases out the property and the lessee is in possession on the date of the sale in execution of the decree in the suit, the rent being payable on a date subsequent to the sale, the rent can at the instance of the auction-purchaser, be apportioned from day to day as between him and the receiver—1918 Mad 557 [A I R V 5] (FB), Foll.; 1916 Mad 323 [A I R V 3] (DB), Not foll.)

1928 Rang 26 (27) [AIR V 15].

4. † 1932 All 178 (181) [AIR V 19] (DB). (Principle of S. 36 applies in regulating rights of proprietors to receipt of income from their properties in the absence of contract to the contrary.)

('02) 16 C P L R 55 (57). (Apportionment of rent in respect of occupancy tenancy.)

S. 36 of this Act is the only statutory provision in India dealing with the question of apportionment, and that if it did not apply, the principle of apportionment cannot be applied. Thus, the principle was held inapplicable to transfers of interest by operation of law(5) and to transfers in execution of decrees.(6) In the undermentioned case(7) it was observed that S. 36 was not applicable to agricultural leases, and it was held that the principle of the section also did not apply. Similarly the principle of the section was held not applicable to the case of the partition of a joint family.(7a)

In *Phirozshaw Bomanjee Petit* v. *Bai Goolbai*(8) the question was whether income derived from rents and shares was apportionable *de die in diem* between the estate of a deceased settlor, who had retained a life-interest and persons beneficially entitled thereafter. The High Court of Bombay held that S. 36 did not apply as the case was not one of transfer of property *inter vivos*, and that the rents and shares were not apportionable. Their Lordships of the Privy Council affirmed this decision. In coming to this conclusion, their Lordships after referring to the Apportionment Act, 1870 (33 & 34 Vict., c. 35), observed as follows :

> "But this Act does not apply in India, nor do any of the earlier English Apportionment Acts. *It is common ground that the principle which applies in the present case is that of the original English law as it stood apart from statute.*
>
> The older English law on the subject was stated by Lord Eldon in *Ex parte Smyth*(9) and is amplified in the learned note appended to the report of that case by Mr. Swanston. The latter traces it to the two propositions, that an *entire contract cannot be apportioned*, and that under such an instrument as, for instance, a lease with a reservation of periodically payable rent, the contract for each portion is distinct and entire."

Their Lordships then, after stating that it was always, however, open to a testator or settlor to exclude the practical consequences of the common law rule against apportionment by expressing his intention to that effect, observed :

> "It is common ground that the old law in England, as referred to in 1818 by Lord Eldon in *Ex parte Smyth*(10) was the law applicable in India to the present case, and that under it the income from the property. . . . . was *prima facie* only apportionable if *an intention to make it so was clearly discoverable in the trust deed*. . . . . ."

Their Lordships held on the facts that there was no such intention discoverable, and as a result confirmed the decision of the High Court.

In view of the decision of the Privy Council the decisions referred to above as laying down that the principle of apportionment may be applicable to cases outside the section, on grounds of justice, equity and good conscience, do not appear to be

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5. 1937 Pat 237(238)[AIR V 24]:16 Pat 184.(DB). ('06) 33 Cal 786 (788) (DB). (Transfer of lessor's interest by operation of law.)

[*See also* 1964 Pat 258 (260) [AIR V 51 C 69] (DB). (Lease between lessor and lessee coming to an end by order of Court—S. 36 held not applicable.)]

6. 1924 Rang 365 (367) [AIR V 11]. (Purchaser at the court sale is entitled to whole grain rented from land as falling due at the end of agricultural year. Original landlord not entitled to apportionment in the absence of equity in his favour.)

1916 Mad 323 (328) [AIR V 3] : 39 Mad 283 (DB). (21 Cal 383, followed.)

✠('93) 21 Cal 383 (386) (DB).

7. 1924 Cal 1069 (1069) [AIR V 11] (DB). (Section 36 has no application to patni lands.)

[*See also* 1928 Rang 67 (68) [AIR V 15]: 5 Rang 803.]

[But see 1951 Mad 601 (603) [AIR V 38 C 169]. (Section 36 applies in terms to the apportionment of agricultural rents — At least the rule prescribed under it will apply as rule of justice, equity and good conscience—AIR 1928 Rang 67, Dissented from.)]

7a. 1959 Ker 208 (211) [AIR V 46 C 74] (DB). (Joint family partition—Rent accruing due on certain property prior to partition can be claimed by co-sharer taking that property.)

8. 1923 P C 171 (173) [AIR V 10] : 50 Ind App 276 : 47 Bom 790. (English Rule did not apply to sums accruing day to day.)

9. (1819) 1 Swan 337 (357) : 36 E R 412.

10. (1819) 1 Swan 337 (357) : 36 E R 412.

correct. Nor are the grounds on which the Privy Council decision has been distinguished in the undermentioned cases,(11) convincing. Where a *general principle* such as the doctrine of *res judicata*, or the doctrine of restitution, which exists apart from statute, is enacted into a section of a statute and the section does not in terms apply to the facts of a particular case, the general principle may be applied as being in consonance with justice, equity and good conscience. But where what is enacted in a statute is really an *exception* to a general principle, and the section does not in terms apply to a particular case, the application of the principle of the exception to that case, is really the addition of another exception not recognised by the Legislature. Mr. Swanston in his note appended to the case of *Ex parte Smyth*(12) referred to above, observed as follows :

> "The distinction is palpable between statutes designed to introduce a general principle (whether with or without an enumeration of individual examples), and statutes which provide only for particular cases. In the former instance, a new rule of law is established, the analogy of which may be consistently adopted, as its authority must be admitted, by Courts of Equity ; in the latter, *the ancient rule of law remaining*, subject to the specific exceptions, the exercise of a power to extend, in equity the provisions of the Act to cases confessedly not within its legal operation, seems a function rather legislative than judicial."

The decisions which have applied the principle of S. 36 to cases not falling within its terms can be supported only if the section is considered to enact a general principle and not merely an exception to a general principle ; and the decision of their Lordships of the Privy Council referred to above, seems to suggest that the rule *against* apportionment based on the principle of the indivisibility of entire contracts is the general rule and the rule of apportionment only an exception thereto.

3. "In the absence of a contract or local usage to the contrary."—The rule of apportionment enacted in the section is applicable only where there is no contract or local usage to the contrary. The contract to the contrary must be as between the transferor and the transferee.(1a) Where the terms of a transfer contain a clearly expressed intention that the right to receive payments should pass without being apportioned, the section does not apply and there will be no apportionment.(1) Where it was provided that "the whole rent shall be payable on the Mahasankaranthi day" it was held by the High Court of Madras that there was a contract to the contrary within the meaning of this section.(2) Where by a deed of assignment one *S*, who was managing agent to a company, transferred all his rights and benefits under the agency

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11. 1944 Mad 568 (569) [AIR V 31].
1937 Mad 219 (222) [AIR V 24] : I L R (1937) Mad 589 (DB).
1935 Cal 39 (58) [A I R V 22] : 61 Cal 711 (DB).

[The observations of their Lordships in AIR 1923 P C 171 [AIR V 10] : 47 Bom 790 : 50 Ind App 276, cannot be said to overrule the decision in AIR 1918 Mad 557 [AIR V 5] (FB)—They did not decide the point whether the Indian rule or the English Common law rule should be applied in a case of apportionment.]

12. (1819) 1 Swan 337 (357) : 36 E R 412.

Section 36 — Note 3

1a 1954 S C 470 (486) [AIR V 41 C 113] : 1955 S C R 313.

1. 1923 P C 171 (173) [AIR V 10] : 47 Bom 790 : 50 Ind App 276.
1930 All 615 (617) [AIR V 17] (DB). (Ordinarily purchaser of shares is entitled to all dividends in the absence of contract to the contrary, declared after the date of purchase.)
† 1916 Mad 323 (325) [AIR V 3] : 39 Mad 283 (DB).
(1900) 69 L J Q B 379 (381) : (1900) 1 Q B 740, Ellis v. Rowbotham.
(1898) 67 L J Ch 409 (410) : 1898 W N 48, In re Meredith, Stone v. Meredith. (Direction not to apportion dividend.)
(1898) 67 L J Ch 65 (68) : (1898) 1 Ch 115, Lysaght v. Lysaght.
(1878) 39 L T 671 (672) : 4 Ex D 24, Black v. Homersham.

2. 1916 Mad 323 (325) [AIR V 3] : 39 Mad 283 (DB).

agreement with the company to one *X*, it was held by their Lordships of the Supreme Court that whatever was the contribution of *S* towards the earning of the commission during the whole of a certain year was the subject of the transfer and that was sufficient to spell out a contract to the contrary and no question of apportionment of the commission therefore arose.(3)

4. "Rents." — Section 8 provides that a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property and in the legal incidents thereof. Such incidents, where the property is land or house, include the rent thereof *accruing* after the transfer. The word "accruing" in that section must be interpreted in the light of this section which provides that rent *accrues from day to day*. So that the transferee is entitled to such portion of the rent only as is proportionate to the period between the date of the transfer and the date on which the rent is payable.(1) In the undermentioned case (2) a land, the annual rent of which was payable in two instalments, 10 annas on the 1st of December and 6 annas on the 1st of May, was transferred on the 20th of February. It was held that the 6 annas rent accrued *de die in diem* over the period from the 1st of December to the 1st of May, and that the transferee was therefore entitled to that portion only of the *6 annas* share of rent as had accrued after the 20th of February. See also the undermentioned case.(3)

5. "Annuities." — An annuity is a yearly payment of a certain sum of money granted to a person for life or for years secured only by the personal covenant or bond of the payer.(1) It is not every annual payment that is an annuity. In order to constitute an annuity the annual payments must be *in the nature of income*. Thus, where an income is purchased with a sum of money and the capital has gone and ceased to exist, the principal is said to be converted into an annuity.(2) But where the *capital itself is repayable* in annual instalments, it cannot be said that there is an *annuity*.(3)

6. "Dividends."—The word "dividend" has not been defined in this Act or in the General Clauses Act, 1897. It has, however, been defined in S. 5 of the Apportionment Act, 1870, (33 & 34 Vict., c. 35) as follows :

> "The word "dividends" includes (besides dividends strictly so called) all payments made by the name of dividend, bonus, or otherwise out of the revenue of trading or other public companies, divisible between all or any of the members of such respective companies, whether such payments shall be usually made or declared at any fixed times or otherwise ; and all such divisible revenue shall, for the purposes of this Act, be deemed to have accrued by equal daily

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3. 1954 S C 470 (486) [AIR V 41 C 113] : 1955 S C R 313.

Section 36 — Note 4

1. 1951 Mad 601 (604) [AIR V 38 C 169].
(1900) 14 C P L R 84 (85).
[*See also* 1922 All 275 (275, 276) [AIR V 9]. (Section does not affect the date when the rent becomes due from the tenant.)
('21) 64 Ind Cas 178 (180) (DB) (Cal). (Lessee purchasing landlord's interest in middle of term—Original landlord is entitled to rent up to the date of transfer.)]
Also see Section 8, Note 14.

2. 1927 All 569 (570) [AIR V 14] : 50 All 18 (DB).

3. 1964 Pat 258 (261) [AIR V 51 C 69] (DB). (Lease of running Sugar Mill — Deed providing for payment of rent in instalments — Sale of Mill by order of Court in liquidation proceedings — Liquidator held entitled to recover the instalment falling due before sale of Mill though no crushing of sugarcane was done during the period.)

Section 36 — Note 5

1. Halsbury's Laws of England, 1912 Edn., Vol. 24, Page 465, para. 903.
Wharton, Law Lexicon, 14th Edn., 1938, Page 64 *sub voce* Annuity.

2. (1858) 157 E R 673 (684) : 3 H & N 769, Foley v. Fletcher. (Per Watson, B.)

3. (1903) 72 L J K B 215 (221) : (1903) 1 K B 494, Scoble v. Secretary of State.

increment during and within the period for or in respect of which the payment of the same revenue shall be declared or expressed to be made, but the said word "dividend" does not include payments in the nature of a return or reimbursement of capital."

It is conceived that the word will have a similar meaning in this section also.

A share of profits will be a "dividend" when declared only in respect of share taken in a *public* concern.(1) A share of profits gained by an individual(2) in a private partnership(3) cannot be called a "dividend," and it will not be apportionable.

Profits arising out of the sale of new shares of a company and distributed amongst all the share-holders of the company are not "dividends."(4)

Where shares are transferred and no express reference is made as to the dividends thereon, the transferor is entitled to the dividend of the period prior to the transfer. The fact that the dividend was *declared* subsequent to the transfer does not affect the right of the transferor.(5)

7. "Other periodical payments in the nature of income."—The expression "periodical payments" must be taken to refer to payments *ejusdem generis* with rents, annuities, pensions and dividends.(1) It therefore refers to payments to be made at *fixed periods* and not periods variable at the discretion of individuals.(2) Thus, dividends paid by a company which is not bound to pay them at fixed periods will not be apportionable.(3) But where the directors of a company were entitled to a certain share of company's profits once in five years *unless a special meeting of the company directed otherwise*, it was held that the payments were periodical and hence apportionable ; the fact that the period fixed could be changed was held to be immaterial.(4)

The payments to be 'periodical' must not only be *declared* at fixed intervals but must also be for or in respect of fixed periods.(5)

See also the undermentioned case.(6)

8. "Payable on the days appointed." — Though the rents, annuities, etc., are, under this section, deemed to accrue *de die in diem* they are *payable* only on the days appointed for the payment thereof. In other words the fact that rent, etc., must be deemed to accrue from day to day does not make proportionate parts thereof *payable* day by day. It was accordingly held in *Barnett* v. *Eastman*(1) that rent could not, before it was payable, be attached under a garnishee order as a debt due. Day, J., said :

Section 36 — Note 6

1. (1879) 28 W R (Eng) 28 (29) : 12 Ch D 655, Carr v. Griffith.
(1878) 47 L J Ch 735 (737) : 9 Ch D 159, In re Cox's Trusts.
(1858) 26 L J Ch 621 (622) : 6 W R (Eng) 407, Hartley v. Allen.

2. (1878) 47 L J Ch 735 (737) : 9 Ch D 159, In re Cox's Trusts.

3. (1879) 28 W R (Eng) 28 (29) : 12 Ch D 655, Carr v. Griffith.
(1872) 8 Ch App 192 (196, 197) : 42 L J Ch 334, Jones v. Ogle. ((1872) L R 14 Eq 419, affirmed.)

4. (1858) 27 L J Ch 621 (623) : 6 W R (Eng) 407, Hartley v. Allen.

5. 1930 All 615 (617) [AIR V 17] (DB). (The sale of shares does not necessarily involve the sale of dividends.)
(1916) 85 L J Ch 598 (600) : (1916) 2 Ch 181, In re Muirhead; Muirhead v. Hill.

Section 36 — Note 7

1. (1900) 14 C P L R 84 (85).

2. (1872) 8 Ch App 192 (198) : 42 L J Ch 334, Jones v. Ogle.

3. (1863) 32 L J Ch 333 (337), In re Maxwell's Trusts.

4. (1879) 12 Ch D 655 (664) : 28 W R (Eng) 28, Carr v. Griffiths.

5. (1922) 2 Ch 442 (446) : 91 L J Ch 449, Jowitt v. Keeling.

6. 1940 Pat 609 (609, 610) [A I R V 27] (DB). (Agreement stating royalty payable at certain date but not stating when it is to be payable — Royalty can be held to be payable within reasonable time of coal being abstracted—Three months held reasonable.)

Section 36 — Note 8

1. (1898) 67 L J Q B 517 (518).

"I have come to the conclusion that the debt must (to enable a garnishee order to be made) be *debitum in praesenti, solvendum in futuro* ; . . . . . .I am of opinion that this debt is not *debitum in praesenti* in the strict sense of these words."

In *In re United Club and Hotel Co.*,(2) a company occupied premises under a lease under which rent was payable on the usual quarter days. The lessor petitioned for a winding up order in respect of his claim for apportioned rent. It was held that the Apportionment Act, 1870, (33 and 34 Vict., c. 35), did not enable the lessor to present a petition in respect of rent not yet due.

Apportionment of benefit of obligation on severance.

37. When, in consequence of a transfer, property is divided and held in several shares, and thereupon the benefit of any obligation relating to the property as a whole passes from one to several owners of the property, the corresponding duty shall, in the absence of a contract to the contrary amongst the owners, be performed in favour of each of such owners in proportion to the value of his share in the property, provided that the duty can be severed and that the severance does not substantially increase the burden of the obligation; but if the duty cannot be severed, or if the severance would substantially increase the burden of the obligation, the duty shall be performed for the benefit of such one of the several owners as they shall jointly designate for that purpose :

Provided that no person on whom the burden of the obligation lies shall be answerable for failure to discharge it in manner provided by this section, unless and until he has had reasonable notice of the severance.

Nothing in this section applies to leases for agricultural purposes unless and until the A[State Government] by notification in the Official Gazette so directs.

Illustrations

(a) *A* sells to *B*, *C* and *D* a house situate in a village and leased to *E* at an annual rent of Rs. 30 and delivery of one fat sheep. *B* having provided half the purchase-money and *C* and *D* one-quarter each. *E*, having notice of this, must pay Rs. 15 to *B*, Rs. 7 1/2 to *C* and Rs. 7 1/2 to *D*, and must deliver the sheep according to the joint direction of *B*, *C* and *D*.

(b) In the same case, each house in the village being bound to provide ten days' labour each year on a dyke to prevent inundation, *E* had agreed as a term of his lease to perform this work for *A*. *B*, *C*, and *D* severally require *E* to perform the ten days' work due on account of the house of each. *E* is not bound to do more than ten days' work in all according to such directions as *B*, *C* and *D* may join in giving.

Synopsis

1. Scope of the section.
2. "In consequence of a transfer."
2a. Involuntary transfer. See Note 2.
2b. Partition. See Note 2.
3. "Is divided and held in several shares."
4. "Benefit of any obligation."
5. "In proportion to the value of his share in the property."
6. Duty must be capable of severance.
7. No apportionment where burden is increased.
8. Proviso.
9. Agricultural leases.

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2. (1889) 37 W R (Eng) Dig 45 (45) : 60 L T 665.

1. Scope of the section. — Section 36, as has been seen in Note 1 thereon, refers to apportionment *as to time*. This section deals with apportionment *as to estate* or, as stated in the marginal note to the section, "apportionment of benefit of obligation on severance." It presupposes that, before the transfer, there existed an obligation relating to the property *as a whole*, that on the transfer, the property is divided and held in several shares, and that the benefit of the obligation passes to the several owners of the property on such transfer.(1) And it lays down how such obligation is to be performed in the absence of a contract to the contrary.

(1) Where the duty *can be severed and* the severance does not substantially increase the burden of the obligation, the duty is to be performed in favour of each of such owners in proportion to the value of his share in the property.

(2) Where the duty *cannot* be severed or if the severance would substantially increase the burden the duty is to be performed for the benefit of such one of the several owners as they shall jointly designate for the purpose.

The person on whom the burden of the obligation lies is, however, not answerable, as the proviso to the section shows, for failure to discharge it unless and until he has had reasonable *notice* of the severance. This principle is recognised in sections 50 and 109.

2. "In consequence of a transfer." — The section has no application unless there is a severance of the estate *in consequence of a transfer*, i.e., a "transfer of property" as defined in S. 5 of the Act. It does not thus apply to a division brought about by the operation of law or by or in execution of any decree or order of Court. This is made clear by section 2, clause (d). It has been held in the undermentioned case(1) that neither this section nor its principle applies to the case of division of land or reversion as a result of partition. But a contrary view that the principle underlying the section will apply in such a case has been taken in the following case.(2)

2a. Involuntary transfer. — See Note 2.

2b. Partition.— See Note 2.

3. "Is divided and held in several shares."—The section applies only if by reason of the transfer, property is *divided and held in several shares*. It has no application where the transfer does not effect a severance. A transfer of a share in a tenure which has been let out to a tenant in its entirety does not, as has been held in the undermentioned cases,(1) of itself effect a severance of the tenure. In such cases the first paragraph of the section will not apply even independent of the last paragraph of the section saving agricultural leases from the operation of the section. An apportionment of the rent can in such cases be made only by an *arrangement* between all

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Section 37 — Note 1

1. ('50) 86 Cal L Jour 198 (213). (On partition, the benefit of the obligation does not so pass. All the co-sharers of the reversion are before the partition entitled to the benefit of the obligation.)

Section 37 — Note 2

1. ('50) 86 Cal L J 198 (212, 213). (Partition is not a transfer.)

2. 1963 Pat 85 (86, 87) [AIR V 50 C 22] : 41 Pat 915 (DB).

Section 37 — Note 3

1. 1919 Cal 997 (998) [A I R V 6] (DB). (See S. 61 (1) (c), Bengal Tenancy Act.)

('12) 14 Ind Cas 292 (293) (DB) (Cal).

† ('80) 5 Cal 902 (905) (FB).

parties including the tenant and in the absence of such arrangement by a *suit* for apportionment.(2)

Where a part of the leasehold property or of any interest therein is transferred as contemplated by S. 109, it cannot be said that the property "is divided and held in several shares in consequence of the transfer" within the meaning of this section. Consequently there is *no duty* on the part of the tenant to apportion the rent between the transferor and the transferee. An apportionment can, in such cases, be effected either by mutual arrangement between all the parties or by a suit in Court.(3) See the last paragraph of section 109.

4. **"Benefit of any obligation."** — The obligation referred to in the section is of an *active* nature, i.e., in the nature of *doing* something. An *easement*, for example, may be said to be an obligation relating to property, but it is not an obligation of an active nature and is, therefore, not within this section. But a provision analogous to this section has been made in S. 30 of the Easements Act, 1882, which runs as follows:

> Where a dominant heritage is divided between two or more persons, the easement becomes annexed to each of the shares, but not so as to increase substantially the burden on the servient heritage: Provided that such annexation is consistent with the terms of the instrument, decree or revenue-proceeding (if any) under which the division was made, and, in the case of prescriptive rights, with the user during the prescriptive period."(1)

Rent is a benefit of an obligation relating to property which is apportionable under this section. So also covenants running with the land and obliging the covenantor to *do* something, e.g., covenants to repair.(2) In the undermentioned case(3) where certain persons had jointly leased property to *X* and had subsequently, become divided by a partition decree, it was held by the High Court of Madras that this section would enable one of the persons so divided to enforce against the lessee the forfeiture clause in the lease so far as his share was concerned. That case was followed by the same High Court in a later case.(4) It is somewhat difficult to follow how the liability to forfeiture of a share of the leasehold property can be considered to be a duty which is to be performed by the lessee within the meaning of this section. It has, however, been held by the Calcutta High Court that a partition amongst the joint landlords had not the effect of bringing about a severance in the tenancy and therefore as there was no separate demise in respect of the divided part of the reversion the landlord to whom a divided part had been allotted acquired no right, by reason merely of the partition, to terminate the tenancy by giving notice to quit as to that part.(5)

5. **"In proportion to the value of his share in the property."**—The value of the shares for the purposes of the section is their value *at the time of the severance* of the estate. Thus, where portions of some property passed to different persons and the rent of the property was to be apportioned between them, it was held that the apportionment must be done on the basis of the value of the different portions of the property at the time of the apportionment and not the value at the time of the creation of the original tenure.(1)

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2. ('12) 14 Ind Cas 292 (292, 293) (DB) (Cal).
('80) 5 Cal 941 (945) (DB).

3. *See* ('78) 4 Cal 96 (101, 102) (FB).
('78) 1 Cal L R 453 (454) (DB). (Suit.)

Section 37 — Note 4

1. Illustrations to S. 30 of the Easements Act are not reproduced here.

2. Section 140 of the Law of Property Act, 1925 (15 Geo V, Ch. 20) makes an express provision for severance of such obligations.)

3. ('05) 29 Mad 29 (35, 36) (DB).

4. 1915 Mad 813 (814, 815) [AIR V 2] : 38 Mad 445.

5. ('50) 86 Cal L Jour 198 (212, 213).

Section 37 — Note 5

1. ('03) 7 Cal W N 453 (454) (DB).

6. **Duty must be capable of severance.**—There can be an apportionment of the obligation only where the duty is capable of being severed. Thus, as shown by illustration (a), the duty to pay rent is capable of being severed into shares into which the landlord's interest becomes divided on a transfer, and consequently the lessee may be required to apportion the rent between the landlords in proportion to their shares. The duty to deliver a fat sheep in the said illustration cannot be severed and so the lessee can only be called upon to deliver it in accordance with the joint direction of the landlords.

7 **No apportionment where burden is increased.** — The person in whose favour an obligation is to be performed cannot increase the burden by any transaction of his own without the consent of the person obliged. This principle is a general one and is recognised also in S. 30 of the Easements Act, 1882. Where, in a partition, an occupancy holding went to one sharer and the house of the occupancy tenant situated in the *Ghati*, passed to another sharer, it was held that the latter could not recover rent for the house, on the ground that the tenant had a right to occupy the house rent-free before the partition and that the partition could not create a new obligation on the part of the tenant to pay rent for the house.(1)

The mere division of rent into several parts cannot be said to increase the burden of the obligation.

8. **Proviso.** — The proviso is obviously in consonance with justice. Compare Ss. 50 and 109. If the person obliged is not aware of the subsequent severance, he cannot be made responsible for failing to perform his duty as provided by this section. He will be justified in performing his duty towards the transferor as it was before the transfer. The notice mentioned in this section may be given either by the transferor or by the transferee.(1)

9. **Agricultural leases.** — The third paragraph of the section saves agricultural leases from the operation of the section. Section 109 has also been rendered inapplicable to agricultural leases (see section 117).

It has, however, been held in the undermentioned cases(1) that the *principle* of the section is applicable to such leases. In the case noted below,(2) decided before this Act, the duty to pay rent was held not capable of severance.

(B) Transfer of Immoveable Property

38. Where any person, authorized only under circumstances in their nature variable to dispose of immoveable property, transfers such property for consideration, alleging the existence of such circumstances, they shall, as between the transferee on the one part and the transferor and other

Transfer by person authorised only under certain circumstances to transfer.

Section 37 — Note 7

1.† ('08) 1908 All W N 123 (124) (SB).
('08) 30 All 282 (285, 287) (FB). (Agricultural lease. 1908 All W N 123 (SB), Rel. on.)

Section 37 — Note 8

1. ('13) 19 Ind Cas 865 (867) (DB) (Cal). (The vesting of title in the assignee is however not postponed till the notice is given.)

Section 37 — Note 9

1. 1916 Cal 410 (411) [AIR V 3] (DB).
1915 Mad 813 (814) [A I R V 2]: 38 Mad 445 (DB).
('05) 29 Mad 29 (35) (DB).

2. *See* ('76) 25 Suth W R 35 (36) (DB). (Note.—Lease in this case appears to be an agricultural lease.)

persons (if any) affected by the transfer on the other part, be deemed to have existed, if the transferee, after using reasonable care to ascertain the existence of such circumstances, has acted in good faith.

Illustration.

A, a Hindu widow, whose husband has left collateral heirs, alleging that the property held by her as such is insufficient for her maintenance, agrees, for purposes neither religious nor charitable, to sell a field, part of such property, to *B*. *B* satisfies himself by reasonable enquiry that the income of the property is insufficient for *A's* maintenance, and that the sale of the field is necessary, and acting in good faith, buys the field from *A*. As between *B* on the one part and *A* and the collateral heirs on the other part, a necessity for the sale shall be deemed to have existed.

Synopsis

1. Scope of the section.
2. Hindu law.
3. Distinction between this section and S. 41.
4. Section applies to transfers of immovable property only.
5. "Person authorised only under circumstances in their nature variable."
6. "Transfers such property for consideration."
7. "Alleging the existence of such circumstances."
8. "After using reasonable care to ascertain the existence of such circumstances."
9. "Acted in good faith."
10. Transfer by operation of law.
11. Onus of proof.
12. Recitals in a deed—Evidentiary value of.

1. Scope of the section.—This section deals with transfers by a person, such as a Hindu widow or the manager of a Hindu family or the guardian of a minor, who is authorised to dispose of immovable property only under certain circumstances in their nature variable.(1) When such person transfers immovable property for consideration, alleging the existence of such circumstances, the section declares that, as between the transferee on the one part and the transferor and other persons affected by the transfer on the other part, *such circumstances shall be deemed to have existed*, if the transferee—

(1) has *used reasonable care to ascertain the existence* of such circumstances, and

(2) has *acted in good faith*.(1a)

As early as 1856, their Lordships of the Privy Council stated the principle underlying this section in *Hanoomanpersaud Pandey* v. *Babooee Munraj Koonweree*.(2) In that case a mortgage had been executed by the manager of an infant heir, who, under the Hindu law, has only a limited and qualified power of disposal over the minor's immovable property and can alienate it only for the minor's needs or for the benefit of the estate. Their Lordships observed as follows :

> ". . . . . the lender is bound to inquire into the necessities for the loan, and to satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the Manager is acting in the particular instance for the benefit of the estate. But they think that if he does so inquire, and acts honestly, the real existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of his charge . . . . . "

This principle was followed by decisions before the Act(3) and has now been, in effect, embodied in the present section.(4)

Section 38 — Note 1

1. See Report of the Second Law Commission, 1879.

1a. ('79) 2 All 267 (271) (FB). (Per Oldfield J.) ('83) 1883 All W N 108 (109) (DB). (Per Stuart C. J.)

2.† (1856) 6 Moo Ind App 393 (424) (PC).

3. ('75) 14 Beng L R 21 (46).
(1864) 1864 Suth W R Gap 166 (166) (DB).
(1864) 1864 Suth W R Gap 385 (386) (DB).

4. ('09) 31 All 176 (199) (FB).
1960 Mad 99 (102) [AIR V 47 C 29] : I L R (1959)

The object of the section is not only to protect innocent transferees for value,(5) but also to protect other persons affected by the transfer such as reversioners,(6) and the effect of the section is that where a transfer is alleged to be for legal necessity and such necessity cannot be established by direct evidence, *it will be deemed to exist*, if it can be shown that the transferee has taken reasonable care to ascertain if such circumstances existed and has acted in good faith.(7)

2. Hindu law. – Prior to the amendment of the Act in 1929, nothing in Chapter II affected any rule of Hindu law. But the provision in this section did not affect any rule of Hindu law; in fact, it was based on Hindu law and, as the illustration to the section indicates, was intended to apply to cases governed by Hindu law, right from its enactment. After the omission of the word "Hindu" from S. 2, Cl. (d), by virtue of the abovementioned amendment, it is, of course, clear that such cases would be directly governed by this section.(1)

3. Distinction between this section and section 41. — The distinction between this section and S. 41 is this: Section 38 applies to cases where the transferor *has* a power to transfer immovable property, under particular circumstances and a transfer under such circumstances would bind all persons interested in the property. Section 41 applies to cases where the transferor has *no* power to transfer the property, but the transfer is nevertheless binding on the *real owner* on the principle of estoppel.

4. Section applies to transfers of immovable property only.—Sections 5 to 37, grouped under sub-heading (A) of this chapter deal with transfers of *movable as well as immovable property*. This section is the first of the sections under the sub-heading (B) in Chapter II of the Act, which deal with transfers of *immovable* property only.

In *Subramania* v. *Krishna*(1) *A*, a *karnawan* of a Malabar *tarwad*, transferred for consideration a money-decree passed in his favour to *B*. The junior members of the *tarwad* sued *A* and *B* for a declaration that the money due under the decree belonged to the *tarwad* and *A* could not, as a *karnawan*, transfer it without necessity. It was contended, *inter alia*, that *B* was bound to enquire into the existence of necessity. It was held that it was only in cases of transfers of immovable property that the question of reasonable enquiry by the purchaser arose, and that as the decree was movable property, the provisions of the section did not apply.

5. "Person authorised only under circumstances in their nature variable." – The following are instances of persons who are authorised to transfer property only under circumstances in their nature variable :

Mad 1046 (DB). (The rule as to inquiry found statutory recognition in S. 38.)
1927 Nag 65 (66) [AIR V 14] (DB).
('96) 22 Bom 1 (10).

5. See Report of the Second Law Commission, 1879.
1922 Pat 122 (135) [AIR V 9] (DB).

6. *See* ('68) 9 Suth W R 350 (351) (DB).

7.† 1917 P C 188 (189) [AIR V 4] : 40 All 171.
1920 Oudh 80 (82) [AIR V 7] (DB).
[*See also* 1955 Orissa 17 (20) [(S) A I R V 42 C 6] : I L R (1954) Cut 588 (DB). (A *bona fide* alience should not suffer when he has acted honestly and with due caution though he may have himself been deceived.)]

Section 38 — Note 2

1. 1960 Mad 99 (102) [A I R V 47 C 29] : I L R (1959) Mad 1046 (DB). (Section 38 has been made applicable to Hindus.)
1943 Mad 292 (295) [A I R V 30] : I L R (1943) Mad 717 (DB).

Section 38 — Note 4

1. 1920 Mad 496 (499) [AIR V 7] (DB).

(1) A Hindu widow or other limited owner under Hindu law.(1)
(2) A manager of joint Hindu family.(2)
(3) A Hindu father.(3)
(4) A *de facto* or *de jure* guardian of a Hindu minor.(4)
(5) An executor under a will made by a Hindu and not governed by the Indian Succession Act, 1925.(5)

Section 38 — Note 5

1. 1918 P C 196 (199) [AIR V 5] : 42 Mad 523 : 46 Ind App 72.
1914 P C 90 (91) [AIR V 1] : 42 Cal 876 : 42 Ind App 64.
('16) 23 Cal 766 (772) : 23 Ind App 57 (PC).
('67) 11 Moo Ind App 619 (632) (PC). (Debts incurred by the husband and debts incurred by her widow in order to defray the expenses of the husband's obsequies.)
(1861) 8 Moo Ind App 529 (551) (PC).
('13) 40 Cal 721 (752) (FB).
1925 All 324 (325) [AIR V 12] : 47 All 355 (DB).
('10) 34 Mad 188 (204) (DB).
('10) 34 Mad 422 (423) (DB).
('04) 6 Bom L R 628 (629) (DB).
('95) 17 All 125 (132) (DB). (Daughter in Benares School.)
('87) 11 Bom 609 (612, 613) (DB).
('69) 11 Suth W R 554 (555) (DB).
[*See also* 1952 Manipur 11 (1) (11) [A I R V 39]. (Manipur law — Sale by widow of her husband's property—Sale certificate is necessary.)
1952 Manipur 10 (10) [AIR V 39]. (In Manipur State, alienation by a Hindu widow of her husband's property will not be upheld, unless there is a certificate of sale from proper authority.)]

2. 1927 P C 121 (122) [AIR V 14] : 8 Lah 597 : 54 Ind App 211.
1917 P C 61 (62) [AIR V 4] : 39 All 437 : 44 Ind App 126.
1917 P C 188 (189) [AIR V 4] : 40 All 171.
(1856) 6 Moo Ind App 393 (423) (PC).
1952 Orissa 239 (242) [AIR V 39].
1943 Mad 292 (295) [AIR V 30] : ILR (1943) Mad 717 (DB).
1923 Pat 268 (274) [AIR V 10] (DB).
('10) 34 Mad 188 (204) (DB).
† ('02) 4 Bom L R 587 (591) (DB).
('77) 2 Cal 438 (444) (DB).
(1863) 1 Bom H C R (AC) 27 (30) (SB).
† 1939 Pat 97 (102) [AIR V 26] : 17 Pat 549 (DB).
1927 Mad 1165 (1166) [AIR V 14].
('04) 7 Bom L R 172 (173) (DB).
('07) 9 Bom L R 1114 (1115) (DB).
('70) 6 Mad H C R 371 (379) (DB).
(1900) 2 Bom L R 686 (687) (DB).
('26) 92 Ind Cas 524 (525) (DB) (Mad).
[*See also* ('98) 21 All 71 (83) : 25 Ind App 183 (PC). (Manager of a limited owner has no powers like those possessed by the manager of a joint Hindu family.)]
Also see section 7, Note 7.

3. † 1917 P C 61 (63) [AIR V 4] : 39 All 437 : 44 Ind App 126.
1960 Mad 99 (102) [AIR V 47 C 29] : ILR (1959) Mad 1046 (DB). (Alienation by father to discharge his antecedent debt.)
1943 Mad 292 (295) [AIR V 30] : ILR (1943) Mad 717 (DB).
('10) 34 Mad 422 (423) (DB).
('10) 34 Mad 188 (204) (DB).
('03) 5 Bom L R 678 (685).
† ('02) 4 Bom L R 587 (591, 592) (DB).
('01) 26 Bom 326 (327) (DB).
(1900) 24 Bom 343 (344) (DB).
('87) 11 Bom 37 (41) (DB).
('74) 20 Suth W R 192 (194) : 12 Beng L R 90 (94) (DB).

4. ('66) 10 Moo Ind App 454 (461) (PC). (Alienation by the step-mother as a guardian of a minor.)
1950 Mad 606 (607) [A I R V 37 C 254] (DB). (Alienation by guardian—Considerable latitude should be allowed for exercise of his discretion, though if act is of speculative character, it cannot be supported by Court.)
1931 Lah 419 (425) [A I R V 18] : 12 Lah 546 (DB).
1950 Nag 69 (70) [A I R V 37 C 20] : ILR (1950) Nag 795. (Transfer by natural guardian of Hindu minors.)
1915 Bom 150 (151) [AIR V 2] (DB). (Mother or step-mother. Note. — Overruled on a different point in AIR 1920 Bom 1 (FB).)
('12) 17 Ind Cas 247 (249) (Lah).
('06) 28 All 508 (528) (DB).
('06) 5 Cal L J 542 (547) (DB).
('02) 26 Bom 433 (435, 436) (DB).
('99) 26 Cal 820 (822, 824) (DB). (Sale by the grand-mother of the minor—In the case of *de facto* manager there is no distinction between a power to mortgage and a power to sell.)
('93) 1893 Bom P J 297 (DB).
('75) 12 Bom H C R 79 (81). (Guardian *de facto* mother.)
('75) 1875 Bom P J 61 (DB).
('71) 3 N W P H C R 2 (4) (DB). (Mother and uncle.)
(1862) 1 Bom H C R (App) 51 (71, 72). (Case of ancestral family trade.)
[*See also* 1952 Manipur 11 (1) (11) [AIR V 39]. (Manipur law — Sale of minor's property by guardian — Certificate from proper authority necessary.)]

5. ('05) 32 Cal 861 (870) (DB).
('98) 22 Bom 1 (10). (Neither "power to manage estate as they deem proper," nor "power to sell it," will authorise executors to lease property for more than 21 years.)
('97) 25 Cal 103 (105) (DB).
('65) 3 Suth W R Misc 7 (7) (DB).

(6) A mahant or a shebait.(6)

(7) A guardian of a minor appointed by a Court.(7)

As for the circumstances under which they can transfer, see S. 7, Note 7, and also the undermentioned cases.(8)

6. "Transfers such property for consideration."—In order that the section may apply there must firstly be a *transfer* and secondly such transfer must be for *consideration*. An *agreement* to sell is not a transfer and this section does not apply thereto.(1) A *gift* is a "transfer" but is without *consideration* and is consequently not governed by this section. Hence a donee from a limited owner cannot set up as against the claim of the alienee for value from the latter the plea that the alienation is bad for want of legal necessity.(2)

7. "Alleging the existence of such circumstances." — It is necessary for this section to apply that the existence of circumstances empowering the transferor to make the transfer, should have been *alleged*. If the transferee makes reasonable enquiry into the existence of the circumstances so alleged and acts in good faith, the representations are binding on the persons who are affected by the transfer.(1) Where no such circumstances are alleged, the transfer is not binding on the persons interested in the property (2) The validity of the alienations must be judged on the circumstances

[*See also* (1909) 1 Ind Cas 248 (249) (Cal) (DB). (Mortgage by executor—His power to mortgage cannot be gainsaid in view of S. 90 of Probate and Administration Act, 1881 and S. 260 of Succession Act, 1865—Mortgagee is not bound to enquire whether executor is mortgaging for proper purposes of administration in the absence of special circumstances to put him to enquiry.)

('78) 4 Cal 455 (469) (DB). (Distinction between an English and Hindu executor.)]

6. 1926 P C 112 (118) [AIR V 13] : 53 Ind App 253 : 6 Pat 139 (PC).

('76) 2 Cal 341 (352) : 4 Ind App 52 (PC).

✱('75) 2 Ind App 145 (151, 152) (PC). (Decree untainted by fraud and collusion obtained against a shebait is binding on the succeeding shebait.)

† 1953 Mad 639 (642, 643) [AIR V 20] (DB).

('09) 3 Ind Cas 93 (94) (Cal). (Permanent lease by a shebait — Purpose stated was filling up a tank — *Held*, purpose was illusory and could not support the lease.)

('95) 18 Mad 359 (362) (DB).

('68) 12 Suth W R 299 (301) (DB).

[*See* ('68) 12 Cal W N 63 (64) (DB). (A permanent lease of debutter property is void if not executed for legal necessity.)]

7. † 1936 Bom 389 (392) [AIR V 23] : ILR (1937) Bom 1 (DB).

1936 Lah 946 (956) [AIR V 23] : 17 Lah 686 (DB).

('11) 11 Ind Cas 764 (764, 765) (All).

('90) 1890 Pun Re No. 56.

Also see S. 7, Note 7 and S. 58, Note 25.

[But see ('82) 10 Cal L R 547 (549) (DB). (In this case even though the permission of the Court was not taken, the mortgage was held binding on the minor, as it was otherwise valid.)]

8. 1953 All 406 (408) [AIR V 40 C 188] : ILR (1954) 2 All 675 (DB).

1922 Pat 22 (23) [AIR V 9] : 1 Pat 266 (DB). (Debts incurred for marriages of twice born Hindu male and antecedent debts, are binding on family property.)

('10) 32 All 575 (580) (DB). (First marriage of member of Hindu joint family is lawful family necessity—But every second marriage is not—Second marriage in Asura form of member at the age of 28 after death of first wife leaving son of 9 years — Alienation for such marriage of joint family property by managing member held for family necessity.)

('78) 2 Bom 666 (668) (DB). (Sale of ancestral property by father in Hindu joint family to pay off a mortgage and a bond at high interest — *Held*, there was apparent necessity and fact that mortgage and the bond had still some time to run, was not sufficient to disprove an otherwise apparent necessity.)

Section 38 — Note 6

1. ('01) 26 Bom 326 (336) (DB).

2. 1923 Nag 127 (128) [AIR V 10]. (Suit by mortgagee on mortgage deed executed by limited owner — Mortgage supported by consideration—Donee from limited owner cannot set up plea of absence of legal necessity for the mortgage.)

Section 38 — Note 7

1. 1934 Lah 895 (896) [AIR V 21] (DB). (Reversed in AIR 1937 P C 124 on another point.)

1925 Lah 240 (241) [AIR V 12] : 5 Lah 511 (DB).

('96) 21 Bom 808 (815) (DB). (Existence of chronic need of money for the current outgoing of family life—Sufficient proof.)

2. † 1921 All 137 (140) [AIR V 8] : 43 All 655 (DB).

obtaining on the date of the transaction and not on subsequent events so that if in the circumstances that existed at the time of the alienation, the act would be regarded as a proper one by men of ordinary prudence, it would not be held invalid because of subsequent changes in the circumstances.(2a)

In *Banga Chandra* v. *Jagat Kishore*,(3) their Lordships of the Privy Council observed as follows:

> "The actual proof of the necessity which justified the deed is not essential to establish its validity. It is only necessary that a representation should have been made to the purchaser that such necessity existed, and that he should have acted honestly and made proper enquiry to satisfy himself of its truth."

A representation by a transferor of the existence of necessity is usually recited in the instrument of transfer. Such recitals are clearly evidence that such representations were made by the transferor.(4) As to how far they are evidence of the *truth* of such representation, see Note 11 below.

8. **"After using reasonable care to ascertain the existence of such circumstances."** — The transferee must use reasonable care to ascertain whether the circumstances alleged as authorising the transferor to dispose of the property exist.(1) What is material under the section is the use of *reasonable care* on the part of the transferee and not the *actual existence* of the circumstances.(2) So that if the transferee uses reasonable care in making the enquiry and is satisfied on such enquiry

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2a. 1950 Mad 606 (607) [A I R V 37 C 254] (DB).

3. †1916 P C 110 (111) [AIR V 3] :.44 Cal 186 : 43 Ind App 249.

4. 1916 P C 110 (111) [AIR V 3] : 44 Cal 186 : 45 Ind App 249.

Section 38 — Note 8

1. 1917 P C 188 (189) [AIR V 4] : 40 All 171.
† ('80) 6 Cal 843 (847) : 8 Ind App 8 (PC).
1957 Andh Pra 776 (776) [AIR V 44 C 242]. (Alienation by Hindu widow in favour of son-in-law — No *bona fide* inquiry as to whose debts were to be satisfied — Alienation not valid.)
('56) 69 Mad L W 809 (811).
1922 Pat 450 (461) [AIR V 9] : 1 Pat 506 (DB).
('12) 13 Ind Cas 7 (14) (DB) (Mad).
('12) 17 Ind Cas 609 (611, 615) (DB) (Mad).
('11) 14 Oudh Cas 299 (302).
('11) 10 Ind Cas 350 (351) (DB) (Cal).
('03) 6 Bom L R 628 (629) (DB).
('02) 4 Bom L R 587 (592) (DB).
('84) 1884 Pun Re No. 67, p. 185 (188).
('79) Oudh Select Case Part VIII No. 70.
('70) 4 Beng L R (AC) 15 (18) (DB). (The money was lent to wipe off a personal debt — No enquiry on the part of the purchaser was proved —Sale was set aside.)
('70) 6 Mad H C R 371 (379) (DB).
('67) 8 Suth W R 75 (78) (DB).
(1864) 1864 Suth W R Gap 143 (144) (DB). (Mortgagee acquiring by operation of law the possession of an estate mortgaged by a Hindu father without the son's consent.)
('67-68) 4 Bom H C R (AC) 169 (172, 173) (DB).
('66) 5 Suth W R 103 (103) (DB). (It was found that the sale was made ostensibly for the purpose of raising money for the minor's marriage, but not in fact for that purpose: that the money when raised was not applied towards their marriage, and that there were ample funds belonging to the estate from which the marriage expenses might and ought to have been paid— Held that the purchaser did not purchase in good faith.)

2 1957 Andh Pra 776 (776) [AIR V 44 C 242]. (Existence of legal necessity in fact or *bonu fide* inquiry as to its existence.)
('56) 69 Mad L W 809 (811).
†1938 Bom 388 (390) [AIR V 25] (DB).
1933 Mad 639 (643) [AIR V 20] (DB). (A pledgee of temple property who advances money to avert a sale in execution of a decree is not bound to go further back beyond the decree to ascertain whether the Court was right in giving the decree or, having given it, in putting up the property for sale.)
1923 Lah 660 (661) [AIR V 10].
('09) 2 Ind Cas 366 (368) (Cal).
†('02) 4 Bom L R 587 (592) (DB). (Existence of necessity—Not a condition precedent.)
('66) 6 Suth W R 149 (150, 151) (DB).
(1864) 1864 Suth W R Gap 166 (166) (DB).
[*See also* 1952 Nag 60 (64) [AIR V 39] : I L R (1950) Nag 679. (Question whether manager or limited owner should borrow money or sell property to obtain money to meet his necessity is for himself to decide.)
1943 Mad 292 (295) [AIR V 30] : ILR (1943) Mad 717 (DB). (Debt incurred by manager of joint family or by father—Lender lending *bona fide* after making due enquiry into necessity for debt—Debt is binding on interests of all the members of the family even if the credited necessity does not in fact exist.)]

that the necessary circumstances authorising the transfer exist, the absence of such circumstances, as a fact, will not affect the validity of the transfer in his favour.(3) Thus, in the case of a purchaser from the guardian of a Hindu minor, it is not obligatory upon the purchaser to show that the necessity for the sale *actually* existed. It is sufficient if he establishes that before completing his purchase he made all reasonable enquiry as to the existence of that necessity and that the result of such enquiry was to satisfy him as an honest man of the necessity being real and not pretended.(4) In the actual application of the rule as to inquiry between a case of necessity and a case of antecedent debt there will be a difference. Thus although in the case of alienation for necessity a *bona fide* inquiry as to its existence is sufficient and it is not necessary that necessity should have actually existed, in the case of alienation to discharge antecedent debt, the existence of the debt should be proved, as, otherwise, it would not be held that the inquiry was full and *bona fide*.(4a)

The question whether the transferee has used reasonable care in making the enquiry must depend upon the facts of each case.(5) The nature of the necessity for the transfer in the particular case and the avenues of the information available to the transferee will also have to be taken into consideration in deciding the sufficiency of the enquiry.(6) As observed by their Lordships of the Privy Council in *Hanooman Persaud's case*(7):

"The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded."(8)

The enquiry ought to be made from a person who is in a position to know. It ought to be made from an independent source and not from one who is interested in upholding the transfer.(9) Thus, the representation of the transferor himself that money is required for a particular purpose will not be sufficient.(10)

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3. ('66) 10 Moo Ind App 454 (461) (PC).
1929 All 128 (129) [AIR V 16] : 50 All 823 (DB). (Recital coupled with such circumstance is no evidence of necessity.)
1925 Oudh 740 (740) [AIR V 12].
1923 Pat 197 (199) [AIR V 10] (DB).
1923 Pat 268 (272) [AIR V 10] (DB).
1920 Oudh 80 (82) [AIR V 7] (DB).
1915 Cal 141 (143) [AIR V 2] (DB). (Alienation by Hindu widow.)
('13) 18 Ind Cas 953 (953) (DB) (Mad).
('11) 34 Mad 422 (423) (DB).
('74) 21 Suth W R 196 (197) (DB).
('67) 7 Suth W R 23 (23) (DB).
('67) 2 Agra 147 (148) (DB).
[*See also* 1955 Orissa 17 (20) [AIR V 42 C 6] : ILR (1954) Cut 588 (DB).]

4. ('01) 3 Bom L R 243 (244) (DB).
†('67) 8 Suth W R 364 (365) (DB).
(1863) 1 Bom H C R 27 (30) (SB).

4a. 1960 Mad 99 (101) [AIR V 47 C 29] : I L R (1959) Mad 1046 (DB).

5. 1935 Lah 42 (44) [AIR V 22] (DB).
1926 Sind 22 24) [AIR V 13] : 19 Sind LR 402 (DB).
1922 Pat 22 (23) [AIR V 9] : 1 Pat 266 (DB).

6. †1935 Lah 42 (44) [AIR V 22] (DB).

7. (1856) 6 Moo Ind App 393 (423) (PC).

8. Also see the following cases :
1950 Mad 606 (607) [AIR V 37 C 254] (DB). (Existence of debts and the insufficiency of income to liquidate them would be sufficient to justify alienation even in the absence of pressure from the creditors.)
1950 Nag 69 (70) [AIR V 37 C 20] : I L R (1950) Nag 795.
1932 Mad 97 (99) [AIR V 19] (DB).
1927 Cal 160 (162) [AIR V 14] (DB). (Sale by Hindu widow.)
1925 Oudh 557 (557) [AIR V 12] : 27 Oudh Cas 329. (Do.)
1919 Cal 603 (606) [AIR V 6] (DB). (Next reversioner made party to the deed of transfer by widow — Transferee cannot avoid proof of legal necessity.)
('69) 11 Suth W R 446 (446) (DB). (Existence of a decree — A clear necessity.)
('70) 14 Suth W R 72 (72) (DB). (Mortgage and sale of portion of property by guardian of minor — The fact of there being a decree, an attachment and a proclamation for sale of minor's property is sufficient pressure.)
('81) 3 Mad 145 (151) DB). (Discusses the law with respect to a loan given to a polygar.)
[*See also* 1951 Nag 403 (405, 406) [AIR V 38 C 126] : ILR (1950) Nag 25. (Transfer by guardian of minor — Transferee to show necessity not only for consideration for transfer of property but also for the transfer itself.)]

9. † 1935 Lah 42 (44) [AIR V 22] (DB).

10. 1935 Cal 94 (95) [AIR V 22].
1923 Pat 197 (199) [AIR V 10] (DB).

If the transferee satisfies himself that the purpose for which the transfer is made justifies the transfer, he is not bound to see to the *application* of money and will be protected even if the money is *not* applied to the purposes for which it was required.(11) The reason is that the transferee has no means of controlling and rightly directing the actual application of the money.(12)

9. **"Acted in good faith."** — As to the meaning of the expression "good faith" in this Act, see S. 51, Note 8. Where a person has acted *honestly*, he can be said to have acted in good faith.(1) The question whether the transferee acted *bona fide*, must depend upon the circumstances of each case.(2) In *Kumar Kalikanand* v. *Shivanandan*,(3) Das, J., observed as follows:

> "It would be impossible, nor it is desirable, to attempt a complete codification of the evidence that would, in all cases, establish a case of *mala fides* against the lender. Each case must depend on its own facts, but, speaking broadly, there must be evidence in the case from which the irresistible inference would follow that the lender knew, when he advanced the money, that the borrowers were so reckless and extravagant, that it would be impossible for them to discharge the debt incurred by them, that the lender knew that the object of the borrowers in purchasing the property was not so much to benefit the family as to get an additional income for themselves, and that in giving the loan, the lender had for his object, not so much the return of his money, as the acquisition of the properties mortgaged to him."

1922 Pat 122 (135) [AIR V 9] (DB).
('13) 20 Ind Cas 951 (952) (All). (Statement of mortgagor that he is borrowing money to pay off antecedent debt is not sufficient.)
('12) 35 Mad 108 (112) (DB).
[*See also* ('89) 1889 Pun Re No. 152 p. 510 (511).]

11. †1927 P C 37 (41) [AIR V 14] : 49 All 149 : 54 Ind App 79.
†(1856) 6 Moo Ind App 393 (424) (PC).
1960 Mad 99 (102) [AIR V 47 C 29] : I L R (1959) Mad 1046 (DB). (Alienation for payment of antecedent debt.)
('56) 69 Mad L W 809 (812).
1939 All 513 (514) [AIR V 26] (DB).
1938 Bom 388 (390) [AIR V 25] (DB).
†1936 Cal 116 (121) [AIR V 23] : 62 Cal 733 (DB). (Sale by manager.)
†('36) 17 Lah 824 (830) (DB). (Debt for family business.)
1935 Lah 160 (160) [AIR V 22].
1935 Lah 314 (315) [AIR V 22] (DB).
1933 Pat 708 (712) [AIR V 20].
†1931 Lah 419 (427) [AIR V 18] : 12 Lah 546 (DB).
1929 All 789 (790) [AIR V 16] : 51 All 1039 (DB).
1929 Bom 55 (56) [AIR V 16] (DB).
1928 Lah 83 (87) [AIR V 15] : 8 Lah 632 (DB).
1927 Mad 890 (892) [AIR V 14].
1927 Nag 65 (66) [AIR V 14] (DB).
1925 Bom 514 (515) [AIR V 12] : 49 Bom 821 (DB).
1925 Nag 196 (197) [AIR V 12].
1922 All 526 (527) [AIR V 9] : 45 All 77 (DB). (Mortgage by de facto guardian (Hindu mother) for the minor son.)
1920 Oudh 144 (144) [AIR V 7] : 23 Oudh Cas 320 (DB). (A mortgage of trust property by the mahant.)
('11) 33 All 242 (244) (DB). (Alienation by father.)
('09) 2 Ind Cas 852 (852) (DB) (Cal). (However, in this case it was held that the purchaser failed to make any enquiry and that there was no necessity for sale of property.)
('09) 2 Ind Cas 366 (366) (Cal).
('06) 33 Cal 1079 (1092) (DB). (Mortgage by Hindu widow — Debt taken for payment of husband's debt; recital to that effect in the deed — Decree against widow existing — *Held*, sufficient to prove necessity — Mortgagee not bound to see application of his money.)
('04) 32 Cal 158 (161) (DB).
('02) 24 All 547 (549) (DB).
('93) 21 Cal 190 (194) (DB). (Alienation by a widow to pay barred debt of her husband.)
('84) 1884 Pun Re No. 67 p. 185 (188).
('78) 2 Cal L R 474 (475) (DB).
('70) 5 Beng L R 508 (519).
('67-68) 4 Bom H C R (AC) 169 (172) (DB).
('68) 9 Suth W R 501 (502) (DB).
('66) 6 Suth W R 193 (194) (DB).
('65) 2 Suth W R 292 (292) (DB).
(1864) 1 Suth W R 59 (60) (DB).
[*See also* ('26) 96 Ind Cas 1005 (1006) (Lah).

12. †(1856) 6 Moo Ind App 393 (424) (PC).
('56) 69 Mad L W 809 (812).

Section 38 — Note 9

1. ('76) 2 Cal 341 (351) : 4 Ind App 52 (PC). (Application of money to different purpose than represented — Purchaser not aware — Action bona fide.)
†(1856) 6 Moo Ind App 393 (423, 424) (PC).
1928 Lah 875 (878) [AIR V 15] (DB). (Alienee from Hindu widow held not to have acted in good faith.)
1922 Pat 135 [AIR V 9]. (Alienation by father for the benefit of the joint family estate.)
[*See* ('11) 10 Ind Cas 676 (678) (DB) (Mad).]

2. 1922 Pat 122 (136) [AIR V 9] (DB).

3 1922 Pat 122 (136] [AIR V 9] (DB).

In *Koonwar Doorganath Roy* v. *Ramchunder Sen*,(4) R, a shebait of a temple, sold part of her temple property on the representation that the amount was required for the repair of the temple. The vendor did not apply the purchase-money to that purpose, though it was proved that, at the time of the transaction, the temple required repairs. Their Lordships of the Privy Council, while dealing with the question of collusion between the transferee and the transferor, observed :

> "It may be that Rashmoni did not intend to apply the money to the purpose for which she professed to require it. It may be that she always intended to apply it to the payment of the Government revenue, as it appears that in point of fact she did. But unless the purchaser was aware at the time he made the purchase that that was her intention, and that the statement in the deed was a colourable one, he could not be injured by her concealment of her true object, or by her having subsequently applied the money to a different purpose."

See also the undermentioned case.(5)

10. Transfer by operation of law. — This chapter, and therefore this section, does not apply to transfers by operation of law. A purchaser in execution of a money-decree against a Hindu father is not bound to go behind the decree, and show that he made an enquiry as to the nature of the debt.(1) If, however, the purchaser has notice actual or constructive of the character of the debt and he purchases with such notice, he is not protected.(2)

11. Onus of proof. — Where a person, authorised only under particular circumstances, to dispose of property, makes a transfer, the transferee will get a good title only if it is proved that—

(1) such circumstances did as a *matter of fact* exist, or

(2) the transferee used reasonable care to ascertain if the circumstances alleged existed, and acted in good faith.

The burden of proof will be on the *transferee* to establish one or the other of the two facts.(1) whether he is the plaintiff or the defen-

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4. ('76) 2 Cal 341 (351) : 4 Ind App 52 (PC).

5. 1957 Andh Pra 776 (776) [A I R V 44 C 242]. (Alienation by Hindu widow in favour of her son-in-law — No bona fide enquiry as to whose debts were to be satisfied—Alienation not valid —Transferee from son-in-law knowing all circumstances — Not in better position than original alience.)

Section 38 — Note 10

1. †('79) 5 Cal 148 (170) : 6 Ind App 88 (PC).
('74) 1 Ind App 321 (332) (PC).

2. ('79) 5 Cal 148 (173) : 6 Ind App 88 (PC).

Section 38 — Note 11

1. 1927 P C 121 (122) [AIR V 14] : 51 Ind App 211 : 8 Lah 197.
1924 P C 56 (59) [A I R V 11] : 51 Ind App 145 : 47 Mad 181.
1920 P C 64 (64) [AIR V 7] : 43 Mad 541 : 47 Ind App 6. (Alienation by widow challenged after 80 years—Presumptions are permissible to fill in details.)
1916 P C 110 (110) [A I R V 3] : 44 Cal 186 : 43 Ind App 249.
†1914 P C 90 (91) [AIR V 1] : 42 Cal 876 : 42 Ind App 64. (Proof aliunde.)
1914 P C 38 (40) [AIR V 1] : 36 All 187. (Recitals in the deed do not dispense with proof aliunde.)
('08) 35 Cal 420 (428) : 35 Ind App 48 (P C).
('98) 21 All 71 (80) : 25 Ind App 183 (PC).
('96) 23 Cal 766 (774) : 23 Ind App 57 (PC). (Although the suit was brought by the representative, and not by the original mortgagee, the burden of proving the legal necessity was on the plaintiff, and it was incumbent on him to adduce sufficient evidence of the nature of the transaction.)
('92) 14 All 420 (427, 429) : 19 Ind App 196 (PC).
('71) 14 Moo Ind App 187 (199) : 10 Beng L R 1 (PC).
('69) 13 Moo Ind App 209 (225) (PC).
('67) 11 Moo Ind App 619 (633) (PC).
†(1864) 2 Bom H C R 348 (360) (SB).
(1863) 1 Bom H C R 27 (30) (SB).
†('09) 31 All 179 (198) (FB).
1957 Andh Pra 776 (776) [AIR V 44 C 242]. (Alienation by Hindu widow.)
1955 Orissa 17 (20) [AIR V 42 C 6] : ILR (1954) 9 Cut 588 (DB).
1951 Nag 403 (406) [A I R V 38 C 126] : I L R (1950) Nag 25. (Transfer by guardian — Transferee must show that there was necessity for transfer itself.)

1950 Nag 69 (70) [AIR V 37 C 20] : I L R (1950) Nag 795. (Alienation by guardian — Alienee must show that alienation itself was justified — Mere utilisation of large portion of consideration for proper purposes not sufficient.)]
1939 All 513 (514) [AIR V 26] (DB).
†1939 All 72 (74) [AIR V 26].
† 1939 Cal 387 (390) [AIR V 26] : I L R (1938) 2 Cal 492 (DB). (Alienation by a widow with the consent of reversioner—Burden not discharged.)
1939 Cal 387 (390) [AIR V 26] : ILR (1938) 2 Cal 492 (DB). (Widow's alienation—Proof of necessity is necessary though consent of all reversioners is present.)
1938 Bom 234 (237) [AIR V 25] (DB). (Guardian appointed under Guardians and Wards Act (1890), borrowing money without sanction of Court—Transferee must prove that alienation was for benefit of minor.)
†1936 Cal 116 (121) [AIR V 23]: 62 Cal 733 (DB).
1935 Bom 259 (260) [AIR V 22].
†1935 Lah 42 (44) [AIR V 22] (DB).
† 1935 Oudh 373 (376) [AIR V 22] : 11 Luck 11 (DB).
1935 Pat 499 (500) [A I R V 22] (DB). (Creditor to show that rate of interest was also reasonable.)
† 1935 Pat 178 (181) [A I R V 22] : 14 Pat 595 (DB).
1934 All 557 (558, 559) [AIR V 21] (DB).
†1933 Cal 900 (904) [A I R V 20] : 60 Cal 1158 (DB).
1930 All 292 (294) [AIR V 17] : 52 All 391 (DB).
1930 Mad 688 (690) [A I R V 17] : 53 Mad 750 (DB).
1930 Nag 220 (221) [AIR V 17] (DB).
1929 Pat 422 (426) [AIR V 16] : 8 Pat 450 (DB).
† 1928 Lah 875 (878) [AIR V 15] (DB).
† 1927 Cal 160 (162) [A I R V 14]. (Due inquiry by an alienee and his bona fides are the two requisites for constituting a transaction a binding one.)
1926 Sind 22 (24) [A I R V 13] : 19 Sind L R 402 (DB).
†1925 Lah 240 (241) [AIR V 12]: 5 Lah 511 (DB).
1925 Oudh 557 (557) [A I R V 12] : 27 Oudh Cas 329. (Mere existence of necessity is not enough — It must be shown that it could not be satisfied without borrowing.)
1924 All 29 (32) [AIR V 11] : 45 All 692 (DB).
1924 All 24 (25) [AIR V 11] : 45 All 576 (DB).
1923 Cal 563 (563) [AIR V 10] (DB).
1923 Pat 143 (146) [A I R V 10] : 6 Pat L Jour 451 (DB).
1923 Lah 660 (662) [AIR V 10].
1922 All 126 (127) [AIR V 9] (DB). (Mere recitals in the deed do not discharge the burden.)
1922 Oudh 175 (177) [AIR V 9].
('21) 63 Ind Cas 255 (256) (DB) (All).
1921 Pat 99 (100, 101) [AIR V 8] (DB).
1920 Oudh 144 (144) [A I R V 7] : 23 Oudh Cas 320 (DB).
1919 Cal 603 (604) [AIR V 6] (DB).
1919 Oudh 34 (35) [AIR V 6] : 22 Oudh Cas 258.
1918 Mad 1302 (1303) [AIR V 5] (DB).
1918 Pat 548 (555) [AIR V 5] (DB).
1916 Mad 347 (348) [AIR V 3]: 39 Mad 565 (DB).
1915 Bom 150 (151) [AIR V 2] (DB).
1915 Cal 141 (143, 144) [AIR V 2] (DB).
1915 Lah 389 (389) [AIR V 2] (DB).
1915 Lah 70 (71) [AIR V 2] (DB).
1915 Mad 90 (91) [AIR V 2] (DB).
1915 Mad 1182 (1184) [AIR V 2] (DB).
1915 Mad 774 (775) [AIR V 2] (DB).
('13) 18 Ind Cas 27 (27, 28) (DB) (Mad). (He is at least bound to show that after making due inquiries he believed that the purchase-money was intended to be used for a purpose which would make the sale beneficial to the minor.)
('12) 13 Ind Cas 401 (401) (DB) (All). (And when the rate of interest is exorbitant, he must also prove the necessity thereof.)
('12) 13 Ind Cas 556 (558) (Lah). (Necessity cannot be inferred merely from the facts that the alienor's holding was small one and that he got into debt by degrees.)
('11) 38 Cal 721 (738) (DB). (Lapse of time does not affect burden of proof.)
('11) 12 Ind Cas 336 (338, 339) (Oudh).
('10) 6 Ind Cas 191 (193) (DB) (All).
('10) 5 Ind Cas 592 (593) (DB) (Lah). (Strict proof is not required of the passing of consideration or of the necessity, where the alienation is more than twenty years old—But where the antecedent creditor is the alience himself and is in a position to prove necessity, lapse of long time is not very material.)
('10) 6 Ind Cas 760 (760) (DB) (Mad).
('09) 31 All 454 (457) (DB).
('09) 4 Ind Cas 632 (635) (DB) (Lah). (1900 Pun Re No. 65 (FB), Followed—After a lapse of considerable time the proof required from the alienee need not be very strict.)
('09) 36 Cal 753 (756) (DB).
('09) 5 Nag L R 172 (176).
† ('07) 9 Bom L R 1114 (1114, 1115) (DB).
('07) 6 Cal L Jour 490 (514) (DB).
† ('06) 28 All 508 (541) (DB).
('05) 7 Bom L R 172 (173) (DB).
('04) 14 Mad L Jour 139 (140) (DB). (Full support of one of the defendants does not affect the onus.)
('03) 6 Bom L R 628 (629) (DB).
('02) 5 Oudh Cas 18 (23, 24).
('01) 26 Bom 326 (327) (DB).
(1900) 27 Cal 762 (767) (DB).
('95) 18 Mad 359 (362) (DB). (When the shebait is not de jure but only de facto, a proof of a more strict enquiry will be required.)
('93) 1893 Bom P J 297 (300) (DB).
('92) 1892 Pun Re No. 137, p. 466 (468).
('89) 1889 Pun Re No. 152, p. 510 (511).
('88) 1888 Pun Re No. 152, p. 405 (406).
† ('87) 9 All 493 496) (DB).
('86) 8 All 279 (281, 282) (DB). (Suit by son to avoid transaction—Transferee to prove reasonable case.)
('84) 8 Mad 75 (76) (DB). (A proof of a purpose ostensibly justifiable is sufficient.)
('81) 1881 Bom P J 293 (DB).
('77) 2 Mad 339 (344, 345) (DB).
('74) 22 Suth W R 119 (119) (DB).

dant.(2) The reason is that he will fail if no evidence were given at all on either side.(2a) Further as stated by their Lordships of the Privy Council in *Hanooman Persaud's case*:(3)

> "Where the mortgagee himself with whom the transaction took place, is setting up a charge in his favour made by one whose title to alienate he necessarily knew to be limited and qualified, he may be reasonably expected to allege and prove facts presumably better known to him than to the infant heir, namely, those facts which embody the representations made to him of the alleged needs of the estate, and the motives influencing his immediate loan."(4)

Lapse of time does not affect the question of *onus* of proof except in so far as it might give rise to a presumption of acquiescence or save the alienee from the adverse inferences arising from scanty proof, which might be offered on his behalf.(5) In *Venkata Reddi* v. *Rani Saheba*.(6) a reversioner brought a suit to set aside a sale made by a Hindu widow more than 82 years after the transaction took place. Their Lordships of the Privy Council affirming the decision of the High Court of Madras approved their statement of law as quoted below :

> "It is not disputed that the *onus* lay upon the defendant to prove the necessity for the sale, but having regard to the great lapse of time since the transaction took place . . . . . it will

('74) 21 Suth W R 287 (288) (DB). (However, the minor had the benefit of the sale proceeds; hence, a decree was passed in his favour but subject to the condition that he should first refund the proceeds of sale.)
('73) 11 Beng L R (App) 29 (29) (DB).
('71) 3 N W P H C R 2 (4) (DB). (Burden as to good faith.)
('70) 5 Beng L R (A C) 118 (124) (DB).
('70) 6 Mad H C R 371 (379, 380) (DB).
('70) 2 N W P H C R 50 (51) (DB).
('69) 3 N W P H C R 8 (10) (DB).
('68) 10 Suth W R 94 (95) (DB). (Purchasers in execution sale decree against widow for her personal debts.)
('68) 9 Suth W R 297 (298) (DB).
(1864) 1 Suth W R 14 (15) (DB).
(1864) 1864 Suth W R 153 (155) (DB).
(1864) 1 Suth W R 247 (247) (DB).
(1864-65) 2 Mad H C R 407 (408) (DB).
(1862-63) 1 Mad H C R 398 (399) (DB).
[*See also* 1960 Mad 99 (101) [AIR V 47 C 29] : ILR (1959) Mad 1046 (DB). (Case of necessity and case of antecedent debt—Distinction—In latter case existence of debt should be proved as, otherwise, it would not be held that inquiry was full or bona fide.)
1952 Orissa 239 (242) [AIR V 39]. (Father transferring his occupancy rights on ground that money was required for household expenses, payment of fine in a criminal case and payment of arrears of rent—Suit by sons for setting aside alienation on ground of want of legal necessity—Payment of fine being avyavaharik debt not covered by legal necessity — Only one fourth sale-price utilised for household expenses—No evidence that remaining amount was utilised for household expenses or transferee made enquiry as to existence of such necessity—No presumption of necessity or utilisation from the stringent circumstances of the father—Transfer held not binding on family.)]

2 1950 Nag 69 (70) [AIR V 37 C 20] : ILR (1950) Nag 795. (Alienation of minor's property by guardian—Transferee from alienee suing for possession — Minor defendant can plead in defence the voidability of transfer—Onus is on plaintiff to justify original alienation.)
† ('69) 6 Bom HCR (AC) 211 (213, 214) (DB).
2a. See the Evidence Act, 1872, Section 101.
3. (1856) 6 Moo Ind App 393 (419) (PC).
4. See also the following cases :
('80) 6 Cal 843 (848) : 8 Ind App 8 (PC).
('87) 11 Bom 609 (616, 617) (DB).
('79) 5 Cal 563 (379) (DB).
('77) 2 Cal 438 (445) (DB).
5 †1920 P C 64 (64, 65) [AIR V 7] : 47 Ind App 6 : 43 Mad 541.
† 1915 P C 57 (58, 59) [AIR V 2] : 43 Cal 417.
† 1933 Oudh 170 (175) [AIR V 20] : 8 Luck 538 (DB).
† 1932 Mad 762 (765) [AIR V 19] (DB). (Lapse of long period between alienation and suit to set it aside — Presumptions are permissible to fill in the details which have been obliterated by time.)
1925 Mad 673 (673) [AIR V 12]. (Do.)
1923 Cal 563 (564) [AIR V 10] (DB).
1915 Mad 786 (788) [AIR V 2] (DB). (In case of alienation that is old, the evidence as to necessity should be approached with a much more indulgent mind.)
('11) 38 Cal 721 (738) (DB).
('73) 11 Beng L R (App) 29 (30) (DB).
('70) 5 Beng L R 508 (519, 520).
('68) 9 Suth W R 350 (351) (DB). (When a considerable time of enjoyment and apparent acquiescence has lapsed a purchaser, or one claiming through him, may be absolved altogether from showing anything more than the fact of sale under some ostensible plea of necessity.)
6. 1920 P C 64 (64, 65) [AIR V 7] : 43 Mad 541 : 47 Ind App 6.

not be reasonable to expect such full and detailed evidence as to the state of things which gave rise to the sale in question as in the case of alienations made at more or less recent dates. In such circumstances, presumptions are permissible to fill in the details which have been obliterated by time."

12. Recitals in a deed—Evidentiary value of.— Recitals in a deed as to the necessity, though evidence of the *representation* made by the transferor as to such necessity, are not by themselves to be relied upon as *proof of existence* of such necessity,(1) for the obvious reason that if such proof were permitted the rights of other persons affected by the transfer would always be defeated by the insertion of carefully prepared recitals.(2) It is, therefore, necessary that there must be some evidence *aliunde* to substantiate the facts recited.(3)

Where, however, the deed in which the recitals occur is an old one, they cannot be totally disregarded though it is not possible to lay down any fixed and inflexible rule as to the proper weight that may be attached to them. In *Banga Chandra* v. *Jagat Kishore*(4) their Lordships of the Privy Council observed:

"If the deeds were challenged at the time or near the date of their execution, so that independent evidence would be available, the recitals would deserve but slight consideration, and certainly should not be accepted as proof of the facts. But, as time goes by, and all the original parties to the transaction and all those who could have given evidence on the relevant points have grown old or passed away, a recital consistent with the probability and circumstances of the case, assumes greater importance, and cannot be lightly set aside ..... The recital is clear evidence of the representation, and, if the circumstances are such as to justify a reasonable belief that an enquiry would have confirmed its truth, then when proof of actual enquiry has become impossible, the recital, coupled with such circumstances, would be sufficient evidence to

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Section 38 — Note 12

1. ✢ 1914 P C 38 (40) [AIR V 1]: 36 All 187.
1914 P C 164 (165, 166) [AIR V 1].
1951 Nag 403 (405, 406) [AIR V 38 C 126]: ILR (1950) Nag 25.
1939 Cal 387 (391) [AIR V 26]: ILR (1938) 2 Cal 492 (DB).
1937 All 219 (222) [AIR V 24].
1933 Cal 900 (904) [A I R V 20]: 60 Cal 1158 (DB).
†1929 All 481 (483) [AIR V 16] (DB).
1929 All 223 (230) [AIR V 16] (DB).
1929 All 128 (129) [AIR V 16]: 50 All 823 (DB).
1927 Lah 373 (374) [AIR V 14] (DB). (It was not shown that any enquiry was made at all, nor was it shown that proof of that enquiry was not forthcoming owing to lapse of time.)
1927 Oudh 566 (566) [AIR V 14].
1925 Oudh 440 (441) [AIR V 12]: 28 Oudh Cas 393.
1924 Oudh 162 (163) [AIR V 11].
1923 Pat 143 (146) [AIR V 10] (DB).
1921 Pat 397 (400) [AIR V 8] (DB).
1919 Oudh 34 (35) [A I R V 6]: 22 Oudh Cas 258.
1915 Mad 786 (790) [AIR V 2] (DB).
1915 Mad 12 (13) [AIR V 2] (DB).
('13) 9 Nag L R 74 (76).
('12) 13 Ind Cas 142 (143) (DB) (All).
('11) 9 Ind Cas 36 (57, 58) (DB) (Oudh).
('09) 31 All 454 (457) (DB).
('87) 11 Bom 609 (617, 618) (DB).
('02) 5 Oudh Cas 18 (25).
('79) 5 Cal 363 (375) (DB).
('68) 9 Suth W R 285 (285) (DB).
('66) 5 Suth W R 244 (245) (DB).
(1864) 1 Suth W R 59 (60) (DB). (A mere declaration of necessity is not sufficient to justify a purchase from a Hindu widow.)
[See '93) 1893 All W N 163 (163) (DB). (Mere statement that a Hindu widow mortgaged family property to pay Government revenue is not sufficient to show necessity.)
('70) 4 Beng L R (AC) 118 (130) (DB). (In spite of the recitals in the deed showing necessity, the issue whether necessity existed was tried.)]

2. †1916 P C 110 (111) [AIR V 3]: 44 Cal 186: 43 Ind App 249.

3. ✢ 1914 P C 38 (40) [AIR V 1]: 36 All 187.
('69) 13 Moo Ind App 209 (225) (P C).
1939 Cal 387 (390) [AIR V 26]: I L R (1938) 2 Cal 492 (DB).
1933 Oudh 535 (538) [AIR V 20]: 9 Luck 237 (DB).
†1933 Oudh 170 (175) [AIR V 20]: 8 Luck 538 (DB).
1929 Nag 60 (61) [AIR V 16]: 25 Nag L R 28.
1929 Oudh 422 (423) [AIR V 16]: 4 Luck 279.
1929 Pat 422 (425) [AIR V 16]: 8 Pat 450 (DB).
1927 Mad 890 (892) [AIR V 14].
1924 Oudh 49 (52) [AIR V 11].
1923 Cal 563 (564) [AIR V 10] (DB).
1919 Cal 603 (604, 605) [AIR V 6] (DB).
1918 Mad 1302 (1303) [AIR V 5] (DB).
1917 Mad 547 (547) [AIR V 4] (DB).
1914 Mad 686 (687) [AIR V 1] (DB).
1916 Cal 792 (794) [AIR V 3]: 43 Cal 574 (DB).

4. 1916 P C 110 (111) [AIR V 3]: 44 Cal 186 (196): 43 Ind App 249.

support the deed. To hold otherwise would result in deciding that a title becomes weaker as it grows older, so that a transaction—perfectly honest and legitimate when it took place—would ultimately be incapable of justification merely owing to the passage of time."

See also the undermentioned cases to the same effect.(5)

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39. Where a third person has a right to receive maintenance, or a provision for advancement or marriage, from the profits of immoveable property, and such property is transferred a[* * *], the right may be enforced against the transferee, if he has notice b[thereof] or if the transfer is gratuitous; but not against a transferee for consideration and without notice of the right, nor against such property in his hands.

Transfer where third person is entitled to maintenance.

c[* * * * * *]

a. The words "with the intention of defeating such right" were *omitted* by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), S. 11.

b. *Substituted* for "of such intention", *ibid.*

c. The illustration was *omitted*, *ibid.* The illustration ran as follows:

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5. 1918 Pat 469 (476) [AIR V 5] : 3 Pat L Jour 199 (SB).
1938 Cal 541 (542) [AIR V 25] (DB).
1938 Mad 300 (302) [AIR V 25] (DB). (Presumptions are permissible to fill in the details which have been obliterated by time and it is open to the Court to assume that the alienation was made for necessity so as to be valid even though the deed of alienation does not contain recitals of such necessity.)
('38) 173 Ind Cas 951 (951, 952) (DB) (Mad). (Deed 40 years old.)
1937 Mad 274 (278) [AIR V 24].
1935 Cal 94 (95) [AIR V 22]. (22 years old transaction—It cannot be assumed that after the lapse of this time, it is not possible to establish the existence of the debts by evidence.
1934 All 1009 (1011) [AIR V 21] (DB).
1934 Mad 169 (170) [AIR V 21]. (Deed more than 30 years old—Original parties dead—Recital in the deed implied that vendee made proper inquiry.)
1934 Lah 837 (838) [AIR V 21].
1934 Nag 222 (223) [AIR V 21] : 31 Nag L R 113. (The recitals in the document executed 40 years ago can be treated as cogent evidence of their correctness.)
1933 Oudh 170 (175) [AIR V 20] : 8 Luck 538 (DB).
1933 Cal 900 (904) [AIR V 20]: 60 Cal 1158 (DB).
1933 Oudh 535 (538) [AIR V 20] : 9 Luck 237 (DB).
1931 Nag 147 (148) [AIR V 18]. (The older the transaction the greater the value of the recitals.)
1930 Cal 508 (510, 511) [AIR V 17] (DB). (Legal necessity recited in document executed by a Hindu widow and both parties dead—Presumption is that there was legal necessity, unless rebutted.)
1930 All 9 (14) [AIR V 17] (DB).
1929 All 128 (129) [AIR V 16] : 50 All 823 (DB).
1929 All 481 (483) [AIR V 16] (DB).
('28) 109 Ind Cas 35 (37) (Cal).
1927 Lah 629 (630, 631) [AIR V 14] (DB). (This rule does not apply where there is lapse of short time, e.g., 12 years.)
1927 Oudh 566 (567) [AIR V 14].
1927 Nag 383 (384) [AIR V 14].
1927 Oudh 566 (567) [AIR V 14].
1926 Mad 692 (693) [AIR V 13] (DB).
1924 Lah 689 (690) [AIR V 11]. (Sale by widow in 1899—Suit by reversioner brought in 1920—Recitals in deed which are clear evidence of representations cannot be disregarded.)
1924 Oudh 49 (52) [AIR V 11].
1924 Oudh 162 (163) [AIR V 11].
1924 All 939 (942, 943) [AIR V 11] : 46 All 656 (DB). (Deed 50 years old—No presumption of necessity possible as per circumstances.)
1923 Cal 575 (577) [AIR V 10] (DB).
1923 Cal 563 (564) [AIR V 10] (DB). (In this case the defendant was in possession of the property under a sale held in execution of the decree obtained on the mortgage executed by a Hindu widow — However, the effect of the decree on the question of burden of proof was not averted to.)
1923 Oudh 147 (148) [AIR V 10] : 25 Oudh Cas 388.
1922 Pat 450 (461, 463) [AIR V 9] : 1 Pat 506 (DB).
1922 Pat 243 (249) [AIR V 9] : 1 Pat 475 (DB).
1922 All 126 (127) [AIR V 9] (DB).
('21) 63 Ind Cas 887 (888) (DB) (Cal). (However it is for the Court to attach such weight to the recitals as it thinks proper, having regard to other circumstances.)
1921 Oudh 214 (215) [AIR V 8] : 24 Oudh Cas 386.
1919 Cal 746 (749) [AIR V 6] (DB).
1919 Mad 685 (686) [AIR V 6] (DB).
1918 Pat 230 (233) [AIR V 5] (DB).

Illustration

A, a Hindu, transfers Sultanpur to his sister-in-law *B*, in lieu of her claim against him for maintenance in virtue of his having become entitled to her deceased husband's property, and agrees with her that, if she is dispossessed of Sultanpur, *A* will transfer to her an equal area out of such several other specified villages in his possession as she may elect. *A* sells the specified villages to *C*, who buys in good faith, without notice of the agreement. *B* is dispossessed of Sultanpur. She has no claim on villages transferred to *C*.

Synopsis

1a. Analogous law.
1. History of the section.
2. Nature of right protected by the section.
3. Section, if retrospective.
4. Transfer by executor or administrator.
5. "Right to receive maintenance."
6. Advancement.
7. Provision for marriage.
8. Notice.
9. Gratuitous transferee.

1a. Analogous law. — S. 28 of the Hindu Adoptions and Maintenance Act (1956) makes a provision similar to this section in respect of persons mentioned in S. 2 of that Act. It provides :

> "Where a dependent has a right to receive maintenance out of an estate and such estate or any part thereof is transferred, the right to receive maintenance may be enforced against the transferee if the transferee has notice of the right or if the transfer is gratuitous, but not against the transferee for consideration and without notice of the right."

1. History of the section.—In *Lakshman Ramchandra Joshi* v. *Satyabhama Bai*,(1) decided in 1877, prior to this Act, in which a Hindu widow sued for maintenance her husband's brother (who was the sole surviving member of the husband's family) and the purchaser of the family property from the brother, West J., observed that the principle on which such cases should be decided was that if the transferor *sought to defraud* the right of maintenance, and the transferee was a *party to such fraud*, he would not be protected, but that he would be protected if, though he knew of the existence of the claim for maintenance, he had purchased the property upon a rational and honest opinion that the sale was one that could be effected without any furtherance of wrong.

Section 39 of the Act, as it originally stood, was based upon the principles so laid down,(2) the object of the section being, as stated by the Law Commissioners in their Report of 1879, "to protect innocent purchasers for value."

The section ran as follows :

> "Where a third person has a right to receive maintenance, or a provision for advancement or marriage, from the profits of immovable property, and such property is transferred *with the intention of defeating such right*, the right may be enforced against the transferee if he has notice of *such intention*, or if the transfer is gratuitous; but not against a transferee for consideration and without notice of the right, nor against such property in his hands."

('11) 34 Mad 188 (204) (DB).
('72) 18 Suth W R 77 (86) (DB).

Section 39 — Note 1

1. ('77) 2 Bom 494 (524) (DB). (8 Beng L R 225 and 25 Suth W R 100, Rel. on.)

2. 1943 Bom 412 (413) [AIR V 30] : ILR (1943) Bom 646 (DB).

('11) 4 Sind L R 278 (280) (DB). (Right of residence of a Hindu widow is one included in general right of maintenance.)

† (1900) 22 All 326 (329) (DB).

('99) 23 Bom 342 (347) (DB).

[*See also* ('55) 1955 Ker L T 244 (246) : AIR 1955 N U C 1912 (DB). (Under the Hindu Law the Hindu widow's right of maintenance is liable to be defeated by a transfer to a purchaser for value even with notice of the claim for maintenance unless the transfer was made with the intention of defeating the widow's right and the purchaser had notice of such intention.)]

Two things were necessary to be established before a transferee could be made liable—

(1) the transferor *must have intended to defeat* the right of the third person, and

(2) the transferee should have notice of *such intention* and not merely of the existence of the right.(3)

This, no doubt, protected *bona fide transferees* for value, but it failed to give sufficient protection to the persons entitled to receive maintenance, etc., against fraudulent transfers inasmuch as it was extremely difficult to prove in most cases that the transferee had knowledge of the fraudulent intention of the transferor.(4) In order to relieve against this hardship the Courts had to resort to presumptions of fact. Thus, the knowledge of the fraudulent intention was presumed, in some cases, from the mere knowledge of the existence of the right, and of circumstances showing that the effect of the transfer was the defeat of such right.(5)

In their Report on the Transfer of Property (Amendment) Bill, 1929, the Special Committee understood the object of the section to be to *protect persons entitled to maintenance etc.*, and that this object was not served by the requirement of knowledge by the transferee of the fraudulent intention of the transferor. They observed:

> "Section 39 is intended to protect persons who are entitled to receive maintenance or for whom provision is made for advancement or marriage from the profits of any immovable property. The section provides that such right can be enforced against the transferee of the property, if the transfer has been made with the intention of defeating the right and the transferee has notice of the intention. The Courts have, therefore, always required proof of the intention on the part of the transferor and also of notice of the intention to the transferee. (ILR 22 All 326, 24 All 160). The illustration to the section is not consistent with the section itself and does not make any reference to the intention of the transferor. In actual practice it is impossible to adduce proof of mere intention. As stated in 12 Bom L R 1075 at pp. 1077 and 1078, in order to enable such proof to be adduced, a transferor must have announced his fraudulent intention of defeating the rights of persons entitled to maintenance and the transferee must have heard him doing so. As it is desirable to *protect persons entitled to maintenance or for whom provision for advancement has been made from improvident holders of the property*, it is necessary that the reference to the transferor's intention should be omitted from the section, and the section should be amended accordingly."

See also the undermentioned cases.(5a)

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3. ('82) 4 All 296 (299) (FB).
1941 Mad 707 (708) [AIR V 28] (DB). (Case of transfer while old section was in force.)
1934 Mad 734 (734) [AIR V 21] (DB).
1932 Cal 451 (454) [AIR V 19] (DB).
1932 Lah 141 (142) [AIR V 19] (DB).
1932 Oudh 40 (42) [AIR V 19] : 7 Luck 411 (DB).
1927 Mad 1092 (1092) [AIR V 14].
1922 Lah 273 (275) [AIR V 9] : 3 Lah 55 (DB). (Transfer of Property Act was not applicable.)
1920 Bom 219 (220) [AIR V 7].
1920 Lah 116 (117) [AIR V 7].
1917 Pat 204 (205) [AIR V 4] (DB).
1916 Pat 252 (254) [AIR V 3] (DB).
('09) 4 Ind Cas 1107 (1107) (DB) (Mad).
('06) 4 Cal L Jour 476 (482, 483) (DB).
('01) 24 All 160 (163) (DB).
(1900) 22 All 326 (328) (DB).
('89) 12 Mad 334 (337) (DB). (Separate possession by a Hindu widow of joint family estate is a sufficient notice of her interest in the property in her right of maintenance.)
('83) 6 Mad 130 (135) (DB).

4. ('10) 8 Ind Cas 1057 (1057) (Bom).

5. 1947 P C 8 (13) [AIR V 34 C 2] : ILR (1947) Kar (PC) 25 : ILR (946) All 756 : 73 Ind App 208. (Mortgage and sale of all property which was available for payment of maintenance—Purchaser aware of this fact and of the circumstances of the family—It would be fair to hold that the transfer would be subject to widow's right to maintenance even assuming that unamended S. 39 applied.)
1926 Cal 1068 (1068, 1069) [AIR V 13] (DB).
1926 Sind 18 (18) [AIR V 13] (DB).

5a. 1963 Pat 74 (75) [A I R V 50 C 17] : 42 Pat 860. (Section 39 is intended to protect persons who are entitled to receive maintenance from profits of immovable property.)
1957 Andh Pra 598 (600) [A I R V 44 C 197]. (Section 39 protects the right of the widow to maintenance from her husband's share of joint family property against improvident alienations by the surviving coparceners.)
1949 Pat 466 (468) [A I R V 36 C 137] : 28 Pat

The section has been amended by the omission of the words "with the intention of defeating such right" after the words "is transferred" and by the substitution of the word "thereof" for the words "of such intention" after the word "notice." It is not therefore necessary under the present section to prove an intention to defeat the right of the third person. A proof of bare notice of the existence of such right is sufficient.(6) (See also Note 8).

On the omission of the illustration which occurred underneath the old section the Select Committee in their Report say :

> "Clause 10 (now clause 11) — We have thought it desirable to omit the illustration to S. 39 instead of amending it. Even as amended by the omission of the words *bona fide* the illustration might have been misleading."

2. Nature of right protected by the section. — The right protected by the section is a right to receive maintenance, etc., "*from the profits* of immovable property." (See also Note 5). These words show that the property itself is not made *security* for the payment of the maintenance, etc., and is therefore not *charged* with such payment. In other words, the right referred to in the section is one which *falls short of a charge*(1) and consequently the section has no application to the enforcement of charges against transferees of the property charged.(2) That subject is dealt with in S. 100 though in terms somewhat similar to this section.

Before applying the section, however, the nature of the right to be enforced should be clearly fixed.(3) Where, for example, property is sold in discharge of debts in respect of which the creditors could have had the property sold through Court *free of the right of maintenance*, this section would not enable the person entitled to maintenance to proceed against the property in the hands of the transferee even if he had notice of the maintenance right.(4) In other words, where the transfer is *binding* on the person entitled to maintenance, etc., according to the law applicable to him, he cannot proceed under this section against the transferee, whether or not such transferee has notice of his right.(5)

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336 (DB). (Section 39 has been enacted to effectually protect the right of the widow to her maintenance.)

6. 1948 Mad 208 (212) [AIR V 35 C 106] : I L R (1948) Mad 335 (DB). (Effect of amendment is not to create a charge where none existed previously.)

1945 Bom 34 (35) [AIR V 32] : I L R (1945) Bom 649. (But the section does not create any new right in favour of any person.)

1944 Bom 50 (57) [AIR V 31] (DB).

1943 Bom 412 (413) [A I R V 30] : ILR (1943) Bom 646 (DB).

1943 Bom 187 (190) [AIR V 30].

Section 39 — Note 2

1. 1951 All 141 (146) [A I R V 38 C 16] : ILR (1953) 1 All 284 (FB).

† 1940 Nag 163 (165) [A I R V 27] : ILR (1941) Nag 513 (DB).

1933 Oudh 76 (78) [AIR V 20] (DB).

2. See the Report of the Second Law Commission, 1879, printed on page 68 (71), where the Commissioners say that they had framed this section to provide for cases "where a third person has a right to receive maintenance from the profits of immovable property and such right does not amount to a charge."

Also see the following cases :

1951 All 141 (146) [AIR V 38 C 16] : ILR (1953) All 284 (FB).

1929 Oudh 316 (318) [A I R V 16] : 5 Luck 172 (DB). (Overruled on another point by A I R 1943 Oudh 354 (FB)).

('06) 28 All 655 (657)

('06) 4 Cal L Jour 476 (479, 480) (DB).

('99) 27 Cal 194 (196) (DB).

3. 1915 Mad 464 (466) [AIR V 2] (DB).

4. 1934 Sind 14 (16) [AIR V 21] : 27 Sind L R 289.

1915 Mad 464 (470, 471) [AIR V 2] (DB).

5. 1955 Mad 571 (574) [(S) A I R V 42 C 166]. (Transferee can discharge himself of obligation to maintain a widow by showing that he has applied the property for family purposes having priority over the widow's claim for maintenance.)

('82) 4 All 296 (300) (FB). (Transfer of property to satisfy a claim for which property is liable under Hindu law and which claim under that law takes precedence of a claim of maintenance.)

3. Section, if retrospective. — It has been held in the undermentioned case(1) that the section is not retrospective in operation, and that the section applicable to a transfer made before the amendment came into force, would be the old section. A contrary view has, however, been taken in the undermentioned case.(2) In *Dan Kuer* v. *Sarla Devi*,(3) their Lordships of the Privy Council have held that the amended section would apply to a suit brought after the amendment even though the transfer was made before the amendment came into force. In view of this decision the former view is, it is submitted, not correct.

1948 Mad 208 (211, 212) (AIR V 35 C 106] : ILR (1948) Mad 335 (DB). (An alienation made for purpose which would have precedence over the widow's claim for maintenance would in the absence of any charge created bind the widow and her right to have her maintenance charged upon an appropriate portion of the family estate can be enforced only subject to such alienation.)

1945 Bom 34 (35) [AIR V 32] : I L R (1945) Bom 649. (Joint Hindu family—Family property sold for legal necessity—Sale proceeds greater than amount required for legal necessity — Right of female members to maintenance and marriage expenses though not a mere personal right comes to end and cannot be enforced against the property transferred.)

1941 Bom 50 (57) [AIR V 31] (DB). (Under Hindu law debts contracted by a Hindu take precedence over the right of maintenance of his wife or infant child. Hence a purchaser of property sold to discharge the debts of a husband acquires a good title against a wife who seeks to charge it with her maintenance unless this has been already done. 1931 Lah 718 [AIR V 18], Rel. on.)

1943 Bom 412 (414) [AIR V 30]. (Right of an unsecured creditor of the husband takes precedence over the claim of the widow for maintenance — S. 30 is not intended to alter the law in this respect.)

1934 Sind 14 (15, 17) [A I R V 21] : 27 Sind L R 289. (Sale in satisfaction of debts binding on the family.)

('76) 1 Cal 470 (475). (Sale in discharge of debts due in family business.)

1933 Lah 901 (904) [AIR V 20]: 15 Lah 9 (DB). (Do.)

1933 Lah 496 (497) [AIR V 20] (DB). (Mortgage of joint family property by sons—No evidence as to mortgage debt being for benefit of family or for necessary purpose—Mortgage must be taken to have been made subject to right of maintenance of mother.)

1932 Lah 141 (142) [AIR V 19] (DB). (Do.)

1931 Lah 718 (718, 719) [AIR V 18] : 13 Lah 41 (DB). (To discharge debts incurred for family necessity.)

1930 Lah 117 (118) [AIR V 17] : 10 Lah 706 (DB). (Sale in satisfaction of debts binding on the family.)

1927 Mad 502 (503) (AIR V 14]. (Do.)

1927 Mad 1092 (1093) [AIR V 14]. (Family debts take precedence of a widow's right to maintenance which has not ripened into a charge.)

('04) 27 Mad 45 (50) (DB). (Execution sale in discharge of decree debt against husband of woman claiming maintenance.)

†1930 Mad 824 (829) [A I R V 17] : 54 Mad 132 (DB). (Do.)

1932 Oudh 40 (43) [AIR V 19] : 7 Luck 411 (DB). (Do.)

1929 Lah 528 (528) [AIR V 16]: 10 Lah 263 (DB). (Suit by wife of absconder for purpose of removing attachment of his property under Ss. 87 and 88, Criminal P. C. — Held, attachment prevails over her right of maintenance.)

('11) 4 Sind L R 278 (280). (Alienation made for the discharge of family debts or to satisfy claims enforceable against the whole family.)

('84) 11 Cal 102 (106) (DB). (Sale in execution of a decree for arrears of maintenance of another person due from the family.)

('83) 5 All 367 (369) (DB). (Gift made by husband in consideration of his debts being discharged by the creditors)

†('76) 1 Cal 365 (377) (DB). (Sale to discharge debts of husband of woman claiming maintenance.)

[*See* 1947 PC 8 (14) [AIR V 34]: ILR (1947) Kar (PC) 25: ILR (1946) All 756 : 73 Ind App 208.

1927 Lah 883 (883) [AIR V 14]. (Debts contracted by a Hindu takes precedence over the right of maintenance of his widow.)]

[*See also* 1939 Nag 1 (3) [A I R V 26]. (Compromise making maintenance to widow a charge on family property – Property sold for arrears of maintenance, not subject to charge — Property is not liable for future maintenance).

1943 Bom 187 (190) [AIR V 30]. (Widow can enforce her right of maintenance from property alienated unless same was alienated for legal necessity.)

('80) 5 Bom 99 (109). (Widow's claim for maintenance ranks next to the family debts.)]

Section 39 — Note 3

1. 1934 Sind 14 (16) [AIR V 21]: 27 Sind LR 289. [*See also* 1941 Mad 707 (708) [AIR V 28] (DB). (Question raised but not decided.)]

2. 1943 Bom 187 (190) [AIR V 30]. (In a suit after the amendment by a claimant to maintenance, challenging the validity of an alienation made before the amendment, the plaintiff need not prove the intention of defeating the right of maintenance but only that the purchaser had notice of that right.)

3. 1947 P C 8 (13) [AIR V 34 C 2] : ILR (1947) Kar (PC) 25: ILR (1946) All 756:73 Ind App 208. [*See also* ('55) 1955 Ker L T 244 (247) (DB). (Act made applicable to the State from 1-4-1951 while suit was pending—*Held* this could not affect rights of parties already existing.)]

4. Transfer by executor or administrator. — Section 307 of the Indian Succession Act, 1925 (old S. 90 of the Probate and Administration Act, 1881, as amended by S. 14 of Act VI of 1890) which entitles the executor or administrator, as the case may be, to dispose of the property of the deceased person, does not, in any way, supersede the provisions of this section. A transfer, therefore, by the executor or administrator will be subject, as in other cases, to the provisions of this section.(1)

5. "Right to receive maintenance." — Under the Hindu law certain persons are entitled to maintenance from others by reason merely of their personal relationship. Thus, a wife, a minor son, an unmarried daughter and the aged parents of a Hindu are entitled to be maintained by him irrespective of the possession of any property. It has been held in the following cases(1) that in the case of these persons it cannot be said that they have got a right to receive maintenance "from the profits of immovable property" within the meaning of this section. Hence the section will not apply in such cases so as to protect their right of maintenance. A contrary view has been taken in the undermentioned case(1a) that though the maintenance of the wife is a legal and imperative duty of a Hindu husband independently of his possession of any property, this does not mean that she has no right to be maintained out of his property if he possesses any; and, therefore, it must be held that she has got a right to receive maintenance "from the profits of immovable property" of the husband within the meaning of this section. Other persons are entitled to maintenance only *out of the property* belonging to the family in the hands of the person from whom such maintenance is claimed. Thus, the widow of a coparcener is entitled to maintenance from out of the family property in the hands of the coparceners.(1a1) This right, however, is not a *charge* on the family property within the meaning of S. 100,(1aa) though it may

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Section 39 — Note 4

1. ('99) 23 Bom 342 (348) (DB).

Section 39 — Note 5

1. 1963 Pat 74(75) [AIR V 50 C 17]: 42 Pat 860.
1947 Mad 376 (377) [AIR V 34 C 197].

1a. 1944 Bom 50 (57) [AIR V 31] (DB). (A Hindu wife has a right of maintenance not only from her husband personally but also out of his property, and for that purpose she can pursue the property even in the hands of a stranger who has purchased it with notice of her claim.)

1a1. ('88) 15 Cal 292 (307) (SB).
('82) 4 All 296 (299) (FB).
1962 Mys 207 (208) [AIR V 49 C 69] : ILR (1962) Mys 150. (AIR 1944 Bom 50 and 1956 Andh W R 1021 ; AIR 1959 Andh Pra 710 and (1958) 1 Andh W R 46; AIR 1957 Andh Pra 396 and AIR 1960 Mad 42, Rel. on; (1947) 1 Mad L J 329 : AIR 1947 Mad 376, held wrongly decided.)
1958 Andh Pra 396 (401) [AIR V 45 C 116] : ILR (1958) Andh Pra 1 (DB).
1957 Andh Pra 710 (713) [AIR V 44 C 227].
1953 Orissa 25 (30) [AIR V 40 C 14] : ILR (1952) Cut 451. (Section 39 recognizes the right to receive maintenance out of the property of the husband.)
1957 Andh Pra 598 (600) [AIR V 44 C 197].
1953 Orissa 25 (30) [AIR V 40 C 14] : ILR (1952) Cut 451.
1944 Bom 50 (52) [AIR V 31].

1aa. 1965 Andh Pra 367 (371) [AIR V 52 C 89]. (Does not create any right or interest in property on ground of maintenance.)
1957 Andh Pra 710 (713) [AIR V 44 C 227].
1957 Andh Pra 598 (600) [AIR V 44 C 197]. (Where there are two estates liable for her maintenance, her deceased husband's separate property which she inherited as his heir and his interest in joint family property which passed by survivorship to the other coparceners, there is no reason in justice or equity for compelling the widow to pay herself her maintenance out of the separate property of her deceased husband exonerating his share of the joint family lands from liability. There is no reason for holding that the separate property of the husband is the primary fund for payment of her maintenance and his share of the joint family property is only secondarily liable.)
1956 Nag 138 (144) [AIR V 43 C 49] : ILR (1956) Nag 181 (DB).
('55) 1955 Ker L Tim 244 (246) (DB).
1955 Mad 571 (574) [AIR V 42 C 166].
1951 All 141 (146) [AIR V 38 C 16] : ILR (1953) 1 All 284 (FB).
1948 Mad 208 (211, 212) [AIR V 35] : ILR (1948) Mad 335 (DB). (Right of Hindu widow to be maintained out of the family property is not a charge till it is created a charge by agreement or decree of Court—The amendment of S. 39 in 1929 was not intended to create charge where none existed previously.)

be made a charge by a decree of Court or by agreement.(2) As has been seen already in Note 2 where it is made a charge, the enforcement of the right is not governed by this section.(3)

The enforcement of the right to maintenance does not depend upon the question whether there exists any property other than the one transferred from which provision for maintenance can be made.(4)

A widow's maintenance is payable in the first instance, from the profits of the *whole* of her husband's immovable property and therefore if a purchaser has notice of the existence of the widow, the burden is upon him to see that her claims are discharged before he purchases the property.(4a)

A right of residence under the Hindu law is a part of the right of maintenance,(5) and will be governed by the same principles as to enforceability as that of a

1943 Bom 412 (413) [AIR V 30]: ILR (1943) Bom 646 (DB).
1934 Pat 99 (102) [AIR V 21] : 12 Pat 869 (DB).
† 1932 Cal 451 (454) [AIR V 19] (DB). (It only creates, if it does, an obligation annexed to the ownership of immovable property.)
1932 Oudh 40 (42) [AIR V 19] : 7 Luck 411 (DB).
1930 Lah 117 (118) [AIR V 17] : 10 Lah 706 (DB). (In respect of maintenance there is no difference between widow and mother.)
1927 Mad 1092 (1092) [AIR V 14].
1926 Oudh 338 (340) [AIR V 13] : 1 Luck 318. (Right of Hindu widow is not charge on property and hence she cannot retain possession in lieu of maintenance.)
1924 Pat 679 (682) [AIR V 11] : 4 Pat 73 (DB). (Obiter.)
1920 Lah 116 (117) [AIR V 7].
1918 Mad 668 (668) [AIR V 5] (DB).
('10) 8 Ind Cas 1057 (1057) (Bom).
('02) 27 Mad 45 (49) (DB).
('01) 24 All 160 (163) (DB).
('94) 17 Mad 268 (270) (DB).
('83) 5 All 367 (369) (DB).
('83) 9 Cal 535 (555) (DB).
('83) 6 Mad 130 (135) (DB).
† ('76) 1 Cal 365 (370) (DB).
✠ ('75) 12 Bom H C R 69 (77, 78) (DB).
('73) 20 Suth W R 126 (126) (DB).
('72) 17 Suth W R 433n (433n).
[*See also* 1918 Pat 296 (296) [AIR V 5] (DB). (Where it is alleged that a transfer of impartible property is subject to the right of maintenance of the younger members of the family of the transferor the allegation must be supported by proof of a custom to that effect existent in the family.)]
[But see 1917 Pat 204 (205) [AIR V 4] (DB). (Whether S. 39 applies to case of maintenance because it is a charge.)
('71) 15 Suth W R 263 (263) (DB).
('71) 7 Mad H C R 226 (228) (DB).
('67) 2 Agra 42 (43) (DB). (Widow's right of maintenance is a charge on the property forming her deceased husband's estate.)
('67) 4 Bom H C R (AC) 73 (74) (DB).]

2. 1962 Mys 207 (208) [AIR V 49 C 69] : I L R (1962) Mys 150. (Persons having right of maintenance independently of the provisions of Hindu Adoptions and Maintenance Act (1956) under this section—Right to have a charge on property is not affected by S. 27 of Hindu Adoptions and Maintenance Act.)
1957 Andh Pra 710 (713) [AIR V 44 C 227].
1956 Nag 138 (144) [AIR V 43 C 49] : ILR (1956) Nag 181.
('55) 1955 Ker L T 244 (246) : AIR 1955 N U C 1912 (DB).
1955 Mad 571 (574) [AIR V 42 C 166].
1943 Cal 227 (232) [AIR V 30].
1920 Bom 219 (220) [AIR V 7].
('96) 6 Mad L Jour 147 (148) (DB).
('86) 1 C P L R 33 (36).
('83) 7 Bom 225 (228) : 1883 Bom P J 48 (DB)
('83) 9 Cal 535 (555) (DB).
†('83) 6 Mad 83 (86) (DB).
(1873) 20 Suth W R 126 (126) (DB).
[*See also* 1932 All 361 (362) [AIR V 19] : 54 All 472 (DB). (A simple money decree-holder against the rights of joint Hindu family cannot dispossess the widow in possession of portion of estate in lieu of maintenance.)]
See also S. 27 of Hindu Adoptions and Maintenance Act (1956) which provides :— "A dependant's claim for maintenance under this Act shall not be a charge on the estate of the deceased or any portion thereof unless one has been created by the will of the deceased, by a decree of Court, by agreement between the dependant and the owner of the estate or portion, or otherwise."

3. 1951 All 141 (146) [AIR V 38 C 16] : ILR (1953) 1 All 284 (FB). (Section 39 does not apply to a charge created by a decree.)
See cases cited in Note 2.

4. ('99) 23 Bom 342 (347) (DB). (2 Bom 494, Rel. on.)
†('83) 7 Bom 282 (286) (DB). (Purchaser of a house taking it with full knowledge that a widow is residing and being maintained in it—Such purchaser cannot ask for summary eviction of the widow from the house even though there may be other property out of which her maintenance can be derived.)

4a. 1943 Bom 412 (414) [AIR V 30]: ILR (1943) Bom 646 (DB).

5. 1932 Sind 162 (163) : 26 Sind L R 269 (DB)

right of maintenance. Thus, it can be enforced under this section against the transferee having notice of the right. But it cannot be enforced against the transferee, whether with or without notice of the right, if the transfer is *binding* on the interest of the person claiming the right under the Hindu law. Thus, the right of residence of a widow cannot be enforced against a transferee where the alienation was made by her husband,(6) or was made to meet the debts of her husband,(7) or to meet debts incurred for family necessity.(8)

The right of residence under the Hindu law is a right merely to a provision for residence and not a right to reside in a *particular* house; hence as long as the person having the right of residence is provided with a residence, she cannot proceed against the transferee of the property in which she had resided. It will be only if no other place suitable for residence can be provided that she can proceed against the transferee.(9)

It has been held that the right to receive maintenance about which this section speaks is not only the right to receive maintenance in the first instance but also the right to receive enhanced maintenance which may be claimed if there is a material change of circumstances.(10)

After the passing of the Hindu Adoptions and Maintenance Act, 1956 the right of Hindu to receive maintenance is governed by the provisions of that Act. Under S. 28 of that Act, which is similar to this section, the right to enforce the claim for maintenance against a gratuitous transferee or transferee with notice of the claim is given only to dependents entitled to maintenance under S. 22 of whom a Hindu wife is not one. But S. 28 of that Act does not in any way affect this section in its application to a Hindu wife in respect of her maintenance and hence she is entitled to invoke this section for following her husband's property in the hands of his transferee for enforcing her claim.(11)

1929 Sind 102 (105, 106) [AIR V 16].

1926 Sind 135 (135, 136) [AIR V 13] (DB).

†('11) 4 Sind L R 278 (280) (DB). (Widow's residence in an ancestral house or a part thereof does not imply a right of possession of the same.)

('10) 8 Ind Cas 1057 (1058) (Bom).

6. ('11) 9 Ind Cas 524 525) (DB) (Mad). (Gift of dwelling house to junior wife by husband — Senior wife cannct contend that the gift is subject to her right of residence.)

('87) 1887 All W N 279 (279) (DB). (Mortgage of joint family house by husband — Mortgagee purchasing it in execution of his mortgage decree—Suit for ejectment against widow claiming right of residence in it, held, maintainable.)

('86) 1886 Bom P J 252 (DB).

('78-80) 2 All 141 (142) (DB). (Mortgage of family dwelling house by husband —In a suit brought by the mortgagee after the husband's death to enforce the mortgage, the widow cannot object on the ground that she has a right of residence in it.)

7. 1931 Lah 718 (718) [AIR V 18] : 13 Lah 41.

920 Mad 106 (107, 108) [AIR V 7] : 43 Mad 635 (DB). (Unmarried sister can resist the possession of the house by auction-purchaser if the debt was not for family necessity and until suitable arrangement is made for her residence.)

('04) 27 Mad 49 (50) (DB).

[*See also* ('07) 1907 Pun Re No. 86, p. 158 (161) (DB).]

[But see ('83) 1883 Pun Re No. 84, p. 266 (268). (Maintenance of wife—Sale of house by husband for purposes not binding on family — Wife entitled to retain possession against purchaser where it is necessary for her maintenance and residence.)]

8. 1920 Lah 135 (135, 136) [AIR V 7].

('89) 12 Mad 260 (267) (FB).

[*See also* ('88) 1888 Pun Re No. 112, p. 313 (314). (Alienation by sons for expenses of marriage of one of the sons – Not such family necessity as would override the widow's right of residence.)]

9. †('22) 69 Ind Cas 602 (607) (Pesh). (Onus that none of the other houses are suitable for her residence is on the widow.)

('10) 1910 Pun Re No. 102 (DB).

('72) 4 N W P H C R 153 (154) (DB).

10. 1964 Mys 265 (267) [AIR V 51 C 66].

11. 1967 Mad 457 (458, 459) [AIR V 54 C 148]; ILR (1966) 2 Mad 164. (Hindu wife claiming charge for maintenance against property transferred by husband—Extent to which charge can be allowed.)

6. Advancement. — An advancement is a gift of money or property to the wife by the husband or to a child by a parent to enable the donee to anticipate the inheritance to the extent of the gift. It is frequently made to persons before they become entitled to but who are presumably entitled or have a vested or contingent interest in an estate or legacy.(1) The "provision for advancement" referred to in the section seems to refer to an advancement of the nature above stated. In India, there is no presumption of intended advancement, when a property is purchased in the name of the wife or the child.(2) But though there may be no legal presumption of the doctrine of advancement in India, there may be an inference of advancement as a question of fact.(2a) Where the property is purchased by a person in the name of his wife or child and the latter claims it as her or his own by alleging that the former intended to make a gift of the property to her or him, the onus is on her or him to prove such a gift.(3)

7. Provision for marriage. — Under the Hindu law certain persons are entitled to have provisions for their marriages from out of the family property.(1) Such persons are entitled to enforce their rights under this section against transferees for consideration of such property with notice of their right or gratuitous transferees of such property.

8. Notice.—The right of the third person to receive maintenance, etc., under this section, can be enforced against a transferee for consideration only if he has *notice* of such right.(1aa) It has been held that a mere knowledge of the legal right to main-

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Section 39 – Note 6

1. (1886) 55 L T 554 (556), Abram v. Aldrige.

2. 1921 P C 56 (57) [AIR V 8] : 48 Cal 260 : 47 Ind App 275.

1959 Madh Pra 359 (364) [AIR V 46 C 123]: ILR (1959) Madh Pra 256. (The presumption of advancement or gift in favour of the child or wife has not been extended to Muhammadans in India.)

('56) 60 Cal W N 886 (890, 891). (There is no presumption that when a property stands in the name of a female the Court will immediately come to the conclusion without any proof that it really belongs to the husband of the female. Before such a presumption is raised or attracted it is necessary for the person, who wants to make out that the property is not the property of the female, in whose name the document stands, to establish the fact that the consideration money for the purchase had come from the husband.)

1954 Mad 987 (990) [A I R V 41 C 342]. (It cannot be presumed that the properties purchased in the name of wife and of two children were purchased for the benefit of the wife and her children.)

1953 Hyd 77 (78) [AIR V 40 C 35] : I L R (1953) Hyd 165 (DB).

('52) 54 Punj L R 193 (197).

1951 Orissa 22 (25) [AIR V 38 C 9] : ILR (1950) Cut 964 (DB). (The presumption of no advancement is however rebuttable one. But there must be proof of some circumstances which would indicate the intention to benefit though no direct proof of the same is necessary.)

1951 Trav-Co 195 (196) [AIR V 38 C 79] (DB).

2a. ('54) ILR (1954) Cut 140 (145, 146).

1953 Mys 89 (89, 90) [A I R V 40 C 43] : I L R (1952) Mys 90.

1952 Pat 61 (65) [AIR V 39] : 30 Pat 1197. (Property purchased in joint names of husband and wife, the former contributing money—Husband in affluent position and no motive for entering into benami transaction—Transaction held for advancement of wife.)

3. 1959 Madh Pra 359 (364) [AIR V 46 C 123] : ILR (1959) Madh Pra 256. (Burden of proving intention of advancement is on person who asserts it though very little evidence of intention is sufficient to turn the scale.)

1951 Raj 133 (134) [AIR V 38 C 60] : ILR (1951) 1 Raj 26 (DB). (The presumption in India, is in favour of the transaction being benami.)

Section 39 — Note 7

1. See Mulla, Principles of Hindu Law, 9th Edn., 1940, S. 304 page 375.

Section 39 — Note 8

1aa. 1964 Mys 265 (267) [A I R V 51 C 66]. (Right to claim enhanced maintenance — Can be enforced against purchaser, having notice of right.)

1963 Pat 74 (75) [A I R V 50 C 17] : 42 Pat 860. (The onus to prove that the defendant transferee had notice of the plaintiff's right to receive maintenance is on the plaintiff and the knowledge of defendant of the plaintiff's right to receive maintenance cannot be inferred from the fact that her husband and the plaintiff's husband were full brothers.)

1960 Mad 42 (43) [A I R V 47 C 11]. (Notice of existence of right is sufficient—Notice of trans-

tenance is not enough. What the section contemplates is a *claim* based on the right to receive maintenance and notice of such claim.(1a) It is submitted that this view is not sound. As to what "constitutes notice," see section.(3)

A executed a mortgage of certain properties to *B* on 19th May 1930. Subsequent thereto *X*, a *married* daughter of *A*, filed a suit against *A* for maintenance. Pending the suit *B* sued upon his mortgage, obtained a decree, and in execution thereof brought the properties to sale and purchased them himself in Court auction. *X* who had obtained a decree prior to the Court sale attached the properties. *B* objected to the attachment and on dismissal of the objection, sued for declaration of his title to the properties. It was held that *B* had, as a matter of fact, no notice of the decree for maintenance, that as under Hindu law a married daughter ordinarily is not entitled to maintenance he could not be presumed to have notice of her right and that his purchase was not subject to *X's* right of maintenance.(1)

Where a widow deliberately lived away from the house of her deceased husband and, in collusion with her son refrained from giving the purchaser notice of her right of residence in the house, it was held that the purchaser must be excused if he thought that she had foregone her right which, therefore, could not be enforced against him.(2)

Where, in a suit, a widow claimed proprietary right in the property left by her husband but failed, a transferee of the same property, from her son, was held not bound by her right of maintenance inasmuch as, by the transfer, he got the rights and interests of the son in the property and was justified in believing that no claim for maintenance would be brought against the property, the proprietary title relied on by the widow being wholly inconsistent with her claim to maintenance.(3)

Where a Hindu widow has a right of residence in the family house and she is residing in it, a purchaser of the property may be presumed to have notice of the fact, and therefore of her right. It is for the purchaser, in such a case, to show that the transfer was *binding* on the widow.(4)

Where property was gifted to a person with a condition that the income of half the property was to be given for the maintenance of another person during his lifetime and the donee sold the entire property, it was held that the transferee must have had notice of the condition which was contained in the deed of gift.(5)

9. Gratuitous transferee. – The right of third person under this section may be enforced against a gratuitous transferee irrespective of the question whether he had notice of the right or not.(1)

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feree's intention to defeat right not necessary. AIR 1947 Mad 376, Dissented from.)
1958 Andh Pra 396 (401) [A I R V 45 C 116] : ILR (1958) Andh Pra 1.
1949 Pat 466 (468) [A I R V 36 C 137] : 28 Pat 336 (DB).
1939 Cal 655 (656) [AIR V 26] (DB).
1916 Mad 102 (110) [AIR V 3] (DB). (Mortgagee of grant of Dasabandham dues can enforce it against purchaser with notice from grantor.)
[*See also* ('57) 59 Punj L R 15 (17). Scope of—Maintenance decree in favour of wife—Charge on husband's land — Gift of land — Donee having notice of maintenance claims — Land can be sold in execution — Separate suit not necessary.)]

1a. 1947 Mad 376 (377) [AIR V 34 C 197].

1. 1939 Cal 655 (656) [AIR V 26] (DB).
2. 1930 Bom 47 (48) [AIR V 26].
3. ('69) 1 N W P H C R 275 (276) (DB).
4. 1937 Mad 193 (194) [AIR V 24].
5. ('12) 34 All 478 (480, 481) (DB).

Section 39 — Note 9

1. 1963 Pat 74 (75) [A I R V 50 C 17] : 42 Pat 860.
1962 Mys 207 (208) [AIR V 49 C 69] : ILR (1962) Mys 150.
[*See also* ('57) 59 Punj L R 15 (17). (Maintenance decree in favour of wife — Charge on husband's land — Gift of land—Donee having also notice of maintenance claim—Land can be sold in execution.)]

40. Where, for the more beneficial enjoyment of his own immoveable property, a third person has, independently of any interest in the immoveable property of another or of any easement thereon, a right to restrain the enjoyment [a][in a particular manner of the latter property], or

Burden of obligation imposing restriction on use of land,

or of obligation annexed to ownership but not amounting to interest or easement

where a third person is entitled to the benefit of an obligation arising out of contract and annexed to the ownership of immoveable property, but not amounting to an interest therein or easement thereon,

such right or obligation may be enforced against a transferee with notice thereof or a gratuitous transferee of the property affected thereby, but not against a transferee for consideration and without notice of the right or obligation, nor against such property in his hands.

Illustration.

A contract to sell Sultanpur to *B*. While the contract is still in force he sells Sultanpur to *C*, who has notice of the contract. *B* may enforce the contract against *C* to the same extent as against *A*.

a. *Substituted* for "of the latter property or to compel its enjoyment in a particular manner," by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), S. 12.

Synopsis

1. Principles underlying the section.
2. "For the more beneficial enjoyment of his own immovable property."
3. "Independently of any interest in the immovable property."
4. "Or easement thereon."
5. "Right to restrain the enjoyment."
6. Negative or restrictive covenant—Test.
7. Second paragraph of the section.
8. Contract for the sale of immovable property.
9. Contract to pay maintenance.
10. Contract for pre-emption.
11. Contract to give a mortgage.
12. Contract to pay zarichaharam.
13. Contract to grant a lease.
14. Contract to pay land revenue or debt on land of another.
15. Miscellaneous.
16. Covenants and the rule against perpetuities.
17. Transferee with notice.
18. "Transferee."
19. Second transferee from bona fide first transferee.
20. Transfers by operation of law.
21. Contract for sale prior to attachment —Sale after attachment—Validity.
22. Injunction does not run with land.
23. Acquiescence in breach of restrictive covenant.
24. Covenant for title.
25. Covenants between landlord and tenant.
26. Covenants in building schemes.

1. **Principles underlying the section.** — The general principle is that a *personal contract* even though it may have reference to property is binding only as between the *parties* thereto and their *privies*. It is not, as a general rule, enforceable against third persons into whose hands the property might have passed.(1)

A contract *affecting the enjoyment of immovable property*, if it is valid, is, like any other personal contract, enforceable, as between the parties and privies thereto. Such a contract is, however, under certain circumstances, declared void and unenforce-

Section 40 — Note 1

1. 1958 Pat 467 (469) [AIR V 45 C 150]. (Reversed on another point in 1962 Pat 193 [A I R V 49].) [*See* 1916 All 200 (200) [AIR V 3]: 38 All 230 (DB).]

able. Thus, such a contract entered into in an instrument of transfer whereby immovable property is purported to be *absolutely* transferred, is repugnant to the transfer and is therefore void. This is provided for by the first paragraph of S. 11. But an exception is provided for by the second paragraph of that section under which such a contract would be valid and enforceable as between the parties and the privies to the contract if it has been made for the purpose of securing the beneficial enjoyment of *other* property of the transferor.(1a)

But is a valid contract *affecting the enjoyment of immovable property*, whether entered into as part of the transfer or not, enforceable by or against the *assigns of the property* affected by it? In other words, does such a contract *run with the land* affected by it in the sense in which the expression is used in the English law, namely that a covenant is said to run with the land where the *benefit* or *burden* of it passes to the successors in title of the covenantee or the covenantor as the case may be ?(2)

At *Common law* if *A* was the covenantee and *B*, the covenantor, and the covenant related to the land of *A*, the *benefit* of the covenant ran with the land of *A* in the sense that *A's* assigns could enforce it against *B* provided that—

(1) the covenant was one "*touching and concerning*" the land of *A*, and

(2) the covenant was *intended by the parties to be annexed to the* land of *A*.(3)

A covenant was said to "touch and concern" the land when it was one which affected the nature or value of the land, or benefited the land, or affected the rent issuing out of the land.(4) If, therefore, the covenant did not relate to the land of *A* at all(5) or

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1a. See Note 11 on Section 11.
[*See also* ('61) ILR (1961) Mys 675 (689, 690) (DB).
1929 Pat 349 (350) [AIR V 16] (DB). (Obligation arising out of a restrictive covenant, may be enforced against a transferee with notice thereof or a gratuitous transferee.)]

2. ('10) 7 Ind Cas 346 (347) (Cal).
† ('03) 6 Oudh Cas 184 (187, 188) (DB).

3. 1958 Pat 467 (468) [AIR V 45 C 150]. (Reversed on another point in 1962 Pat 193 [A I R V 49].)
(1899) 69 L J Ch 59 (64) : (1900) 2 Ch 388 (396), Rogers v. Hosegood. (Affirmed on appeal in (1900) 2 Ch D 388.)
[*See also* ('53) ILR (1953) 1 Cal 34 (37) (DB).
(1900) 2 Ch 388 and (1909) A C 98, Ref.)
(1933) 102 L J Ch 241 (249.: 1933 Ch 611, In re Union of London and Smith's Bank Conveyance; Miles v. Easter.
(1924) 40 T L R 650 (651) : (1924) 2 Ch 379 (395), Kelly v. Barret.
(1936) 105 L J Ch 233 (235) : (1936) 1 Ch 451, Drake v. Gray.]

4. 1959 Pat 463 (472) [AIR V 46 C 132] : 38 Pat 443, (*Held*, on facts that as a coal land without any convenient egress from and ingress to it was much less valuable than one with it, the covenant granting right of way through plot No. 24 was annexed to the land of the plaintiff. i. e., plot No. 23, effectively in order that its benefit should run with it and, therefore, when the plaintiff took the lease of No. 23 he acquired the right to enforce it against the defendants who had taken plot No. 24, with notice of the covenant.)
1958 Pat 467 (468) [AIR V 45 C 150]. (Reversed on another point in 1962 Pat 193 [A I R V 49].)
1955 Manipur 37 (39) [AIR V 42 C 7].
1954 Orissa 110 (112) [A I R V 41 C 33] : I L R (1954) Cut 1 (DB).
1950 Cal 195 (196) [AIR V 37 C 67] : ILR (1951) 1 Cal 276.
†(1900) 69 L J Ch 59 (63) : (1900) 2 Ch D 388 (395), Rogers v. Hosegood.
(1908) 25 T L R 166 (167) : 1909 App Cas 98, Dyson v. Forster.
(1889) 58 L J Q B 341 (342) : 23 Q B D 35 (37), Fleetwood v. Hull.
(1889) 59 L J Ch 477 (482) : 44 Ch D 503 (516), Clegg v. Hands.
(1881) 51 L J Q B 73 (76) : 8 Q B D 403 (408, 409), Haywood v Brunswick Building Society. (A covenant to do something which shall be an improvement on the land does not "touch and concern the land.")
1920 Pat 383 (401) [AIR V 7] (DB). (Covenant by lessee of mine not to work mine in certain direction is covenant running with land and binds lessee's assignees.)
[*See also* ('53) ILR (1953) 1 Cal 34 (37) (DB).
((1900) 2 Ch 388 and (1909) A C 98, Ref.)
('13) 19 Ind Cas 67 (68) (All). (At common law the benefit of a covenant runs with the land under certain circumstances.)]

5. 1958 Pat 467 (468) [AIR V 45 C 150]. (Reversed on another point in 1962 Pat 193 [A I R V 49].)
✠(1878) 9 Ch D 125 (130) : 26 W R (Eng) 754, Renals v. Cowlishaw. (In order to enable purchaser to claim benefit of restrictive covenant, he must show that benefit of covenant was sub-

if *A* had no land to the advantage of which the covenant might be said to have been entered into,(6) the benefit of the covenant could not be said to run with the land of *A*. Further, a covenant affecting *A's* land, not directly but only *collaterally*, was not regarded as "touching and concerning the land" and therefore was held not to run with the land.(7) Thus, a contract of fire insurance was held not necessarily connected with the use and enjoyment of the property insured but only a collateral contract, the benefit of which did not run with the land.(8) But where the consequence of the covenant was that the money got from the insurance company *should be laid out in rebuilding the premises*, it was held that it was one touching and concerning the land, and therefore ran with the land.(8a)

There is no general provision enacted in the Transfer of Property Act as to benefits of covenants running with the land. A particular application of the rule is, however, found in the second paragraph of S. 55, sub-s. (2), which provides that the benefit of the statutory covenant for title will go with the interest of the covenantee.(9) Sections 65 and 108 (c) are also instances of covenants running with the land binding on the property in the hands of the transferee.(9a) It is conceived that the English Common law rule referred to above will apply generally in this country also under similar circumstances.(10)

As regards the *burden* of a covenant affecting land, the general rule at Common law was that it did *not* run with the land. Thus, if *A* was the covenantee and *B* the covenantor and the covenant affected the land of *B*, then the burden of the covenant did not run with the land of *B* and was not enforceable against the assigns and successors in title of *B*.(11) An exception was, however, recognised to this general rule in

ject-matter of purchase.)
(1850) 138 E R 68 (77) : 10 C B 164, Ackroyd v. Samuel Smith.
(1876) 46 L J Ch 505 (509) : 4 Ch D 718 (723), Master v. Hansard.

6. 1958 Pat 467 (468) [AIR V 45 C 150]. (Reversed on another point in 1962 Pat 193 [AIR V 49].)
(1927) 2 Ch 225 (240) : 96 L J Ch 415 (422), Torby Hotel v. Jenkins.
(1933) 102 L J Ch 241 (250) : 1933 Ch 611, Miles v. Easter.
(1914) 83 L J Ch 260 (263) : (1914) 1 Ch 34, Millbourn v. Lyons.
[*See also* (1923) 1 Ch 149 (158) : 92 L J Ch 227 (232), Chambers v. Randall.]

7. 1952 Pat 409 (415) [AIR V 39].
(1869) 38 L J Ex 175 (176) : 4 Ex 311, Thomas v. Hayward.
(1903) 2 Ch 539 (552) : 72 L J Ch 716 (720, 721), Formby v. Barker.
[*See also* ('53) ILR (1953) 1 Cal 34 (37) (DB). (1909) A C 98, Ref.)
('10) 7 Ind Cas 346 (347) (Cal).]

8 (1881) 18 Ch D 1 (6) : 50 L J Ch 472 (476), Rayner v. Preston
[See however 1954 Orissa 110 (112) [AIR V 41 C 33] : ILR (1954) Cut 1 (DB). (Covenant to insure against fire — Runs with the land.)

8a (1821) 106 E R 1094 (1096) : 5 B & Ald 1, Vernon v. Smith.

9. 1958 Pat 467 (469) [AIR V 45 C 150]. (Reversed on another point in 1962 Pat 193 [AIR V 49].)
('48) ILR (1948) 1 Cal 492 (497).
('03) 6 Oudh Cas 184 (188) (DB).

9a. 1958 Pat 467 (469) [AiR V 45 C 150]. (Reversed on another point in 1962 Pat 193 [AIR V 49].)
('48) ILR (1948) 1 Cal 492 (497).

10. 1955 Manipur 37 (39) [AIR V 42 C 7].
1954 Orissa 110 (112) [A I R V 41 C 33] : ILR (1954) Cut 1 (DB). (Covenant is said to run with the land if it directly concerns the land, as for example, covenant to pay rent, to repair houses already built, to insure against fire, etc.)
1952 Pat 409 (415) [A I R V 39]. (Covenants that touch and concern land, as distinguished from collateral covenants, run with land.)
† ('09) 36 Cal 675 (702) (DB). (Benefit of covenant annexed to covenantee's land runs with the land — Whether the covenant agrees with the nature, quality or value of the land is the test.)
('03) 6 Oudh Cas 184 (187) (DB). (Agreement to pay revenue is not annexed to land.)

11. 1958 Pat 467 (468) [A I R V 45 C 150]. (Reversed on another point in 1962 Pat 193 [AIR V 49.])
1944 Oudh 35 (37) [AIR V 31]. (Covenant by vendee of land to pay revenue on other land of vender is not binding on vendee's transferee.)
(1885) 55 L J Ch 633 (644) : 29 Ch D 750, Austerberry v. The Corporation of Oldham.

cases of covenants between *landlord and tenant.*(12) Thus, a covenant by *B* the lessee in favour of *A* the lessor touching and concerning the thing demised, ran with the land and was enforceable not only against *B* but also against his assigns provided the covenant had reference to things *in esse*, i. e., in existence on the land, or, if the covenant referred to things not in existence, the covenantor covenanted "for himself and his assigns."(13) The exceptions were laid down in what was known as *Spencer's case*,(14) the basis of the exception being that, in cases of landlord and tenant, an assignment by a tenant of his interest creates a *privity of estate* between the landlord and the assignee who is consequently bound by the covenants in the lease.(14a) A privity of estate was not created unless the lessee transferred the *whole* of his interest.(15) Consequently, an *under-lessee* was not regarded as an "assign" of the lessee and was not bound by the covenants in the head lease.(16)

The English Common law general rule that the *burden* of a covenant affecting land does not run with the land applies in this country also.(17) So also the rule that in the case of *landlord and tenant* the burden of a covenant runs with the land.(18)

It may be noted that the doctrine of covenants running with the land (whether the case is one of *benefit* or *burden* of the covenant) does not depend upon any question of *notice* of the covenant on the part of the person, by or against whom, it is enforced. Such covenants are enforceable, if at all, *irrespective of any question of notice.*

(1872) 41 L J Q B 165 (167) : 7 Q B 316, Dennett v. Atherton.
✠(1899) 69 L J Ch 59 (64) : (1900) 2 Ch 388 (407), Rogers v. Hosegood.
('13) 19 Ind Cas 67 (68) (All).
✠('03) 6 Oudh Cas 184 (188).

12. 1958 Pat 467 (468) [A I R V 45 C 150]. (Reversed on another point in 1962 Pat 193 [AIR V 49].)
(1872) 41 L J Q B 165 (167) : 7 Q B 316, Dennett v. Atherton.

13. 1958 Pat 467 (468, 469) [AIR V 45 C 150]. (Reversed on another point in 1962 Pat 193 [AIR V 49].)
1848) 116 E R 543 (547) : 11 Q B 444, Doughty v. Bowman.
1802) 102 E R 490 (492) : 6 R R 511, Stevenson v. Lambard. (Covenant to pay rent.)

14. ✠(1583) 77 E R 72 (74) : 5 Coke Rep 16.

14a. 1958 Pat 467 (468) [AIR V 45 C 150]. (Reversed on another point in 1962 Pat 193 [AIR V 49].)
(1802) 102 E R 490 (492) : 6 R R 511, Stevenson v. Lombard.
(1789) 100 E R 639 (644) : 3 T R 393, Webb v. Russel.
†('10) 7 Ind Cas 815 (817, 818) (DB) (Cal).

15. ✠1918 Mad 425 (426) [AIR V 5] : 40 Mad 1111 (DB). (Mere possession, in the absence of privity of estate, will not make the mortgagee liable to the lessor.)

16. 1940 Mad 453 (455) [AIR V 27] (DB).
1918 Mad 425 (426) [A I R V 5] : 40 Mad 1111 (DB).
(1887) 57 L J Ch 95 (98) : 37 Ch D 74, Hall v. Ewin.
(1906) 76 L J Ch 78 (81) : 1906-2 Ch 631 (638), South of England Dairies Ltd. v. Baker.
[*See also* 1920 Pat 383 (402) [A I R V 7] (DB). (A lease of the entire interest of the lessee subject to a power of surrender operates as an assignment and not as sub-lease.)]

17. 1922 P C 165 (166, 167) [AIR V 9] : 48 Ind App 376 (FB). (Agreement by A to grant site to B if he required it to build temple—Agreement is not a covenant running with the land.)
1958 Pat 467 (469) [A I R V 45 C 150]. (Reversed on another point in 1962 Pat 193 [AIR V 49].)
1938 Mad 405 (412) [AIR V 25] (DB). (Impliedly overruled by AIR 1946 Mad 542 [AIR V 33] on another point.])
1924 Cal 487 (488) [AIR V 11] (DB). (Covenant to pay money between vendor and purchaser does not run with land sold but runs with land leased.)
('03) 6 Oudh Cas 184 (188) (DB).
('13) 19 Ind Cas 67 (68) (All).
†('10) 7 Ind Cas 815 (817) (DB) (Cal).

18. 1958 Pat 467 (469) [A I R V 45 C 150]. (Reversed on another point in 1962 Pat 193 [AIR V 49].)
1925 Bom 330 (331). (Covenant to pay ground rent runs with the land.)
See 1918 Cal 306 (307) [A I R V 5] (DB). (A contract between lessor and lessee for the preparation of a set of jama wasib vaki and jama mufassil papers is a covenant running with the land—So assumed.)]
[See however 1916 Mad 102 (110) [AIR V 3] (DB). (The English law of covenant running with the land does not apply to India. AIR 1916 Mad 298, followed.)]

But although *at law* the burden of a covenant did not run with the land, except in the case of landlord and tenant, Courts of Equity, in the exercise of their *equitable jurisdiction*, enforced such covenants *in personam* as, for example, by injunction, against the assigns of the covenantor under certain circumstances. The principle on which they proceeded was that where *C* acquires land by purchase from *B with the knowledge of a previous lawful contract* made by *B* with *A* to use and employ the property for a particular purpose and in a particular manner, *C* shall not, to the material damage of *A*, in opposition to the contract and inconsistently with it, use and employ the property in a manner not allowable to *B*.(19) It will be noticed that the covenants restricting the enjoyment of land are not, except as between the contracting parties and their privies, enforceable by anything in the nature of an action or suit *founded on the contract*. Such actions and suits depend alike on *privity of contract* and no possession of the land coupled with notice can avail to create such privity. But the Courts of Equity held that where a person took property with notice of a covenent restricting its enjoyment, there was called into existence an *equity* attached to the property of such a nature that it was annexed to and *ran with the land in equity*. This equity though created by covenant or contract could not be sued on as such, but stood on the same footing and was analogous to an equitable charge on real estate created by some predecessor in title of the present owner of the land charged.(20)

The leading case on the subject is *Tulk* v. *Moxhay*.(21) In that case, *B* purchased certain land from *A* and covenanted that he would not erect buildings on the land, but would use and keep it in ornamental repair for the benefit of the occupiers of the houses in the neighbourhood which belonged to the vendor. *B* sold the land to *C* who had knowledge of this covenant. *C* began to build on the land. It was held that *C* should be restrained by injunction from erecting any such building. The Lord Chancellor observed as follows :

> "I have no doubt whatever upon the subject; in short, I cannot have a doubt upon it, without impeaching what I have considered as the settled rule of this Court ever since I have known it. That this Court has authority to enforce a contract, which the owner of one piece of land may have entered into with his neighbour, founded, of course, upon good consideration, and valuable consideration, that he will either *use or abstain from using* his land in any manner that the other party by the contract stipulates shall be followed by the party who enters into the covenant, appears to me the very foundation of the whole of this jurisdiction ..... Now

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19. ✱1920 Pat 383 (402) [AIR V 7]. (Doctrine of Tulk v. Moxhay, (1848) 41 E R 1143, is founded on the principle that if an equity is attached to property no one purchasing or getting other transfer of the property with notice of the equity can stand in a different situation from the party from whom he got the transfer.)
(1854) 69 E R 1 (5): 101 R R 491 (497), Patching v. Dubbins.
†(1858) 45 E R 108 (110): 124 R R 250 (264), De Mattos v. Gibson.
(1926) 95 L J P C 71 (75, 77): 1926 App Cas 108, Lord Strathcona Steamship Co. v. Dominion Coal Co.
(1853) 69 E R 25 (29): 1 Kay 56, Coles v. Sims.
(1846) 60 E R 665 (666): 74 R R 101 (103), Mann v. Stephens. (A being owner of house and adjoining land selling house to X and covenanting that he will not build on the land —Subsequent purchaser of land with notice of covenant is bound by it.)
('03) 6 Oudh Cas 184 (188) (DB). (A person who takes with notice of a covenant is bound by it.)
(1838) 59 E R 333 (338): 47 R R 214 (225), Whatman v. Gibson. (Covenant by A with purchaser of part of his land that he will not allow buildings on other lands of his to be used as hotels etc.)
[*See also* 1936 Mad 901 (904) [AIR V 23]. (If an equity is attached to the land by the owner no one purchasing with notice of that equity can stand in a different position from the party from whom he purchased it. Overruled by AIR 1943 Mad 429 (FB) on another point.)]

20. (1928) 97 L J P 71 (75): 139 L T 238, Sloggett v. Sloggett.
(1908) 77 L J Ch 617 (624, 625): (1908) 2 Ch 374, Elliston v. Reacher.
(1905) 74 L J Ch 310 (312): (1905) 1 Ch 391, In re Nisbet and Pott's contract.

21. ✱(1848) 18 L J Ch 83 (87, 88, 89): 41 E R 1143 (1144).

I do not apprehend that the jurisdiction of this Court is fettered by the question, whether the covenant runs with the land or not. The question is, whether a party taking property, the vendor having stipulated in a manner binding by the law and principles of this Court *to use it in a particular way*, will be permitted by this Court to use it in a way diametrically opposite to that which the party has covenanted for . . . . . Of course, the party purchasing the property under such restriction, gives less for it than he would have given if he had bought it unencumbered. Therefore, can there be anything much more inequitable or contrary to good conscience, than that a party, who takes property at a less price because it is subject to a restriction, should receive the whole value from a third party, and that such third party should then hold it unfettered by the restriction under which it was granted? That would be most inequitable, most unjust, and most unconscientious; and, as far as I am informed, this Court never would sanction any such course of proceeding; but on the contrary, has always acted upon this, that you, who have the property, are bound by the principles and law of this Court to submit to the contract you have entered into; and you will not be permitted to hand over that property, and give to your assignee or your vendee a higher title, with regard to interest as between yourself and the vendor, than you yourself possess.

That is unconnected with the equitable doctrine of covenant running with the land."

The expressions "*use* or abstain from using" and "to *use* it in a particular way" used by the Lord Chancellor in the above passage, gave rise to a difference of opinion as to whether the said principles applied not only to *negative* covenants *not* to enjoy the property in a particular manner, but also to *affirmative* covenants to enjoy in a particular manner.(22) The conflict was set at rest by the decision in *Haywood* v. *Brunswick Building Society*,(23) and other cases(24) that the principle of *Tulk* v. *Morhay*,(25) was confined to negative covenants and was inapplicable to *affirmative* covenants.

The important distinction between the Common law doctrine of covenants running with the land and the equitable doctrine of *Tulk* v. *Morhay*,(26) is that in the former case, an assign of the covenantor is subject to the burden of the covenant *irrespective* of any question of notice, while in the latter case, an assign of the covenantor is bound by the covenant *only if he had notice of the covenant or was a gratuitous transferee.*

Originally, the first paragraph of this section enacted the equitable rule laid down in *Tulk* v. *Morhay*,(27) as interpreted to mean that it applied both to *affirmative* and *negative covenants*.(28) The covenant could be enforced not only where it was one *restraining* the enjoyment of property, but also where it was one *compelling* its enjoyment in a particular manner. In some cases,(29) however, it was held that the first paragraph of the section did not apply to affirmative covenants. In view of *Haywood* v. *Brunswick Building Society*,(30) and other later cases referred to above

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22. *See* (1868) 37 L J Eq 825 (829) : L R 6 Eq 252, Moreland v. Cooke. (Principle of Tulk v. Moxhay, (1848) 41 E R 1143, applied to affirmative covenants.)

23. (1881) 51 L J Q B 73 (76, 77) : 8 QBD 403.

24. (1885) 55 L J Ch 633 (639) : 29 Ch D 750, Austerberry v. The Corporation of Oldham.
(1882) 51 L J Ch 530 (532) : 20 Ch D 562, London & South-Western Railway v. Gomm.
(1882) 52 L J Ch 294 (295) : 48 L T 148, Andrew v. Aitken. (Covenant to build on request does not run with the land in equity.)
(1887) 57 L J Ch 95 (99) : 57 L T 831, Hall v. Ewin.

25. (1848) 2 Ph 774 : 41 E R 1143.

26. (1848) 2 Ph 774 : 41 E R 1143.

27. (1848) 2 Ph 774 : 41 E R 1143.

28. See Report of the Special Committee, 1927.
('48) ILR (1948) 1 Cal 492 (497).

29. † 1931 All 552 (553) [AIR V 18] : 53 All 742 (DB). (AIR 1919 All 308, Dissented from.)
1925 Bom 183 (185) [AIR V 12] (DB). (Question whether the section applies to affirmative covenants involving expenditure of money, was not decided.)
1916 Pat 226 (231) [AIR V 3] (DB). (Contract for sale is a personal covenant to convey land and as such it is an affirmative one.)
('13) 19 Ind Cas 67 (68) (All).
('03) 6 Oudh Cas 184 (188) (DB).

30. (1881) 51 L J Q B 73 (76, 77) : 8 QBD 403.

confining the operation of the equitable rule to negative covenants, the first paragraph of the section was amended by Act XX of 1929 by omitting the words "or to *compel* its enjoyment in a particular manner," which occurred at the end of the first paragraph.(30a)

Thus, a condition or a covenant restraining the enjoyment of the property transferred, where such condition or covenant is for the beneficial enjoyment of other property of the transferor, can, under the second paragraph of S. 11 be enforced against the *transferee* himself, and under the first paragraph of this section against the transferees, from the transferee, if they had notice of the condition or covenant or if they were gratuitous transferees.(31)

The right mentioned in the first paragraph is not one conferred by the section itself. The section merely regulates or governs the exercise of such a right if it exists otherwise.(31a)

The right under a covenant referred to in the first paragraph of the section can be exercised or enforced either by the original covenantee himself or by another to whom he has transferred the benefit or the right under the covenant along with the entire ownership of immovable property or an interest in that property of such a character that it is possible for one to say that the right under the covenant is directly or appropriately related to it.(31b) The principle of the English law of equitable assignment or reciprocal obligation cannot be read into S. 40.(31c)

The second paragraph of the section must be understood as relating to covenants not necessarily relating to the *enjoyment* of the property though annexed to the ownership of immovable property such as a contract for sale of land. Such a contract, though an affirmative one may, under that paragraph, be enforced against a transferee with notice of such a contract.(32)

Neither of these paragraphs has anything to do with "covenants running with land" under the Common law of England as explained above.(33)

2. **"For the more beneficial enjoyment of his own immovable property."** — The first paragraph of the section applies only if the right to restrain the enjoyment of certain property by another person exists for the more beneficial enjoyment of the property of the owner of the right. It follows that the covenantee must himself have an interest in the property for the beneficial enjoyment of which the covenant is entered into. If he has no such interest the covenant is merely a *personal* one and is not enforceable against the assigns of the covenantor.(1)

30a. ('61) ILR (1961) Mys 675 (690) (DB).
1952 Pat 409 (415) [AIR V 39]. (Covenant must be one restricting or affecting the user of the land and the remedy is not a remedy at law by way of specific performance under a species of implied privity, but a remedy in equity by injunction against the violation of the covenant.)

('48) ILR (1948) 1 Cal 492 (497). (A covenant to pay money by a vendee to the vendor and his successors being an affirmative covenant does not run with the land.)

31. ('61) ILR (1961) Mys 675 (690) (DB). (As between immediate parties to a transfer covenants both affirmative as well as restrictive may be enforced.)

('48) ILR (1948) 1 Cal 492 (497).
1929 Pat 349 (360) [AIR V 16] (DB).

31a. ('61) ILR (1961) Mys 675 (689) (DB).

31b. ('61) ILR (1961) Mys 675 (691) (DB).

31c. ('61) ILR (1961) Mys 675 (688, 689) (DB).

32. *See* ('03) 6 Oudh Cas 184 (188) (DB). (A covenant to pay the land revenue on the land sold by A to B was held not to fall within paragraph 1 as being an affirmative covenant — As regards paragraph 2 it was held not to apply, not on the ground that it was affirmative covenant but on the ground that it was not "annexed to the ownership" of property.)

33. ('13) 19 Ind Cas 67 (68) (All).

Section 40 — Note 2

1. 1936 Cal 727 (733, 734) [AIR V 23] (DB). (Lord Strathcona Ltd. v. Dominion Coal Co.,

3. "Independently of any interest in the immovable property." — The section has no application to the enforcement of rights which amount to an interest in immovable property. It does not, therefore, apply to the enforcement of *charges*, that subject being dealt with by section 100.

4. "Or easement thereon." – The section has no application to rights which amount to easements.(1a) A sale deed by *A* to *X* of one of three shops belonging to him provided that neither *A* nor *X* would erect a balcony in front of their shops. Subsequently, *A* sold another of the three shops to *Y* who began to build a balcony, whereupon *X* sued *Y* for an injunction restraining him from doing so. It was held that the right claimed by *X* under the sale deed was an easement right, and that S. 40, therefore, had no application to the case.(1) *A*, the owner of a *ghat* adjoining a river, sold a portion of the *ghat* which abutted the river to *B*, and contracted with him that if the river encroached upon the purchased portion, he would allow *B* to use the portion of the *ghat* situated further back for religious ministrations. It was held that the sale deed created an easement right in *B*, and such right was not governed by this section.(2)

5. "Right to restrain the enjoyment." — As has been seen in Note 1 the first paragraph deals only with *negative* and not with *affirmative* covenants. Further, the right must be one restraining the enjoyment, i.e., *the use to be made of the property*. A contract *to pay* a certain sum of money on the happening of a particular event is not such a covenant as is contemplated by the first paragraph of this section.(1) In the undermentioned cases(2) it was held that a contract by a purchaser with his vendor that he will pay annually a sum of money to the vendor is not within the section.

6. Negative or restrictive covenant – Test. – In order to determine whether a covenant is a negative or a positive one, regard must be had to the *substance* of the transaction and not merely to the question whether the word "not" has been used. The absence of a negative form of expression is immaterial if, in substance, a negative covenant is implied. In such cases the principle of this section as regards restrictive covenants will apply.(1) In interpreting the section guidance can be had from the decided cases of the English Courts while taking care not to depart from the plain meaning and effect of the language employed in the section.(2)

7. Second paragraph of the section. — The second paragraph deals with a case where *A* is entitled to the benefit of an obligation arising out of contract with *B* and annexed to *B's* ownership of immovable property but not amounting to an interest therein or an easement thereon.(1a)

(1926) 95 L J P C 71 followed. In case of restrictive covenants in agreement, constructive notice makes sub-lessee liable.)

Section 40 — Note 4

1a. 1962 Punj 299 (304) [AIR V 49 C 79] : ILR (1962) 2 Punj 255.

1. 1917 Lah 397 (398) [AIR V 4]. (7 Ind Cas 815, referred.)

2. 1931 All 207 (208) [AIR V 18].

Section 40 — Note 5

1. 1931 All 552 (552) [AIR V 18] : 53 All 742 (DB). (AIR 1919 All 235, Dissented from.)

2. ('48) ILR (1948) 1 Cal 492 (49 / 1924 Cal 487 (488) [AIR V 11] (DB).

Section 40 — Note 6

1. 1945 Cal 89 (92) [AIR V 32] (DB). (In deciding whether a covenant in a lease is an affirmative or negative covenant the Court must look to the substance and not to the form.)
1936 Cal 727 (732) [AIR V 23] (DB).
†1930 Cal 357 (360) [AIR V 17]: 57 Cal 953 (DB).

2. ('61) ILR (1961) Mys 675 (684) (DB).

Section 40 — Note 7

1a. 1962 Punj 299 (307) [AIR V 49 C 79] : ILR (1962) 2 Punj 255. (Benefit of obligation amounting to right of easements —S. 40 Para 2

The distinction between this paragraph and the first paragraph is that, under the latter, the person claiming the right *must himself be the owner of immovable property* for the beneficial enjoyment of which the right exists and the right relates to the *enjoyment* of the immovable property of the person against whom the right exists. Under the second paragraph, the person claiming the benefit of the obligation *need not be the owner of any property*, and the obligation *need not be one relating to the enjoyment* of the property, though it must be annexed to the ownership of immovable property.(1) The words "obligation annexed to the ownership" mean an obligation which can be performed by a person, only *if he is owner of the property*. Where *B* contracts to sell his property to *A*, the obligation under the contract can be performed only if and so long as *B* is the *owner* of the property. The obligation is therefore one "annexed to the ownership of immovable property."

The test whether an obligation is annexed to the ownership of property is to see if the obligation was intended to be, or could be performed only if he was the owner of the property. If independently of such ownership the obligation was intended to be or could be performed it is not "annexed to the ownership of property."

8. **Contract for the sale of immovable property.**— In England a contract for sale of land creates an *equitable interest* in the property. After the passing of the Transfer of Property Act, the distinction between legal and equitable estates in England does not apply in this country and a contract for sale of immovable property does *not* create any interest in such property in the ven lee.(1) But although it does not create an interest in the property it creates an obligation "annexed to the ownership of the property"(2) inasmuch as the obligation can be performed only if and so long as the obligor is the owner of the property: consequently such an obligation can be enforced against a transferee of the property with notice of the obligation or a gratuitous transferee(3) but not against a transferee for consideration and without

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does not apply.)

1. ('48) ILR (1948) 1 Cal 492 (497).

Section 40 — Note 8

1. 1967 S C 744 (749) [AIR V 54 C 156] : (1967) 1 S C W R 533: (1967) 1 S C R 293. (5 Cal W N 343 and 1923 All 514 [AIR V 10] and 9 Beng L R 433 (PC) and 24 Suth W R 321 and 1922 P C 165 [AIR V 9], held not good law.)
1962 Pat 201 (202) [AIR V 49 C 49] : 41 Pat 709 (DB).
('59) 38 Pat 1160 (1184, 1185) (DB).
1958 Bom 194 (195) [AIR V 45 C 53]: ILR (1958) Bom 234.
1953 Mad 409 (412) [AIR V 40 C 151].
1943 Cal 417 (426) [AIR V 30] : ILR (1943) 2 Cal 605 (FB). (Section 27 (b), Specific Relief Act (1877) cannot be invoked to show that interest in property is created by contract of sale—Foundation for specific relief provided for in S. 27 (b) is to be found in para 2 of S. 40, T. P. Act.)
See Notes on S. 54.
[*See also* (1900) 13 C P L R 172 (175, 176)
1919 Mad 528 (530) [AIR V 6] (DB).]

2. 1967 S C 744 (748, 749) [AIR V 54 C 156] : (1967) 1 S C R 293. (5 Cal W N 343 and 1923 All 374 [AIR V 10] and 9 Beng L R 433 (PC) and 24 Suth W R 321 and 1922 P C 165 [A I R V 9], held not good law.)
('59) 38 Pat 1160 (1184) (DB).
1958 Bom 194 (195) [AIR V 45 C 53]: ILR (1958) Bom 234.
1943 Cal 417 (426) [AIR V 30] : ILR (1943) 2 Cal 605 (FB).
1917 Mad 4 (5) [AIR V 4] (DB).

3. 1967 S C 978 (982) [AIR V 54 C 207] : (1967) 1 S C R 873. (Though the sale is valid and binding as between the owner and the subsequent transferee with notice of the prior contract the latter holds the property as a result of S. 91, Trusts Act for the benefit of the person in whose favour the prior contract is made to the extent necessary to give effect to that contract—Except to the extent necessary for giving effect to the contract title would pass from the owner to the subsequent transferee under that sale.)
1967 S C 744 (749) [AIR V 54 C 156] : (1967) 1 S C R 293.
1954 S C 75 (81) [AIR V 41 C 22] : 1954 S C R 360. (The proper form of decree is to direct specific performance of the contract between the vendor and the prior purchaser and direct the subsequent transferee to join in the conveyance so as to pass on the title which resides in him to the prior transferee.)
1929 P C 195 (200) [AIR V 16].
1916 P C 245 (246) [AIR V 3].

notice.(4) An agreement for re-sale may stand side by side with a sale or an agreement for sale. The fact that the sale and the re-sale are to be effected as independent and separate transactions does not prevent the obligation under the agreement for re-sale from becoming annexed to the ownership simultaneously with the transfer.(4a)

The contract to sell cannot be said to be a "covenent running with the land" in the sense in which it is used in English law.(5) The *burden* of a covenant never runs with the land under the English law except in the case of a landlord and tenant (See Note 25.) The observations in the undermentioned case(6) that a contract for sale or re-sale of land is a "covenant running with the land" are not correct.

A contract to sell means a *valid* contract to sell. A contract unenforceable against the vendor cannot by virtue of this section be enforced against the transferee with notice.(7) Again a mere *offer* to sell not perfected by acceptance is not a contract to sell and cannot be enforced against a transferee of the property.(8)

Contract for repurchase of easement.

A contract for the repurchase of a right of *easement* is not a "covenant running with the land." In the case noted below(8a) decided by the Nagpur High Court *A* assigned by a deed to *B* a right of way across his field. The right was granted in perpetuity to the assignee (*B*), his heirs and his lessees. There was also a stipulation that if the assignor (*A*) within 5 years was able to get a purchaser for the entire field, the assignor would be entitled to take back the above right on payment of a certain sum. *A* subsequently sold the field to *P*, who sued for the specific performance of the contract of reconveyance. Dismissing the plaintiff's suit, their Lordships observed:

"The right of reconveyance or a right of casement granted in perpetuity is a positive covenant arising out of contract, and in our opinion, can be as completely dissociated from the

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('59) ILR 38 Pat 1160 (1185) (DB).
1958 Bom 194 (195) [AIR V 45 C 53] : ILR (1958) Bom 234.
1955 Cal 21 (24) [AIR V 42 C 4] : ILR (1956) 2 Cal 469 (DB).
1943 Cal 417 (426) [AIR V 30] : ILR (1943) 2 Cal 605 (FB).
1917 All 112 (114) [AIR V 4] (DB).
†1917 Mad 955 (957) [AIR V 4] (DB).
1916 Bom 95 (95) [AIR V 3] : 40 Bom 498 (DB).
[*See also* 1932 P C 228 (230) [AIR V 19] : 59 Ind App 386 : 13 Lah 687. (Transferee knowing facts which would lead him to inquire and discover previous agreement is not without notice.)
1953 Mad 409 (412) [AIR V 40 C 151]. (The person in whose favour there was a prior agreement can specifically enforce his agreement under S. 27 (b) of the Specific Relief Act and compel the subsequent purchaser with notice of the prior agreement to execute a sale deed in his favour.)
1952 Trav-Co 199 (201) [AIR V 39] : ILR (1951) Trav-Co 516 (DB). (The proper decree in a suit for specific performance of a contract to sell land when the same has been sold to a third party subsequent to the contract with the plaintiff is to direct the subsequent purchaser to execute a conveyance to the plaintiff.)]

4. 1954 S C 75 (81) [AIR V 41 C 22] : 1954 SCR 360.
1955 Cal 21 (24) [AIR V 42 C 4] : ILR (1956) 2 Cal 469 (DB).
1933 All 452 (452) [AIR V 20] : 54 All 966 (DB).
1925 Cal 61 (62) [AIR V 12] : 52 Cal 121 (DB).
(1865) 3 Suth W R 64 (64) (DB). (Vendee's remedy is not a suit for specific performance but an action for damages.)

4a. 1955 Cal 21 (24) [AIR V 42 C 4] : ILR (1956) 2 Cal 469 (DB). (Agreement for re-sale may be enforced against subsequent transferee of property except *bona fide* transferee for value without notice.)
[But see (1911) 35 Bom 258 (260) (DB). (Covenant for re-purchase held personal — Suit for enforcement by heir of vendor against heir of vendee held not maintainable.)]

5. 1955 Manipur 37 (39) [AIR V 42 C 7].
1916 Mad 385 (385, 386) [A I R V 3] (DB). (Contract of sale can be enforced against the surviving member of Hindu joint family.)

6. (1900) 22 All 338 (339) (DB).

7. 1935 Pat 237 (238) [A I R V 22]. (Contract for sale by minor's guardian or manager on behalf of minor can be enforced if legal necessity is proved.)
1928 Mad 407 (412) [A I R V 15] (DB). (Hindu law—Minor — Guardian cannot bind minor by personal covenant to sell.)

8. 1926 Mad 120 (122) [AIR V 13].

8a. 1943 Nag 4 (5) [AIR V 30] : ILR (1942) Nag 736 (DB). (Such a contract, however, is assignable, and if assigned, specific performance

land itself as a right of reconveyance in respect of land sold or of land leased out for an indeterminate number of years. The right of easement is not in itself restricted by the condition of reconveyance. It is either to be enjoyed in perpetuity or it ceases altogether on the grantor's acting on the condition of reconveyance or surrender of the grant on payment. There is nothing which can fasten this condition on to the land itself so as to make it a covenant running with the land; it is a personal covenant independent of the land."

9. **Contract to pay maintenance.** — An obligation to pay maintenace may amount to a *charge* on immovable property. Such an obligation is not governed by this section but by S. 100. But an obligation to pay maintenance may not amount to a charge and may merely be annexed to the ownership of immovable property. In such cases the second paragraph of the section will apply. Where *A* made a gift of certain property to *X* and *X* agreed to pay *B* Rs. 40 a year *out of the income of the property* it was held that it was an obligation annexed to the ownership of the property.(1) In the unfermentioned case(2) a zamindar made a grant for the benefit of the ladies of the family of *the dasabanadham dues recoverable by him from certain villages* and himself undertook to collect and pay them; it was held that the obligation was annexed to the ownership of the property and was enforceable against transferees of the vendee with notice of the obligation. Where B, *A*'s widow, left her husband's separate property with *C* and *D* (who were other members of the family of the husband) in consideration of the payment of an allowance for maintenance by *C* to *B*, it was held that the obligation was not intended to be annexed to the property transferred by *B* to *C* and *D* and that this section did not apply.(3)

10. **Contract for pre-emption.**— It has been held that a right of pre-emption under a contract is merely a right under a contract for sale and clearly falls within the category of the rights dealt with by the second paragraph of this section.(1) It has also been held that the right is not a "covenant running with the land."(2) The contrary view has also been taken that it is a "covenant running with the land".(3) In

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thereof can be 'assigned' by the assignee. AIR 1939 Nag 65, Reversed.)

Section 40 — Note 9

1. 1916 Bom 104 (105) [AIR V 3]: 41 Bom 372 (DB).
[*See also* 1932 Cal 451 (454) [A I R V 19] (DB). (The obligation is not a charge and could not be enforced against transferee without notice.)
1931 All 338 (340) [AIR V 18]. (Do.)]
2. 1916 Mad 102 (110) [AIR V 3] (DB).
3. ('09) 4 Ind Cas 1107 (1107) (DB).
[*See also* ('48) 1LR (1948) 1 Cal 492 (497). (It is an affirmative covenant not running with land.)]

Section 40 — Note 10

1. 1943 Cal 417 (426) [AIR V 30]: I L R (1943) 2 Cal 605 (FB).
† 1927 All 170 (172) [A I R V 14]: 49 All 627 (FB).
1961 Cal 152 (154) [A I R V 48 C 30]: I L R (1960) 2 Cal 852. (AIR 1924 All 400; AIR 1924 All 657 and AIR 1927 All 170 (FB), Rel. on.)
1960 Assam 178 (182) [A I R V 47 C 43]: I L R (1959) 11 Assam 423 (DB).
('59) 38 Pat 1160 (1185) (DB). (A I R 1943 Cal 417, Rel. on.)
1956 Nag 243 (244) [AIR V 43 C 83]: ILR (1956) Nag 116 (DB).
1926 All 70 (70) [AIR V 13]: 48 All 12 (DB).
✠1924 All 400 (406-408) [AIR V 11]: 46 All 333 (DB).
1924 All 657 (658) [AIR V 11]: 46 All 514 (DB).
('09) 4 Ind Cas 743 (744) (Cal).
[*See also* ('98) 2 Cal W N 575 (576) (DB). (Agreement by the mortgagor reserving to mortgagee a right of pre-emption.)]
[But see ('83) 1883 All W N 134 (134) (DB). (Case before the T. P. Act.)]
2. † ('99) 22 All 1 (19) (FB).
1956 Nag 243 (244) [A I R V 43 C 83]: I L R (1956) Nag 116 (DB).
('01) 24 Mad 449 (461) (DB).
[*See also* ('13) 18 Ind Cas 237 (238) (DB) (Cal). (Question whether the covenant would fall under the second paragraph of S. 40 not considered.)]
3. ('86) 8 All 102 (104) (FB).
1924 Oudh 382 (384) (DB).
('89) 1889 All W N 81 (82).

Audh Behari v. *Gajadhar*(4) their Lordships of the Supreme Court observed : "The crux of the whole thing is that the benefit as well as the burden of the right of pre-emption run with the land and can be enforced by or against the owner of the land for the time being although the right of the pre-emptor does not amount to an interest in the land itself. It may be stated here that if the right of pre-emption had been only a personal right enforceable against the vendee and there was no infirmity in the title of the owner restricting his right of sale in a certain manner, a *bona fide* purchaser without notice would certainly obtain an absolute title to the property, unhampered by any right of the pre-emptor and in such circumstances there could be no justification for enforcing the right of pre-emption against the purchaser on grounds of justice, equity and good conscience on which grounds alone the rights could be enforced at the present day. In our opinion the law of pre-emption creates a right which attaches to the property and on that footing only it can be enforced against the purchaser". In view of these observations the contrary view must be held to be the correct view.

11. **Contract to give a mortgage.** — Where *A* took a mortgage from *B* of certain property with notice of a prior agreement by *B* to mortgage the same to *C* it was held that, on the principles underlying this section as well as S. 91 of the Indian Trusts Act, 1882, *A*'s mortgage will be postponed to the mortgage of *C* which, though taken subsequent to *A*'s mortgage, was in pursuance of the prior agreement to mortgage.(1)

As to whether an agreement is specifically enforceable, see Note 6 on section 58.

12. **Contract to pay zarichaharam.** – Where A executed a kabuliat in favour of a zamindar by which he agreed to pay *zarichaharam* (that is, one-fourth of the sale proceeds received by him whenever he sold his interest to another) to the zamindar, it was held by the High Court of Allahabad that the obligation could not be said to be one "annexed to the ownership of immovable property" within the meaning of the second paragraph of this section.(1) No question was raised in the case as to whether, apart from this section, the covenant, being one between landlord and tenant, "ran with the land" within the meaning of the English law, which, as will be seen in Note 25, will apply to similar cases in this country also. In the undermentioned cases(2) the High Court of Calcutta has held that such a covenant was one "running with the land" and therefore enforceable against the purchaser. No reference was made to the second paragraph of this section.

('04) 27 All 12 (14).
('88) 10 All 621 (626) (DB).
[*See also* ('89) 11 All 257 (261) (DB).]

4. 1954 S C 417 (422) [A I R V 42 C 102] : 1955 S C R 70. (The benefit as well as the burden of the right of pre-emption run with the land and can be enforced by or against the owner of the land for the time being although the right of the pre-emptor does not amount to an interest in the land itself.))
[*See also* 1957 Pat 695 (697) [A I R V 44 C 204] (DB). (AIR 1954 S C 417, Foll.)]

Section 40 — Note 11

1. ('06) 29 Mad 177 (178) (DB).

Section 40 — Note 12

1. 1931 All 552 (553) [A I R V 18] : 53 All 742 (DB). (Contract to pay certain amount of money on the happening of a certain event is not a restrictive covenant.)
[*See also* 1960 All 513 (514) [AIR V 47 C 136] : ILR (1960) 1 All 864 (FB).]

2 1933 Cal 506 (507) [AIR V 20].
†1930 Cal 357 (360) [A I R V 17] : 57 Cal 953 (DB). (Where agreement was negative in substance, held that the form of expression was immaterial and principle of restrictive covenant applied.)
1923 Cal 679 (680) [AIR V 10] (DB).

It is submitted that the views of the Allahabad and Calcutta High Courts are both correct. The obligation cannot be said to be "annexed to the ownership of the property" because it comes into existence only *after* the obligor *parts with his ownership*, and consequently the section cannot apply. But apart from the section, the covenant is one between landlord and tenant and touches and concerns the demised premises. Consequently, it runs with the land, and as has been seen in Note 1, this principle applies in this country also in cases between landlord and tenant. The Patna High Court has however held in the undermentioned case(3) that where the payment of chauth money is not made a condition precedent for the passing of title to the assignee, then the covenant for payment is only a personal covenant and is not one running with the land. In this view, the abovementioned cases of the Calcutta High Court were distinguished on the ground that in those cases the payment of chauth money by the assignee was a condition precedent for the passing of title.

13. Contract to grant a lease.—In the undermentioned case(1) a contract to grant a lease has been held not to be a covenant that *runs with the land*, and not enforceable against the representatives of the covenantor. The view that it is not a covenant running with the land is correct, but it is not clear why it is not enforceable against the representatives. It is clearly a contract annexed to the ownership of immovable property within the meaning of the second paragraph of this section. Such a contract is also enforceable under S. 27 (b) of the Specific Relief Act, 1877, (since repealed by Specific Relief Act, 1963. See now S. 19 of that Act) against persons claiming under the covenantor unless the contract can be said to be bad as contravening the rule against perpetuities. As to whether such contract is governed by the rule against perpetuities, see Note 10 on section 14.

14. Contract to pay land revenue or debt on land of another. — An undertaking by a transferee of land *x* to pay Government revenue on land *y* belonging to the vendor cannot be said to be annexed to the land transferred and cannot be enforced under the second paragraph of this section against a purchaser from the transferee.(1) In the undermentioned case(2) a compromise was entered into between co-sharers *A* and *B* that *A* should get land *x* and *B*, land *y*, and that *A* should pay the revenue of land *y* in excess of Rs. 200. It was held that S. 40 applied to the case. It is submitted that this view is not correct. The contract cannot be said to be annexed to the *ownership* of immovable property inasmuch as it could be performed without owning any property at all.

Where *A*, the vendor, covenanted with *B*, the purchaser, that he will discharge an existing encumbrance on the property or in default to pay back the purchase-money and take the land, it was held that the covenant could not be said to be annexed to the land but was merely a collateral one, and could not be enforced by a subsequent purchaser from *B* against *A*.(3)

Where on a partition among Hindu brothers it was provided that "each of us shall discharge the debt falling to his share from the properties which have fallen to

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3. 1962 Pat 193 (195) [A I R V 49 C 46] : 41 Pat 656 (DB). (AIR 1958 Pat 467, Reversed.)

Section 40 — Note 13

1. 1925 All 427 (429) [A I R V 12] : 47 All 582 (DB).

Section 40 — Note 14

1. 1944 Oudh 35 (37) [A I R V 31]. (6 Oudh Cas 184, AIR 1916 All 200 and AIR 1917 All 249, Followed.)
('13) 19 Ind Cas 67 (68) (All).
('13) 19 Ind Cas 126 (126) (All).

2. 1920 Oudh 180 (182) [A I R V 7] : 23 Oudh Cas 118 (DB).

3. ('09) 3 Ind Cas 936 (937, 938) (DB) (Mad). Also see S. 55, Note 8.

his share," it was held that this was not a mere personal covenant, but was one annexed to the ownership of the immovable property within the meaning of this section.(4)

15. Miscellaneous. — (1) A *kanom* deed provided that *jenmi* redeeming the *kanom* should pay compensation for improvements effected by the tenant at rates specified therein. It was held that the obligation of the *jenmi* could not be regarded as one annexed to the ownership of the property and could not be enforced under S. 40 against transferees from the *jenmi*.(1)

(2) *A*, a co-owner, contracted with *B*, another co-owner, that *B* should be in the sole management of the whole of the property and that *A* will receive only half the income out of it. It was held that the principle that a party cannot be permitted to use land in a manner inconsistent with the contract entered into by his vendor with notice of which he purchases, can be invoked only in the limited class of *covenants* and not in other cases and that a purchaser from the co-owner could not be debarred by the above principle of his inherent right to claim partition.(2)

(3) There was an island between two branches of a river which belonged to a third party. The land to the north of the northern branch belonged to *A* and that to the south of the southern branch belonged to *B*. *A* and *B* agreed that the island should belong to *A* if the northern branch became fordable and to *B* if the southern branch became fordable. *B* subsequently purchased from the third party the island, and thereafter when the northern branch became fordable *A* sued *B* for ejectment; it was held that *A* and *B* could not impose by contract any burden on the land of a third party which would run with the land in the hands of any possessor of it by any title.(3)

(4) *P* at his own cost constructed an artificial channel through *D's* land to take water to his land. *D* agreed to pay *P* a water rate for water taken by him for his own land from the channel. It was held that this was an obligation under a contract annexed to the ownership of immovable property and was therefore enforceable against transferees of the property with notice.(4)

(5) *S*, a lessee of a coal mine, agreed to transfer his rights to *P* but subsequently transferred them to *C*. As a result of the conflicting interests created between *P* and *C*, there was a compromise under which *C* agreed to pay to *P* a certain commission per ton of coal sold by him during the term of the lease. It was held that this was an "obligation annexed to the ownership of immovable property but not amounting to an interest therein" within the meaning of this section and was therefore enforceable against a transferee from *C* with notice of such agreement.(5).

16. Covenants and the rule against perpetuities. — The rule against perpetuities does not apply to covenants which "run with the land." See Note 11 on S. 14. As to whether the rule against perpetuities applies to contracts relating to immovable property including those falling under this section, see Note 10 on section 14.

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4. † 1933 Mad 715 (719) [AIR V 20] (DB).

Section 40 — Note 15

1. 1940 Mad 453 (455) [AIR V 27] (DB).

2. (1900) 2 Bom L R 884 (887) (DB). (3 Beng L R 14 and 6 Cal 106, Followed.)

3. ('72) Ind App (Supp Vol) 34 (39) (PC).

4. 1935 Mad 975 (976, 977) [AIR V 22] (DB).

5. 1948 Nag 286 (287) [A I R V 35 C 95] : I L R (1948) Nag 200.

17. Transferee with notice. — The right or the benefit of the obligation under this section is enforceable against a transferee of the property for consideration only if it can be said that he had *notice* of such right or obligation.(1) As to what constitutes notice, see S. 3 and the Notes thereon.

The *onus* is on the *transferee* to show that he paid consideration and that he took the transfer without notice of the prior contract.(2) The reason for this view was stated by their Lordships of the Privy Council in *Bhup Narain* v. *Gokul Chand*(3) which was a case arising under S. 27 (b) of the Specific Relief Act, 1877, which was worded in terms similar to the last paragraph of this section. Their Lordships observed :

> "In their Lordships' opinion, the section lays down a general rule that the original contract may be specifically enforced against a subsequent transferee, but allows an exception to that general rule, not to the transferor, but to the transferee, and, in their Lordships' opinion it is clearly for the transferee to establish the circumstances which will allow him to retain the benefit of transfer which *prima facie*, he had no right to get. Further the subsequent transferee is the person within whose knowledge the facts as to whether he has paid and whether he had notice of the original contract lie, and the provisions of Ss. 103 and 106, Evidence Act, 1872, have a bearing on the question."

Although a contract for sale of immovable property is enforceable against a transferee thereof with notice of the contract, the transferee is not liable to the person in whose favour the contract was made for *mesne profits* until the sale is actually executed by a formal conveyance.(4)

It has been held that Ss. 55 (2), 65 and 108 (c) which are instances of covenants running with the land, are binding on the property in the hands of transferees irrespective of any question of notice.(5)

As to the question of notice to a transferee under a registered document, see Note 18.

18. "Transferee." — A transferee means a transferee under a registered conveyance where such conveyance is necessary for the validity of the transfer.(1) But under S. 47 of the Registration Act a registered document takes effect from the date of its execution and therefore, a notice after execution of the document but before its registration will not affect the protection given to the transferee by the section.(2)

As to whether a partition is a transfer, see S. 5, Note 4.

Section 40 — Note 17

1. ('65) 69 Cal W N 503 (509).
1921 Bom 161 (162) [AIR V 8] : 45 Bom 170 (DB).
1921 Mad 559 (560) [AIR V 8] (DB)

2. ('65) 69 Cal W N 503 (509).
1963 Punj 470 (471) [AIR V 50 C 130]. (Onus can be discharged by evidence—Mere denial that he had no notice of prior agreement will not discharge onus.)
1960 Ker 139 (140) [AIR V 47 C 64] : ILR (1959) Ker 1242 (DB).
1927 Mad 699 (700, 701) [AIR V 14]. (Notice includes constructive notice.)
1926 Lah 136 (137) [AIR V 13] (DB).
1925 Cal 61 (62) [AIR V 12] : 52 Cal 121 (DB).
('03) 5 Bom L R 991 (995). (A person who alleges himself to be a *bona fide* purchaser for value without notice must specifically plead that in his written statement or in the plaint as the case may be. If he does not plead all that, he will not be allowed at the hearing to go into evidence on that point.)
[But see ('84) 1884 All W N 254 (254) (DB). (In this case onus was laid on transferor to prove notice.)]

3 1934 P C 68 (70) [A I R V 21] : 61 Ind App 115: 13 Pat 242. (36 Bom 446 : 40 Cal 565; AIR 1914 Mad 634; AIR 1916 All 342 and AIR 1930 Pat 452 Approved; AIR 1923 Bom 410, Disapproved.)

4. 1936 Bom 276 (277) [AIR V 23].

5. ('48) ILR (1948) 1 Cal 492 (497).

Section 40 — Note 18

1. 1930 Pat 181 (182) [AIR V 17] (DB). (Case under S. 27 (b) of the Specific Relief Act.)

2. 1962 Cal 40 (42) [AIR V 49 C 11] (DB).

19. Second transferee from bona fide first transferee. — An assignee of land from a purchaser without notice is not affected by any right or obligation which does not "run with the land" even though he may have notice himself.(1) The reason is that the first purchaser without notice gets a good title to the property free from such obligations and is entitled to convey his rights to any one whether the latter has notice or not of such obligations.

20. Transfers by operation of law. – Section 2, clause (d) provides that the Act does not apply to transfers by operation of law or by or in execution of a decree or order of a Court of competent jurisdiction. In a Madras case,(1) however, it was observed that it was not clear that the term "transferee" in S. 40 may not include a purchaser at a court-auction. In *Nur Muhammad* v. *Dinshaw*(2) their Lordships of the Privy Council observed : "Assuming that . . . . . section 40 of the Transfer of Property Act has full scope, it is only if the purchaser at a judicial sale bought with notice of the contract that it could be enforced against him" and they held that in the particular case the purchaser had no such notice. The High Court of Calcutta has, in the undermentioned decision,(2a) held that the principle underlying this section will apply to involuntary transfers as well including statutory transfers unless excluded either expressly or by necessarily implication.

In the undermentioned case(3) it was held that the Official Receiver in whom the estate of the insolvent had vested was a person "*claiming under the insolvent*" within the meaning of S. 27 (b) of the Specific Relief Act, 1877, (since repealed by Specific Relief Act, 1963—See now S. 19 of that Act) and that a contract enforceable against the insolvent was enforceable against the Receiver.

A person acquiring property by adverse possession cannot be said to be a transferee for consideration and is bound by a restrictive covenant even if he had no notice.(4)

21. Contract for sale prior to attachment—Sale after attachment—Validity.— Since a contract for the sale of immovable property creates an obligation annexed to the ownership of immovable property, a subsequent attachment will be deemed to have been made only subject to such obligation. Consequently, a sale in pursuance of the contract though subsequent to the attachment is not contrary to the attachment and is therefore valid. This is the general trend of opinion, though a contrary view has also been expressed in some cases. For a full discussion of the subject, see Note 15 on S. 64 of the A. I. R. Commentaries on the Code of Civil Procedure, 7th (1963) Edn.

22. Injunction does not run with land. — An injunction does not run with the land. An injunction restraining the user by the defendant of his land cannot, therefore, be enforced against an auction-purchaser of the property in execution of a decree.(1) In the undermentioned

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Section 40 — Note 19

1. (1911) 2 K B 476 (483) : 80 L J K B 1107 (1113), Wilkes v. Spooner.
(1879) 49 L J Ch 68 (72, 73) : 11 Ch D 327 (337), Attorney-General v. Biphosphate Guano Co.

Section 40 — Note 20

1. 1917 Mad 4 (5) [AIR V 4] (DB).
2. 1922 P C 393 (396) [AIR V 9].
2a. 1955 Cal 21 (24) [AIR V 42 C 4] : ILR (1956) 2 Cal 469 (DB).
3. 1932 All 78 (79) [AIR V 19] : 54 All 17 (DB).
4. (1905) 1 Ch 391 (398) : 74 L J Ch 310 (313), In re Nisbet & Pott's Contract.

Section 40 — Note 22

1. ('08) 32 Bom 181 (184) (DB).
('02) 26 Bom 140 (141) (DB). ((1881) 17 Ch D 685, followed.)

case,(2) however, it has been held that a private purchaser with notice of an injunction against the vendor not to alienate the property cannot claim a valid title to the property.

23. **Acquiescence in breach of restrictive covenant.**—A restrictive covenant running in equity with land will not be enforced if there has been acquiescence in the breach thereof for a long time. In *Sayers* v. *Collyer*(1) Bowen L. J., observed : "A person who is entitled to a restrictive covenant may, by his conduct or omissions, put himself in such an altered relation to the person bound by it as makes it manifestly unjust for him to ask a Court to insist on its enforcement by injunction." This principle has been followed in this country also. In *Dhannu Lall* v. *Bansidhar*(2) where *A* being entitled to a restrictive covenant restraining *B* from opening certain windows in a wall, kept quiet till the building was completed and did not take any steps to prevent such opening of the windows it was held that the case was one in which *A* lost the right which he might have had, by reason of his acquiescence. See also the undermentioned case.(3)

24. **Covenant for title.**—By S. 55, sub.s. (2), a covenant for title being *implied* in every sale deed runs with the land.(1) It has been held that an *express* covenant for title will, on the same principle, run with the land.(2) In the Punjab, where the Transfer of Property Act does not apply, it has been held that a covenant for title is a personal covenant and not one running with the land and cannot be taken advantage of by a pre-emptor.(3) A covenant for *indemnity*, undertaking that if the vendee should be deprived of the property the vendor would compensate him is not one running with the land as it does not touch and concern the land.(4)

25. **Covenants between landlord and tenant.**—As has been seen in Note 1, in English law, covenants between landlord and tenant, touching and concerning the demised premises, run with the land and the burden of the covenant could be enforced against the assigns from either party thereto independent of any question of notice of the covenant. It has also been seen that the same is the law in this country.

Thus, the *burden* of the following covenants has been held to touch and concern the thing demised and, therefore, to run with the land ;

(1) A covenant by the lessee to pay rent.(1) But an agreement reducing the rent by some of the co-sharer landlords has been held not amounting to a covenant running with the land.(1a)

('99) 1 Bom L R 854 (854, 855) (DB).

2. ('99) 12 C P L R 109 (110, 112).
Also see Section 6, Note 30.

Section 40 — Note 23

1. (1884) 28 Ch D 103 (108) : 54 L J Ch 1 (4).

2. †(1929) Pat 349 (351) [AIR V 16] (DB).

3. ('09) 3 Ind Cas 936 (937) (DB) (Mad). (Covenant may be waived.)

Section 40 — Note 24

1. 1928 Mad 894 (895) [AIR V 15] : 51 Mad 688 (DB) (But it is not annexed to the interest of transferee by Court sale.)

2. †1929 All 293 (295) [AIR V 16] : 51 All 651 (DB).

(1842) 11 L J Q B 104 (106): 90 R R 903, Thomas v. Thomas.

3. 1928 Lah 357 (359) [AIR V 15] : 9 Lah 659 (DB).

4. 1928 Mad 894 (895) [AIR V 15] : 51 Mad 688 (DB).

Section 40 — Note 25

1. 1935 Cal 368 (388) [AIR V 22] : 62 Cal 346 (DB).
(1823) 107 E R 152 (154) : 25 R R 437, Vyayan v. Arthur. (If the performance of the covenant be beneficial to the reversioner, in respect of lessor's demand, and to no other person his assignee may sue upon it.)

1a. 1950 Pat 22 (25) [AIR V 37 C 8]: 28 Pat 844 (DB).

(2) A covenant by the lessee not to transfer the land without the consent of the landlord.(2)

(3) A covenant by the lessee not to so work a mine as to encroach upon the landlord's other property.(3)

(4) A covenant by the landlord to renew a lease at the option of the tenant.(4) But a covenant to renew a lease at the option of the lessee at a time when the lessor himself would have ceased to have any interest in the property was held to be a personal one and not one running with the land.(4a)

(5) A covenant by the landlord to allow the tenant to erect a structure on the demised premises.(5) So also a covenant requiring the lessee to put a building on the leased premises.(5aa)

(6) A covenant by the lessor to pay the lessee cost of construction of building on determination of lease.(5a)

(7) A covenant in a patni lease by a patnidar to submit collection papers year by year in the landlord's office.(5b).

As regards the *benefit* of covenants between landlord and tenant, the general rule referred to in Note 1 will apply, namely, the benefit of covenant will always run with the land if it touches and concerns the land of the covenantee and the covenant was intended by the parties to be annexed to such land. Thus, a covenant in a lease that the lessee should not purchase the undertenant's holding being for the benefit of the lessor's land, will run with the land of the lessor.(6) In other words, the benefit of the covenant will "run with the reversion."(6aa)

A covenant between landlord and tenant which runs with the land can, as has been seen in Note 1, be enforced only against the *assigns* of the covenantor and not against a *sub-lessee* between whom and the landlord there is no privity of contract.(6ab) Thus a covenant in a head-lease as to payment of a specified rent being a positive or affirmative covenant cannot be enforced against the sub-lessee.(6a) But a covenant between a landlord and tenant may, if it is *restrictive* one, be enforced against the sub-lessee on the equitable principle of *Tulk* v. *Moxhay*(7) as embodied in the first

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2. 1962 Pat 193 (194) [AIR V 49 C 46] : 41 Pat 656. (Covenant that in case lessee wished to assign demised property he should first take lessor's consent and if lessor did not wish to purchase then lease might be assigned to third person.)
1936 Pat 493 (494) [AIR V 23] :15 Pat 673 (DB).
†1923 Cal 679 (680) [AIR V 10] (DB). (Williams v. Earle, (1868) 16 W R (Eng) 1041; McEacharn v. Cotton, (1902) 71 L J P C 20 and West v. Dobb, (1869) 17 W R (Eng) 879, followed.)
Also see S. 10, Note 17.

3. †1920 Pat 383 (400, 401) [AIR V 7] (DB).

4. 1959 Assam 22 (23) [AIR V 46 C 9] (DB).
1954 Orissa 110 (111) [A I R V 41 C 33] : I L R (1954) Cut 1 (DB). (The leasehold interest having been severed by agreement of the parties, each of the assignees was entitled to enforce the term providing for the renewal so far as his separated part was concerned irrespective of the others.)
1927 Mad 513 (516) [A I R V 14] : 50 Mad 595 (DB).
1921 Mad 541 (541) [AIR V 8]: 44 Mad 230 (DB).
('01) 24 Mad 449 (457) (DB).
('12) 17 Ind Cas 180 (183, 184) (DB) (Cal).
[*See also* ('59) 38 Pat 1160 (1160) (DB).]

4a. 1929 Cal 50 (54) [AIR V 16] : 55 Cal 841 (DB). (Lessor having leasehold interest up to 1916, leasing the interest for 20 years from 1902 with the clause for renewal.)

5. 1923 Oudh 114 (116) [AIR V 10] : 27 Oudh Cas 34.

5aa. 1954 Orissa 110 (111) [AIR V 41 C 33] : ILR (1954) Cut 1 (DB).

5a. ('53) ILR (1953) 1 Cal 34 (38) (DB).

5b. 1950 Cal 195 (196) [AIR V 37 C 67] : I L R (1951) 1 Cal 276 (DB).

6. ('97) 1 Cal W N 174 (179) (DB).

6aa. 1954 Orissa 110 (111) [AIR V 41 C 33]: ILR (1954) Cut 1 (DB).
('50) 86 Cal L Jour 198 (206, 207).

6ab. 1952 Pat 409 (415) [AIR V 39] (DB).

6a. 1945 Cal 89 (92) [AIR V 32] (DB) (AIR 1915 Cal 154, followed.)

7. †(1848) 41 E R 1143 (1144) : 2 Ph 774. (If the equity is attached to property by owner, no one who purchases with notice of that can stand in

paragraph of this section.(8)

It has been held in the undermentioned case(9) where a lease provided for the re-conveyance of certain lands comprised in the lease whenever the lessor may require them, that a *positive* covenant never runs with the land *either at law* or in equity. It is submitted that the observation that positive covenant can never run at law between a lessor and lessee is not correct. In the undermentioned case,(9a) an option given by the lessee to the lessor to resume the leasehold land has been held to be merely a personal covenant and not a covenant creating an interest in land.

A reversion may be severed by an assignment of the reversion in part or by an assignment of part of the reversion. In either case covenants which run with the land run with the severed parts and the assignee in respect of the part has the benefit of the lessee's covenants and bears the burden of the lessor's covenants.(10)

26. Covenants in building schemes. — *A*, the owner of a land, parcels it out into plots for building purposes and sells the plots to various persons *X*, *Y* and *Z* who enter into covenants touching and concerning the plots so purchased by them. Can these covenants be enforced not only by *A*, but by one purchaser against another? It has been held that if the scheme was such as to show a *community of interest* between all the purchasers such community of interest necessarily imports a *reciprocity of obligation* which is enforceable not only against the original owner, but also between the various purchasers themselves. *In Spicer* v. *Martin*,(1) seven houses, forming part of a building estate, were conveyed by *C* to *S* who covenanted that they should be used as private dwelling houses only. The dwelling houses were let by *S* to *M* containing covenants similar to that contained in the sale by *C* to *S*. Subsequently, the successor in title of *S* proposed to use the other houses as a hotel. Thereupon *M* sued the successor for an injunction restraining him from doing so. It was held that *M* was entitled to do so. Lord Macnaghten said :

> "The restriction was obviously for the benefit of all the lessees on the estate : they all had a common interest in maintaining the restriction. This community of interest necessarily I think, requires and imports reciprocity of obligation."

In *Reid* v. *Bickerstaff*(2) Cozens-Hardy, M. R. observed as follows :

> "What are some of the essentials of a building scheme ? In my opinion there must be a *defined area* within which the scheme is operative. Reciprocity is the foundation of the idea of a scheme. A purchaser of one parcel cannot be subject to an implied obligation to purchasers of an undefined and unknown area. He must know both the extent of his burthen and the extent of his benefit. Not only must the area be defined, but the obligations to be imposed within that area must be defined. Those obligations need not be identical. For example, there may be houses of a certain value in one part and houses of a different value in another part. A building scheme is not created by the mere fact that the owner of an estate sells it in lots and takes varying covenants from various purchasers. There must be notice to the various purchasers of what I may venture to call the local law imposed by the vendors upon a definite area."

In *Cooverji* v. *Bhimji*(3) the plaintiff and the defendant had taken adjacent plots

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different situation.)

8. 1936 Cal 727 (736) [AIR V 23] (DB).

9. 1927 Cal 41 (43) [AIR V 14] (DB).

9a. 1962 Pat 201 (202) [AIR V 49 C 49] : 41 Pat 709 (DB).

10. 1954 Orissa 110 (111) [AIR V 41 C 33] : ILR (1954) Cut 1 (DB).
('53) ILR (1953) 1 Cal 34 (37, 38) (DB). (This is also the effect of S. 109 of the Act.)
('50) 86 Cal L Jour 198 (207, 208).

Section 40 — Note 26

1. (1888) 58 L J Ch 309 (315) : 14 App Cas 12 (20, 25) (Renals v. Cowlishaw, (1878) 9 Ch D 125, followed.)

2. (1909) 78 L J Ch 753 (756) : (1909) 2 Ch 305 (319).

3. ('82) 6 Bom 528 (533). (Western v. Macdermott, (1866) 1 Eq 499 and German v. Chapman, (1878) 7 Ch D 271, followed.)

under agreements for lease from the Secretary of State. The terms inserted were for the common benefit of a group of lessees taking sites for buildings intended to be contiguous and to form one block or group in mutual relation. It was held by the Bombay High Court that the defendant having knowledge of the circumstances was bound by his covenant not only towards the Secretary of State but also towards the lessees of neighbouring plots for whose benefit the terms were introduced, and on whom, he, reciprocally on his part, had a claim for the fulfilment of the like terms by them for his benefit as lessee.

In pursuance of a building scheme the Bangalore Municipality sold house sites by auction to several purchasers imposing on all such purchasers certain conditions and restrictions regarding the use of sites and putting up of structures on them. A final title deed was to be given to the original purchaser only after the building had been completed complying with all the conditions. A plot was transferred by the original purchaser *A* to *B* who completed the building and established in it a lodging and boarding Hotel. *C* who was an assignee of the contiguous plot from the original purchaser *D* brought a suit against the Municipality and *B* to enforce against *B* the restrictive covenants entered into by *B's* predecessor *A* with the Municipality while purchasing the plot. It was held that although the ultimate objective of the Municipality might have been to see that the area developed in a particular manner, its intention in imposing several conditions on the bidders and in expressly providing for the postponement of the execution of a regular deed of sale till after all the conditions of sale were completed, was to keep in its own hands the enforcement of all the covenants and that it was no part of its intention to transfer to any other bidder the right to enforce any one of these covenants. There was neither an express transfer of the benefit of covenants by the Municipality to *C* nor could any such transfer be implied from the documents produced and the evidence adduced by *C*. Therefore *C* had not acquired the right of enforcing any of the covenants.(3a)

See also the undermentioned cases.(4)

Transfer by ostensible owner.

41. Where, with the consent, express or implied, of the persons interested in immoveable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorized to make it: provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, had acted in good faith.

Synopsis

1. Scope of the section.
2. Distinction between S. 115 of the Evidence Act and this section.
3. Application of this section to execution sales.
4. Application of section to transfers of movable property.
5. Principle of section applies to States where the Act does not apply.

3a. ('61) ILR 1961 Mys 675 (695) (DB).

4. (1910) 79 L J Ch 239 (241) : (1910) 1 Ch 325, Wille v. St. John.
(1884) 53 L J Ch 183 (193, 194) : 43 Ch D 265 (273), Mackenzie v. Childers.
(1886) 55 L J Q B 280 (284, 285) : 16 Q B D 778, Nottingham Patent Brick & Tile Co. v. Butler.
(1854) 69 E R 237 (242, 243) : 101 R R 736, Child v. Douglas.

6. Application of section where S. 10A, Dekkhan Agriculturists' Relief Act (XVII of 1879), applied.
7. Conditions for the applicability of the section.
8. Ostensible owner with the consent of persons interested.
9. "Persons interested."
10. Express or implied consent.
11. Consent need not be to the transfer by the ostensible owner.
12. Consent under coercion, fraud, misrepresentation and mistake.
13. Attestation by person interested, if consent.
14. Motive of consent immaterial.
15. Consent must continue up to time of transfer.
16. Section 52 and this section.
17. Ostensible owner, if includes mortgagee.
18. Ostensible owner need not be one who has no interest in the property.
19. "Transfers."
20. The transferee, if includes subsequent transferees from first transferee.
21. Transferee must have acted in good faith after making reasonable enquiry.
22. "Good faith."
23. Reasonable care.
24. Plea of reasonable care and good faith when to be taken.
24a. Transferee's title to be considered with reference to date of transfer.
25. Burden of proof.

1. Scope of the section. — One of the general principles of the law of transfer of property is enunciated by the maxim *nemo plus juris ad alium transferee potest quam ipse habet*—no man can transfer to another a right or title greater than what he himself possesses. Another maxim enunciating the same principle in another form is *non dat qui non habet*—he gives not who hath not. To this general principle, however, there are several exceptions. Thus, under the law-merchant as to negotiable instruments, a transferee *bona fide* of an instrument may get a better title than that of the transferor.(1) Similarly, a *bona fide* purchaser of chattels at a sale in market overt in England may get a better title to the chattels than that of the seller.(2) Again if the true owner of property permits another to hold himself out as the real owner, as by entrusting him with the documents of title or in some other way, a third person who *bona fide* deals with that other may acquire a good title to the property as against the true owner.(3) The ground of this last exception was stated by their Lordships of the Privy Council in *Ramcoomar* v. *McQueen*,(4) as follows:

> "It is a principle of natural equity, which must be universally applicable, that where one man allows another to hold himself out as the owner of an estate, and a third person purchases it, for value, from the apparent owner in the belief that he is the real owner, the man who so allows the other to hold himself out shall not be permitted to recover upon his secret title, unless he can overthrow that of the purchaser by showing, either that he had direct notice, or something which amounts to constructive notice, of the real title, or that there existed circumstances which ought to have put him upon an enquiry, that, if prosecuted, would have led to a discovery of it."(5)

The principle so stated is really a form of the equitable doctrine of estoppel.(5a) This

Section 41 — Note 1

1. Broom, A Selection of Legal Maxims, 10th Edn., 1939 Pages 305, 550.
See also S. 58, Negotiable Instruments Act, 1881.
2. Broom, A Selection of Legal Maxims, 10th Edn., 1939, Pages 305, 548.
Compare S. 27, Sale of Goods Act, 1930.
3. Broom, A Selection of Legal Maxims, 10th Edn., 1939, Page 547.
('57) 1957-2 Mad L Jour 603 (608) (DB).
('46) 1946 Marwar L R 48 (Civ) (49).
[*See also* (1875) 1875 Pun Re No. 87, p. 206 (207).]
4. ('72) Ind App Sup Vol 40 (43) (PC).
5. *See also* (1860) 3 L T 130 (130) : 123 R R 906, Cairncross v. Lorimer.
5a. ('62) 64 Punj L R 230 (234).
('57) 1957-2 Mad L Jour 603 (608) (DB).
('55) I L R (1955) 1 All 673 (686) : AIR 1955 N U C 1698 (DB).
1944 All 1 (3) [A I R V 31] : ILR (1944) All 20 (DB). (Section lays down a particular case of the general rule of estoppel.)
1943 Lah 168 (170) [AIR V 30]. (Section is one of the illustrations of the rule of estoppel.)
1943 Mad 459 (462) [A I R V 30]. (Section 41 is after all another species of estoppel when the representation is not made directly to the representee but when it consists in making it

section is a legislative enactment of the principle stated by the Privy Council in *Ramcoomars case*,(6) and is, thus, an exception to the general principle stated above that a man cannot confer a better title than he himself has.(7) It does not lay down any new rule of law, but merely enacts what was the law before.(8)

The estoppel under this section operates between the true owner and the transferee in good faith and not between the true owner and the ostensible owner. Consequently, an ostensible owner cannot invoke the provisions of this section for his benefit.(9)

2. **Distinction between section 115 of the Evidence Act and this section.** — Section 115 of the Evidence Act, 1872, and this section enact different aspects of the same principle underlying the equitable doctrine of estoppel.(1) But the main distinction between the two provisions is that under S. 115 of the Evidence Act it is necessary that the party sought to be estopped should have *intended* that the party plea ling the estoppel should act on his representation; while under this section it is not necessary that the real owner should have *intended* that the transferee should take a transfer of the property. Indeed, the intention of the person who places property in the name of another, is in most cases to screen the property from creditors and *not* that the ostensible owner should transfer it to any one.(1a)

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possible for the ostensible owners to mislead those with whom they are dealing on account of the special position of vantage in which they were placed by the conduct express or implied, of the real owners.)
1925 Cal 993 (995) [AIR V 12].

6. 1920 Pat 1 (21) [AIR V 7] : 5 Pat L Jour 521 (SB).
1961 Pat 314 (316) [AIR V 48 C 94].
1960 Mad 389 (400) [AIR V 47 C 142] (DB).
1951 Pepsu 101 (105) [AIR V 38 C 41] (DB).
1947 Mad 287 (295) [A I R V 34 C 142] : ILR (1947) Mad 574 (DB).
('46) 1946 Marwar L R 48 (Civ) (49).
1943 Oudh 398 (401) [AIR V 30] : 19 Luck 216.
1940 Rang 184 (185) [AIR V 27].
1933 Rang 361 (362) [AIR V 20] (DB). (Husband holding out that his wife and children are sole owners of the property — Wife and children mortgaged the property — Good faith on the part of the mortgagee — Husband cannot impugn the mortgage.)
1930 All 422 (425) [AIR V 17]. (Vendee is bound to take reasonable care to examine the title deed of the vendor.)
1930 Cal 92 (93) [AIR V 17] [DB). (Purchaser from the mortgagee's right is also protected.)
1929 Cal 83 (86) [AIR V 16] (DB).
1929 Pat 305 (306) [AIR V 16] (DB).
✣1926 Cal 916 (917, 918) [AIR V 13] (DB).
('04) 26 All 490 (492).
('92) 14 All 362 (364) (DB).
† ('86) 8 All 409 (414) (DB).
[*See also* 1918 Oudh 214 (217) [AIR V 5]. (Section is based on the doctrine of estoppel.)]

7. 1963 S C 1917 (1919) [A I R V 50 C 276] : (1963) Supp 1 S C R 55.
1920 Pat 1 (20) [A I R V 7] : 5 Pat L Jour 521 (SB).
('62) 64 Punj L R 230 (234).
1961 Pat 16 (17, 18) [AIR V 48 C 4].
1952 Nag 106(108) [AIR V 39]: ILR(1953) Nag 684.
('49) 28 Pat 542 (550) (DB).
1948 Nag 110 (117) [AIR V 35 C 40] : ILR (1947) Nag 510 (DB). (Section 41 has to be construed strictly.)
1947 Bom 49 (52) [AIR V 34 C 14] : I L R (1946) Bom 984. (Hence the conditions last set forth in the section must be strictly fulfilled before its benefit can be available to the transferee.)
1925 Cal 993 (995) [AIR V 12].
1920 Mad 505 (507) [AIR V 7]: 43 Mad 135 (DB).

8. ('62) 64 Punj L R 230 (234).
('95) 22 Cal 909 (919) : 22 Ind App 129 (PC).
('73) 19 Suth W R 292 (296, 297) (PC).
('91) 15 Bom 32 (41) (DB).
('88) 1888 Bom P J 139 Reprint 81 (81) (DB).
('83) 9 Cal 898 (900) (DB).
('81) 1881 All W N 67 (67) (DB).
('81) 7 Cal 199 (206, 207) (DB).
('76) 25 Suth W R 281 (282) (DB).
('76) 25 Suth W R 532 (534) (DB).
('72) 18 Suth W R 526 (526) (DB).
('68) 10 Suth W R 185 (186) (DB).
('68) 9 Suth W R 593 (594) (DB).
('67) 8 Suth W R 67 (68) (DB).
('66) 5 Suth W R 37 (38) (DB).
(1865) 3 Suth W R 87 (89, 90) (DB).
(1865) 3 Suth W R 10 (11) (DB).
(1864) 1 Suth W R 115 (115) (DB).
(1864) 1864 Suth W R 318 (318) (DB).
(1864) 1 Suth W R 110 (110) (DB).
[*See also* ('66) 5 Suth W R 120 (121) (DB).]

9. 1962 Pat 140 (146) [AIR V 49 C 33] (DB).
1944 Mad 237 (238) [AIR V 31].

Section 41 — Note 2

1. ('57) 1957-2 Mad L Jour 603 (609) (DB).
† 1934 Oudh 460 (461) [AIR V 21] (DB).
('86) 8 All 409 (414) (DB).
[*See* ('86) 8 All 324 (332) (DB).]

1a. ('57) 1957-2 Mad L Jour 603 (609) (DB).

The law, in these two sections, has made a distinction between an *intentional* inducement and an *unintentional* inducement. It views with more disfavour the conduct of a person who has *intentionally induced* a person to act to his detriment, than the conduct of a person who has *unintentionally* done so. In the former case, which is the one falling under S. 115 of the Evidence Act, the person making the representation cannot escape responsibility on the ground that though he intentionally induced the other to act, yet the latter should have made inquiries and found out the truth. The person acting need merely show that he was not aware of the truth, and acted on the inducement made.(2)

In a case falling under this section, on the other hand, the transferee cannot merely rest on the fact that ostensible ownership was in his transferor and that he took the transfer from such ostensible owner. He must also show that he acted *bona fide* after taking reasonable care to ascertain that the transferor had power to make the transfer. It has been held in some cases,(3) however, that even in cases falling under S. 115 of the Evidence Act, proof of reasonable inquiry is not dispensed with. In the undermentioned case(4) it was held that S. 41 is a restriction on the general law of estoppel enacted in S. 115 of the Evidence Act when the transaction relates to immovable property. It is submitted that in view of what has been said before these views are not correct.

There may be cases in which a person may be estopped both under S. 115 of the Evidence Act and under S. 41 of this Act. Thus, where *A* has, with his consent, allowed his property to stand in the name of *B*, and intentionally induces *C* to take a transfer from *B* and *C* takes such transfer after taking reasonable care to ascertain that *B* has power to transfer the same, S. 115 of the Evidence Act and S. 41 of this Act will both operate to estop *A* from asserting against *C* that the property is his own.(5)

3. Application of this section to execution sales. — The Act applies as has been seen in the Notes on S. 5, only to transfers by *act of parties*. The section, therefore, does not apply to court sales in execution of decrees.(1) The question, however, arises whether the *principle* of the section can be applied to court sales. It has been held in the undermentioned cases(2) that there is no warranty of title in such sales,

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2. ('57) 1957-2 Mad L Jour 603 (609) (DB).
1952 Kutch 55 (58) [AIR V 39]. (Such a case of estoppel under S. 115, Evidence Act, must be specifically pleaded—In absence of such a plea it cannot be made out by Court of appeal.)
1934 All 193 (196, 197) [AIR V 21] : 56 All 582 (DB).
1934 Oudh 460 (461) [AIR V 21] (DB).

3. 1935 Rang 423 (425) [AIR V 22] (DB).
1919 Mad 50 (51) [AIR V 6] (DB).

4. ('10) 6 Ind Cas 898 (899) (Bom).

5. ('57) 1957-2 Mad L Jour 603 (609) (DB). (Karnavan of Malabar tarwad abandoning his position—Oldest female becoming karnavasthri—Alienation by—Karnavan keeping silent for many years—Estoppel—Case held covered by both S. 115 and S. 41.)
1937 Lah 272 (272) [AIR V 24] (DB).

Section 41 — Note 3

1. ('55) ILR (1955) 1 All 673 (686) : AIR 1955 NUC 1696 (DB).
1952 Nag 64 (64) [AIR V 39].
1946 Oudh 213 (220) [AIR V 33 C 64] (DB).
1944 All 17 (23) [AIR V 31] : ILR (1943) All 892 (DB).
1942 Mad 193 (196) [AIR V 29].
1940 Nag 7 (8) [AIR V 27].
1935 All 234 (235) [AIR V 22] (DB).
1934 Oudh 233 (235) [AIR V 21] (DB). (Auction-purchaser cannot take protection under this section.)
1929 All 800 (801) [AIR V 16] (DB).
1927 Bom 368 (368) [AIR V 14] (DB).
[*See also* 1920 Mad 505 (508) [AIR V 7] : 43 Mad 135 (DB). (Where title is ostensibly in a third person and the real owner acknowledges it as true, persons who seek to prove that the title is illusory will not be allowed to do so. This principle does not apply to execution creditors who are not estopped by consideration affecting the judgment-debtor.)]

2. 1940 All 256 (258) [AIR V 27] : ILR (1940) All 344 (DB).
1935 All 234 (235) [AIR V 22] (DB).

that what the auction-purchaser purchases at a court sale is merely the *right, title and interest* of the judgment-debtor whatever it is, and that the principle of estoppel underlying this section has no applicability to such cases. The contrary view expressed in some cases(3) that the principle of the section would apply is, it is submitted, not correct.

4. Application of section to transfers of movable property.— The section, in terms, applies to transfers of *immovable* property and not to *movable* property. It has been held by the High Court of Madras that the principle underlying the section applies to transfers of movable property such as decrees.(1) In the undermentioned case(2) of the Court of Lower Burma it was held that this section did not apply to the transfer of a decree, the decree being a movable property. No reference was, however, made to the question of applicability to the case of the principle underlying the section. The principle has been applied in England to the transfer of goods.(3)

5. Principle of section applies to States where the Act does not apply.— The section does not apply to cases arising in States to which the Act does not apply. But even in these States the principles underlying the section are applicable.(1)

6. Application of section where section 10A, Dekkhan Agriculturists' Relief Act (XVII of 1879) applied.—It was held in the undermentioned case(1) that where S. 10A of the Dekkhan Agriculturists' Relief Act (XVII of 1879) applied, this section ceased to have any application. Consequently where a suit was instituted within 12 years of a transfer, the transferee was not protected under this section even if he was a *bona fide* transferee for value without notice of the real nature of the transaction.(2)

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†1934 Oudh 233 (235, 236) [AIR V 21] (DB).

3. 1952 Nag 64 (64) [AIR V 39].
1952 Trav-Co 479 (480) [AIR V 39] (DB).
('42) 1942 Nag L Jour 353 (354, 355).
1930 All 521 (521, 522) [AIR V 17] (DB). (Applicability of principle assumed.)
1924 All 63 (64) [AIR V 11] (DB).
1917 Mad 885 (885) [AIR V 4] (DB). (No discussion of the point.)
('12) 16 Ind Cas 811 (815) (DB) (Cal). (Auction-purchaser protected.)
[*See also* 1955 Pat 189 (192) [AIR V 42 C 43]. (Auction sale in execution of decree of property in ijara to several ijardars —Only symbolical possession delivered to purchasers — *Held* that even on equitable view, S. 41 did not apply as it contemplated possession of the vendor.)]

Section 41 — Note 4

1. 1942 Mad 28 (29) [AIR V 29] : ILR (1942) Mad 225 (DB).

2. 1916 Low Bur 27 (28) [AIR V 3] (DB).

3. (1839) 50 R R 347 (353) : 10 A & E 90 Greigg v. Wells.
(1853) 118 E R 616 (618) : 1 E & B 749, Walter v. Drakeford.

Section 41 — Note 5

1. ('62) 64 Punj L R 230 (234). (In other places applicability of its principle still depends on the consideration of justice, equity and good conscience.)
1947 Lah 147 (155) [AIR V 34 C 26] : ILR (1947) Lah 749 (FB). (Principles of this section applies to the Punjab though not the section.)
1947 Lah 199 (210) [AIR V 34 C 39] (DB). (Principles of this section apply in the Province of Delhi.)
1942 Pesh 68 (70) [AIR V 29]. (The Transfer of Property Act does not apply to the N.-W. Frontier Province but the principles underlying its sections are used by the Courts there as principles of equity, justice and good conscience under S. 28, Frontier Law and Justice Regulation.)
1941 Pesh 59 (61) [AIR V 28] (DB).

Section 41 — Note 6

1. † 1921 Bom 426 (427) [A I R V 8] : 45 Bom 87 (DB).

2. Now see the Bombay Agricultural Debtors' Relief Act (28 of 1939), S. 85, sub-section (1) which runs : "On the date on which this Act comes into force, the Dekkhan Agriculturists' Relief Act, 1879, shall be repealed."

7. Conditions for the applicability of the section. — In order that this section may apply—

(1) the transferor must be an *ostensible owner* of the property transferred, with the consent of the persons interested;

(2) the transfer must be for *consideration*; and

(3) the transferee must have acted in *good faith after taking reasonable care* to ascertain that the transferor had power to transfer the same.

If all these conditions exist in any particular case the transferee will be protected.(1) He will not be protected if any one of these conditions is not satisfied.(2)

8. Ostensible owner with the consent of persons interested. — The word "ostensible" means "professed" and the expression "ostensible owner" is used in contradistinction to the expression "*real* owner." An ostensible owner is thus a person who has the *indicia* of ownership but not the real ownership of the property.(1aa) Thus, a *benamidar* is an ostensible owner inasmuch as he has the *indicia* of ownership, such as the title standing in his name, but not the real ownership.(1) But a donor,

Section 41 — Note 7

1. 1947 Lah 147 (150) [AIR V 34 C 26] : I L R (1942) Lah 749 (FB).
1964 Him Pra 19 (26) [AIR V 51].
1962 Punj 46 (47) [AIR V 49 C 12].
('62) 64 Punj L R 230 (234).
1961 Pat 16 (18) [AIR V 48 C 4].
1959 Assam 15 (19) [AIR V 46 C 7] : ILR (1957) 9 Assam 465 (DB).
('57) 1957-1 Mad L Jour 603 (609) (DB).
1957 Orissa 157 (159) [A I R V 44 C 43] : I L R (1957) Cut 585.
1952 Nag 106 (108) [AIR V 39] : ILR (1953) Nag 684.
1949 Assam 17 (18, 19) [A I R V 36 C 12] : I L R (1949) 1 Assam 1 (DB).
('49) 2 Sau L R 203 (205, 206).
1948 Mad 320 (321) [AIR V 35 C 158] (DB).
1947 Bom 49 (52) [AIR V 34 C 14] : I L R (1946) Bom 984.
1947 Mad 287 (296) : [A I R V 34 C 142] : I L R (1947) Mad 574 (DB).
1943 Lah 168 (169) [AIR V 30].
('42) 1942 Nag L Jour 405 (406).
1931 Oudh 419 (421) [AIR V 18] (DB).
('21) 63 Ind Cas 125 (126) (DB) (All).
1921 Cal 549 (551) [AIR V 8] (DB).
1918 Oudh 356 (360) [AIR V 5] (DB). (A person disclaiming his own title cannot subsequently set up his title against the *bona fide* transferee.)
('11) 9 Ind Cas 504 (505) (DB) (Mad).

2. 1965 Mad 432 (435) [A I R V 52 C 154] (DB). (Absence of ostensible ownership by consent — Mere *bona fides* of transferee not enough. S. A. 1389 of 1960, dated 23-3-1953 (Mad), Reversed.)
('65) ILR (1965) 2 Punj 720 (735) (DB). (Transfer without consideration—Section does not apply.)
1956 Assam 154 [156) [AIR V 43 C 44].
('50) 1950 Ker L T 23 (26) (DB). (Consideration and good faith alone not enough.)
1921 Cal 653 (656) [A I R V 8] (DB). (Fictitious release without consideration in favour of mortgagor by some representatives of mortgagee—Mortgagor cannot claim protection extended to innocent person *bona fide* acting upon ostensible title.)

Section 41 — Note 8

1aa. 1955 Pat 189 (192) [AIR V 42 C 43]. (Where all that a person (transferee) got by virtue of the auction sale was only a right to obtain possession and what was delivered to him was merely symbolical possession the property being in ijara to number of ijardars S. 41 has no application.)
1952 Kutch 55 (57) [A I R V 39]. (Such as title, possession or entries in records.)

1. ('72) Ind App Supp. Vol. 40 (43) (PC).
('73) 19 Suth W R 292 (297) (PC).
1957 S C 49 (66, 67) [A I R V 44 C 9] : 1956 S C R 691. (Nature of two classes of Benami transactions explained.)
('57) 1957 Ker L T 997 (999, 1000). (Benami transfer in favour of wife—Heirs of husband are bound by it—Transferee from benamidar wife—No circumstances putting him on enquiry—Held protected by S. 41.)
1957 Orissa 157 (158) [A I R V 44 C 43] : I L R (1957) Cut 585.
('37) 170 Ind Cas 590 (591) (DB) (Cal).
('36) 1936 Mad W N 849 (849).
1930 Nag 273 (278) [AIR V 17] : 26 Nag L R 277 (DB).
('72) 18 Suth W R 151 (152) (DB).
('68) 10 Suth W R 185 (186) (DB).
[*See also* 1957 Andh Pra 557 (559) [A I R V 44 C 189] (DB). (Benamidar represents the real owner.)
1956 Cal 613 (614) [A I R V 43 C 174] : I L R (1957) 3 Cal 383 (DB). (Benamidar cepresents the real owner.)
('51) 1951 All L Jour 449 (449) (DB). (A sale-deed may be taken in the names of two persons, one of whom is a benamidar.]
1941 Cal 318 (319) [AIR V 28]. (Husband purchased property with his money benami in the name of his wife—Wife held ostensible owner-

who has no power of revocation, ceases to have any interest or right in the property on his divesting himself of his title in favour of the donee. In such a case there is no question of the donor continuing after the gift to be an ostensible owner within the meaning of this section even where he retains the custody of the gift deed.(1a) Similarly after the creation of a wakf, the heirs of the creator cannot transfer the property as the property does not belong to them and the transferee cannot claim protection under this section.(1b) Where a revenue sale in favour of the Government did not pass any title to the Government, being void, it was held by the Supreme Court that a subsequent sale by the Government was of no effect and the transferee could not invoke the rule of estoppel contained in this section.(1c)

The words "where with the consent express or implied of the persons interested in immovable property, a person is the ostensible owner of such property" mean "where the persons interested in immovable property *hold out* or *represent* another as the *owner* of such property."

It is such *representation* that brings into operation the equitable doctrine of estoppel on which the section is based.(2) Consequently, the section will not apply unless the ostensible *ownership* of a person is *consented* to by the persons interested in the property.(3) The question whether a person consented to the ostensible ownership of another, is a question of fact to be determined upon the particular facts of each case.(4)

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with the consent of the real owner, husband.) 1929 Sind 195 (197) [AIR V 16] (DB). (Benamidar has at least all the authority of an agent of the real owner.)

('89) 16 Cal 137 (144).]

1a. 1947 Mad 127 (129) [AIR V 34 C 66].

1b. 1950 All 109 (116) [AIR V 37 C 45] : I L R (1950) All 1001 (DB).

1c. 1963 S C 827 (835) [AIR V 50 C 126] : 1963 Supp 1 S C R 322.

2. 1925 Cal 1034 (1035) [A I R V 12] (DB). (A person holding land for his services is not the ostensible owner.)

[*See also* 1963 S C 827 (835) [A I R V 50 C 126]: 1963 Supp 1 S C R 322. (Revenue sale—Purchase by Government — Sale void and not passing any title to Government—Subsequent sale for consideration by Government in favour of third party — Vendee from Government cannot invoke S. 41 as against the real owner who had made no representation.)

1966 Madh Pra 307 (311) [A I R V 53 C 77]. (A and B settling up their mutual claims to certain properties—A taking up all houses while B accepting movable property including ornaments—Sale of a house by A to C—B is precluded by her conduct from challenging it —Sections 53A and 41 compared.)

1952 Nag 64 (66) [AIR V 39]. (No representation on part of real owner—The mere fact that purchaser comes to know of the owner's conduct after purchase by him is of no consequence.)

1952 Orissa 75 (80) [A I R V 39] (DB). (There must be something more than a mere inaction on the part of real owner such as words or conduct which induces belief in transferee that transferor was competent to transfer.)]

3. 1965 Mad 432 (435) [AIR V 52 C 154] (DB). (Good faith and *bona fides* of transferee not enough if real owner is not standing by acquiescing in ostensible owner holding out the title.)

1956 Assam 154 (156) [AIR V 43 C 44].

1951 Kutch 85 (86, 87) [AIR V 38 C 57]. (Person exercising acts of ownership over property not to the knowledge of real owner—Not an ostensible owner.)

('49) 1949 All L Jour 566 (582) (DB). (A mortgage created by a person who had no right to the property cannot bind the true owner unless S. 41, applied.)

1949 Assam 17 (20) [AIR V 36 C 12] : ILR (1949) 1 Assam 1 (DB).

1942 Mad 193 (196) [AIR V 29].

1939 Mad 299 (299) [AIR V 26]. (The entry in survey register does not amount to ostensibility.)

†1938 All 242 (250) [AIR V 25] (DB).

1930 Lah 286 (288) [A I R V 17]. (Widows of sons of mortgagee having no title to property accepting amount of debt and allowing redemption — No consent by real heirs — S. 41 does not protect mortgagor.)

1918 Oudh 214 (216) [AIR V 5]. (Transferee from trespasser cannot benefit from mere silence of real owner and avail of trespasser's possession.)

4. 1949 Assam 17 (18, 19) [AIR V 36 C 12]: ILR (1949) 1 Assam 1 (DB). (Held on evidence that transferors were ostensible owners with implied consent of the true owners.)

1927 Cal 220 (224) [A I R V 14] (DB). (Transferee's refraining from getting his name recorded by filing a suit does not show acquiescence in allowing the transferor as owner.)

Where the person interested is *incapable* of giving consent, such as a minor(5) or a religious endowment,(6) there cannot be an ostensible ownership with the *consent* of such person and the section will have no application. Where again, the person interested has *denied* that the so-called ostensible owner has any interest in the property, it cannot be said that the former *consented* to the ostensible ownership of the latter.(7)

Where the person interested merely allows another to be in possession as *manager*(8) or as *licensee*,(9) or as an agent(9a) it cannot be said that he represents such other as the *owner* or in the words of the section, that he *consents* to the ostensible

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[*See also* 1930 All 417 (418) [AIR V 17]. (Consent was not inferred on the facts.)]

5. 1931 P C 118 (120, 121) [AIR V 18] : 53 All 290 : 58 Ind App 206.
1952 Nag 106 (111) [AIR V 39]: ILR(1953)Nag 684.
1952 Punj 289 (290) [AIR V 3+]. (An idol is in a perpetual state of tutelage and minority.)
1951 Nag 403 (406)]AIR V 38 C 123]: ILR (1950) Nag 25.
1947 Lah 199 (210) [AIR V 34 C 39] (DB).
1947 Sind 179 (181) [AIR V 34 C 63] : ILR (1947) Kar 161 (DB).
('46) 1946 Marwar L R 48 (Civ) (49).
1943 All 197 (200) [AIR V 30] (DB).
1943 Mad 459 (461) [AIR V 30].
1942 Pesh 68 (70) [AIR V 29]. (But in this case, the transaction was found to be for minor's benefit and it was held that the alienee was entitled to relief "on the lines of S. 41," T. P. Act as a matter of justice, equity and good conscience.)
†1936 Lah 161 (164) [A I R V 23] (DB). (Father even in a joint Hindu family, cannot give such consent on behalf of the minor.)
1934 Rang 90 (91) [AIR V 21] : 12 Rang 35 (DB).
1918 Oudh 214 (216) [AIR V 5].
('12) 34 All 22 (24) (DB).
('02) 26 Bom 433 (436) (DB).
[*See also* ('57) 1957 Ker L T 997 (999, 1000). (Benami transfer in favour of wife — Heirs of husband though minors are bound by the transfer — Transferee from wife held protected by S. 41 — AIR 1943 Mad 459, distinguished.)]

6. 1961 All 206 (214) [AIR V 48 C 55] (DB). (Mortgage of endowed property by shebait — Deity, not a sentient to allow or not to allow shebait to act as ostensible owner — Suit by deity to set aside mortgage and for possession, held not barred by S. 41.)
1951 Pepsu 101 (105) [AIR V 38 C 41] (DB).
1950 All 109 (116) [AIR V 37 C 45] : ILR (1950) All 1001 (DB). (Even *bona fide* purchaser of wakf property cannot seek protection under S. 41 against God.)
1948 Oudh 247 (253) [A I R V 35 C 88] (DB). (Mahant in possession of endowed property is not ostensible owner.)
1944 All 1 (3) [AIR V 31] : ILR (1944) All 20 (DB). (If the property vested in an idol, no estoppel could operate against the idol unless perhaps it was guilty through its recognised agent of some deception or laches and thereby induced a purchaser to believe in the ownership of a stranger. It would be impossible to hold that the human representative of the idol could defeat the claims of the idol merely by setting himself up as the owner of the property.)
†('23) 73 Ind Cas 711 (716) (Pesh).
[*See also* 1950 All 109 (116) [A I R V 37 C 45] : ILR (1950) All 1001 (DB). (Wakf property — Transfer by heirs of creator — Transferee cannot claim protection under S. 41.)]
[But see ('42) 1942 Nag L Jour 405 (408). (Privileges accorded to human minors cannot be extended to idols as they act through their managers.)
1937 Sind 177 (179) [A I R V 24] : 31 Sind L R 197 (DB). (The necessity for consent of the person interested was not adverted to — Submitted that the decision is not correct.)]

7. 1915 P C 103 (105) [AIR V 2] (Do.) 1939 Lah 135 (137) [AIR V 26] (DB). (Real owner objected to the mutation of the transferor's name — Delay in suing does not amount to consent.)
1931 Oudh 253 (255) [AIR V 18] (DB).
1932 Nag 165 (168) [AIR V 19] : 28 Nag L R 227. (Objection during mutation proceedings.)
1930 Oudh 184 (191) [AIR V 17] (DB).
[*See also* 1936 Nag 214 (216) [AIR V 23] : I L R (1936) Nag 177.]

8. 1965 S C 295 (299) [AIR V 52 C 53]: (1964) 6 S C R 192. (Transfer from co-sharer put in management of common property.)
1952 Nag 106 (111) [AIR V 39] : ILR (1953) Nag 684.
1931 Cal 144 (149) [AIR V 18] (DB).
1922 All 392 (393) [AIR V 9] : 44 All 674 (DB).
1914 All 232 (234) [AIR V 1] : 36 All 308 (DB).
[*See* ('13) 40 Cal 378 (385) (PC). (Purdanashin woman in Muhammadan family having interest in property left in management of other male members of family — Mortgage by male members — Mortgagee taking mortgage under mistaken belief that Hindu law of inheritance prevailed in the family — *Held*, as there was no evidence that the lady misrepresented to the mortgagee, the mortgage was not binding on her.)
1943 Bom 419 (422) [A I R V 30]. (Property shown in register in name of one of the brothers as eldest brother.)]

9. 1925 Cal 1034 (1035) [A I R V 12] (DB). (Owner permitting another to occupy land for menial services rendered — Section does not apply.)

9a. 1952 Nag 106 (111) [AIR V 39] : ILR (1953) Nag 684.

ownership of the other. Under the Hindu law, the fact that property stands in the name of a coparcener of a joint Hindu family does not necessarily show that he is the separate owner of it. Consequently, the fact that the name of a coparcener is used in acquiring the property cannot be taken to mean that the other coparceners hold out the purchasing coparcener as the ostensible owner of the property.(10) Similarly mere possession of a co-owner cannot amount to the flaunting of an ostensible title against another.(10a)

The fact that the property is purchased in the name of the wife and stands in her name, cannot be taken to mean that she is the real owner of the property. The reason is that in India, where the doctrine of advancement is not recognised, property is generally purchased benami in the name of wife.(10b)

Where a Hindu widow is in possession of her husband's property, or a mortgagor is in possession of the mortgaged property, it cannot be said that the reversioner in the one case, and the mortgagee in the other consented to the ostensible ownership of the widow and the mortgagor respectively, *firstly*, because, the widow and the mortgagor are the real owners of the property and not *ostensible* owners at all, and *secondly*, they are such owners in their own right and not with the *consent* of the reversioners or the mortgagee.(11) See also the undermentioned case.(11a) A contrary view has been taken in the undermentioned cases,(12) namely, that a mortgagee may be estopped under this section from asserting his rights against an alienee from the mortgagor. It is submitted that this view is, for the reasons above stated, not correct.

This section will not also apply to a case where the karnavan of a marumakkathayam tarwad or illom alienates tarwad or illom property standing in his name as he is not the ostensible owner of the property standing in his name but one of the real owners, and the property stands in his name not because of or with the consent of the real owners but because of the law that property belonging in the tarwad or illom shall ordinarily vest in the karnavan.(12a)

Where the conditions of this section are satisfied the transferee will be entitled to the protection of this section and the mere fact that the real owner is a pardanashin lady, will not preclude the transferee from claiming such protection.(13)

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10. 1937 Pat 353 (355) [AIR V 24].
1928 Mad 635 (636) [AIR V 15] (DB).
[*See also* 1920 Pat 1 (19) [A I R V 7] : 5 Pat L Jour 521 (SB). (Name of coparcener entered in revenue papers—Not sufficient to show that he held as ostensible owner.)]

10a. 1960 Mad 399 (400) [AIR V 47 C 142] (DB).
1950 Kutch 34 (35) [AIR V 37 C 27]. (Ostensible ownership of co-sharer in joint family house cannot be inferred from long occupation and sole enjoyment in absence of written record.)

10b. ('52) 54 Punj L R 193 (197) (DB).

11. 1961 Cal 300 (305) [AIR V 48 C 65] (DB). (Purchase from mortgagor.)
1943 Lah 168 (170) [AIR V 30]. (Transfer by a limited owner like a widow under Hindu law or customary law—Section does not apply.)
1941 Pesh 59 (61) [AIR V 28] (DB). (Mortgagor—AIR 1936 Lah 405 dissented from.)
1934 Oudh 283 (285) [A I R V 21] (DB). (Mortgagor.)
† 1931 Nag 144 (145) [A I R V 18] : 27 Nag L R 144. (Do.)
1925 All 79 (84) [AIR V 12] : 46 All 637 (DB).
[*See also* 1925 Bom 343 (343) [AIR V 12] (DB). (The case of a holder of property which is made subject to a charge by a decree is also the same as that of a mortgagor and a purchaser of such property cannot claim protection under this section against the holder of the charge.)]

11a. 1922 Mad 290 (291) [A I R V 9] (DB). (Holders of *adimayavana* and *karamkari* tenures transferring them to defendants—No question of ostensible ownership—S. 41 not applicable.)

12. 1940 Lah 269 (272) [AIR V 27]. (Principle of S. 41 applies to mortgagees.)
1936 Lah 405 (405) [AIR V 23] (DB). (Mortgagee in the Punjab not getting his mortgage recorded in revenue records.)
1929 Rang 117 (120) [A I R V 16] : 7 Rang 118 (DB). (Mortgage-deed — Failure to give proper index of property—Item not disclosed in search—Subsequent transferee gets better title.)

12a. 1959 Ker 325 (326) [AIR V 45 C 115] (DB).

13. 1944 All 42 (59) [AIR V 31] (DB). (Decree for possession in favour of real owner on condi-

The section should not be construed so as to conflict with S. 47, Registration Act. Thus where a deed of transfer is executed earlier but registered later, it prevails over a later deed of transfer and the subsequent transferee cannot claim protection under this section.(14)

9. "Persons interested." — The real owner will of course be a person interested in the property of which another is the ostensible owner. It has been assumed in some cases that where the real owner is a Hindu widow with a limited interest, *the reversioners* are also persons interested in the property. Where, therefore, the ostensible ownership is in third person with the consent of the Hindu widow but not with the consent of the reversioners, an alienee from such ostensible owner cannot claim protection under this section as against the claims of the reversioners.(1) In the undermentioned case(2) a Hindu widow in possession of her husband's property in lieu of maintenance got her cousin's name entered in the revenue papers, and the cousin transferred the property to a third person. It was held that the transfer was not binding on the reversioners, on the ground that they did not claim through the widow who alone, as a person interested, would be estoppel under S. 41. In a later case(3) it has been held by the Allahabad High Court that a reversioner is not a person "interested in" the property in the possession of a Hindu widow, but has only a *spes successionis* and that a transfer by a third person as ostensible owner with the consent of the widow is not binding on the reversioner. It has now been held by the Supreme Court that in the case of a transfer by a person who has been allowed by the owner of a limited estate to occupy the position of an ostensible owner the rule of this section protects the transferee only during the lifetime of such limited owner and not against the claim of the reversioners.(3a)

A *trustee* in whom property is vested in trust for a public institution, is a "person interested" in the property and if, with his consent, another person is the ostensible owner, a transferee from the latter will be protected if the other requirements of the section are satisfied.(4)

The *guardian* of a minor owner cannot be said to be a person interested in the property so as to enable him to consent to the ostensible ownership of the property by a third person. A transferee from such owner cannot, as against the minor, claim protection under this section.(5)

10. Express or implied consent.—The consent referred to in the section may, as the section itself states, be either express or implied. Where the person interested has expressly declared that he has no interest in the property, or that another person is the real owner, the consent to the ostensible ownership of another is *express*. Thus, where a mother having an interest in property allowed her son to

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tion of her paying a certain sum—Decree set aside.)

14. 1914 All 313 (314) [AIR V 1].

Section 41 — Note 9

1 1943 Sind 212 (213) [AIR V 30] : ILR (1940) Kar 403 (DB).
1933 All 493 (494) [AIR V 20] : 55 All 554 (DB).
1917 Bom 15 (16) [AIR V 4] (DB). (Quaere.)

2. 1930 All 374 (375) [AIR V 17] (DB).
[See however 1967 All 370 (373) [A I R V 54 C 110] : 1966 All L J 1010 (DB). (Decree against Hindu widow on ground of estoppel under S. 41—Held on facts that the decree was binding on reversioners as widow had represented the estate.)]

3.† 1942 All 175 (181) [A I R V 29] : ILR (1942) All 259 (DB).

3a. 1952 S C 207 (213) [AIR V 39] : 1952 S C R 793 : ILR (1953) 2 All 195.

4. 1935 Lah 410 (411) [AIR V 22].

5. 1952 Nag 106 (111) [A I R V 39] : ILR (1953) Nag 684.

† ('07) 29 All 292 (294) (DB). (It would be opening a wide door to fraud.)

mortgage it as his exclusive property, attested the mortgage deed and stated therein that she had no interest in the property, it was held that the son was the ostensible owner with the express consent of the mother.(1) Similarly, where the real owner gets the property mutated in the revenue papers in the name of another making statements before the mutation officer disclaiming his own interest in the property, he expressly consents to the ostensible ownership of the other person.(2)

A consent may be implied from the *conduct* of the person interested in the property,(2a) whether such conduct is previous to the transfer or subsequent to it.(2b) Where the person interested allows the name of another to be recorded in the *khewat* as owner and himself manages the property on such other's behalf, he will be deemed to have impliedly consented to the ostensible ownership of the other.(3)

Mere *silence* or inaction is not consent.(4) Thus, silence or inactivity at a time when the person interested was not even conscious of his own rights will not debar him from urging his own claim against a transferee even if he be a transferee for consideration.(4a) Where a co-owner leaves a place and his brother, who is entitled as a co-sharer to look after the property is in possession, it cannot be said that mere inaction on the part of the owner amounts to his consent, particularly when there is no evidence that he had any knowledge of the fact that his brother was treating the property as his own and he acquiesced in it.(4b) There must be something more than mere inaction,

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Section 41 — Note 10

1. † ('3) 20 Ind Cas 291 (293) (DB) (Lah).

2. †1931 Nag 194 (196) [AIR V 18] : 27 Nag L R 283. (Though a bequest by the widow of property inherited from her husband is invalid, yet where the next reversioners consented not only to the will but to the getting of the legatee's name entered in the record of rights the legatee became an ostensible owner with the consent of the reversioners' daughters.)

1926 Oudh 131 (132) [AIR V 13]. (Attesting the document is express consent.)

2a. ('63) 1963 Gur L Jour 425 (429) (Punj). (Such consent may be by words or conduct.)

1959 Assam 15 (19) [AIR V 46 C 7] : ILR (1957) 9 Assam 465 (DB).

1956 Madh Bha 16 (16) [AIR V 43 C 3].

('50) 1950 Bur L R (H C) 163 (175). (Sale by one of two joint and several executors of will—Implied consent inferable from conduct of other executor at the time of sale—Other executor cannot challenge sale on the ground that the executor making sale could not do so by himself.)

1949 Assam 17 (18, 19) [A I R V 36 C 12] : I L R (1949) 1 Assam 1 (DB).

1947 Lah 147 (156) [A I R V 34 C 26] : I L R (1947) Lah 749 (FB).

2b. 1952 Kutch 55 (58) [AIR V 39].

3. 1935 Oudh 437 (440) [AIR V 22] : 11 Luck 376 (DB).

4. ('63) 1963 Cur L Jour 425 (429) (Punj).

1962 Punj 46 (47, 48) [A I R V 49 C 12]. (In order to create ostensible ownership the real owner must, in some manner, be privy to it.)

1959 Punj 123 (128) [A I R V 46 C 44] : ILR (1958) Punj 2258 (DB).

1952 Orissa 75 (80) [AIR V 39] (DB).

1948 Mad 320 (322) [A I R V 35 C 158] (DB). (The expression "with the consent express or implied" in the context of the section, import that the real owner is in some manner privy to the creation of the ostensible ownership. When the real owner has done nothing by way of holding out another person as the owner it cannot be said that by his mere inaction and silence he impliedly consented to such person holding the property as "ostensible owner.")

1944 Nag 20 (22) [AIR V 31]: ILR (1943) Nag 726. (Unless it was such as to induce a belief that he had no rights.)

1925 Cal 993 (995) [AIR V 12]. (Unless there is a duty to speak.)

1920 Oudh 44 (50) [AIR V 7]. (Absence of interference by the real owner in dealings with the property is no consent.)

1918 Oudh 214 (216, 217) [AIR V 5].

4a. 1947 Lah 147 (156) [AIR V 34 C 26] : I L R (1947) Lah 749 (FB). (For example, when a minor who had attained majority had no knowledge of a will in his favour giving him rights in the property, it cannot in law be said that he had in any way consented to another person representing himself as the owner of that property which really vested in him.)

('63) 1963 Cur L Jour 425 (429) (Punj)

1951 Kutch 85 (85) [A I R V 38 C 57]. (Acts of ownership not exercised by a person to the knowledge of real owner — Such person cannot be said to be an ostensible owner with the consent of the real owner.)

4b. 1959 Assam 15 (19) [AIR V 46 C 7] : I L R (1957) 9 Assam 465 (DB).

such as words or conduct on the part of the real owner which induced the transferee to believe that the transferor was competent to make the transfer.(4c) But silence under circumstances which would induce a belief in others that another man is the owner of the property will amount to an implied consent to such ostensible ownership.(5) It would, therefore, always be a question to be determined in the circumstances of each case as to whether or not the inactivity on the part of the person interested attracts the rule of estoppel in this section.(5a)

Illustrations.

(1) *B*, a Muhammadan lady, after the death of her husband, got her name recorded as the sole owner of the property; she dealt with it as owner by selling and mortgaging certain items of the property and by recovering rent from the tenants. *A* who was entitled to a share in the property did not do any act to assert his right to the share. It was held that *A* impliedly consented to *B* representing herself as the sole owner of the property.(6)

(2) After the death of *A*, his heir got the property recorded in his name, took possession of the property and enjoyed rents and profits thereof, amounting to Rs. 200 a year. *B* to whom the property had been bequeathed by *A* and who was aware of it was silent for four years. It was held that the heir was the ostensible owner with the implied consent of *B*.(7)

(3) A Muhammadan husband orally transferred his property to his wife in lieu of her dower debt, but the lady did not take steps to obtain possession or to have mutation in her name. It was held that the husband was an ostensible owner with the implied consent of the wife.(8)

(4) Two Muhammadan sisters and their brother inherited the property of a deceased person. The sisters, however, allowed their brother to take possession, and manage the whole of the property. The sisters were not ignorant of the state of the family and of such claims as they might have to a share in the succession. It was held that the brother was the ostensible owner of the property with the implied consent of the sisters.(9)

(5) After the death of a Hindu widow the reversioners allowed *R*, who styled himself as the adopted son of the deceased husband of the widow, to continue in possession and deal with the property as owner. It was held that *R* was an ostensible owner of the property with the consent of the reversioners.(10)

(6) A *de facto* guardian of a Muhammadan minor, *A*, sold the equity of redemption to the mortgagee. The mortgagee thereafter dealt with the property as full owner. *A*, after attaining majority, never questioned the transfer of the equity of redemption. It was held that the mortgagee was the ostensible owner of the property with the consent of *A* after he had attained majority.(11)

See also the undermentioned cases.(12)

1950 Kutch 34 (35) [AIR V 37 C 27]. (Held that the mere fact of allowing the co-sharer to be in exclusive possession of the family house or the acquisition of separate residence cannot lead to the inference of consent of ostensible ownership left in sole enjoyment.)

4c 1962 Pat 140 (148) [A I R V 49 C 33] (DB). (Silence must be such as would induce belief in transferee that real owner had no right.)

1959 Punj 123 (128) [AIR V 46] : I L R (1958) Punj 2258 (DB).

1956 Madh B 16 (16) [A I R V 43 C 3]. (Mere attestation does not create estoppel but when it is established that at the time of attestation the attestor has full comprehension of the transaction, it is different.)

5. 1947 Lah 147 (156) [AIR V 34 C 26] : I L R (1947) Lah 749 (FB). (To infer consent from silence or inaction it must be proved that the person giving the consent was aware of his rights, title or interest in the property.)

('62) 64 Punj L R 230 (234).

1925 Cal 993 (995) [AIR V 12].

5a. ('62) 64 Punj L R 230 (234).

6. ('21) 63 Ind Cas 125 (126) (DB) (All).

7. 1938 Bom 125 (131) [AIR V 25] (DB).

8. 1925 Bom 299 (300) [AIR V 12] (DB).

9. 1928 P C 202 (208) [AIR V 15] : 3 Luck 372 : 55 Ind App 303.

[*See also* 1952 Kutch 55 (58) [AIR V 39].]

10. 1925 All 79 (84) [AIR V 12] : 46 All 637 (DB).

11. 1927 All 807 (809) [AIR V 14].

12. 1957 Cal 551 (555) [AIR V 44 C 146]. (Sale of second hand car by owner — Registration of

11. Consent need not be to the transfer by the ostensible owner.—The words "with the consent express or implied of the persons interested in immovable property" have reference to the *ostensible ownership* and not to the *transfer* by such owner.(1) The observations to the contrary effect made in the undermentioned cases(2) are not correct. As pointed out by Niamatullah, J., in *Fazl Hussain* v. *Muhammad Kazim* : (3)

> "Section 41 enacts a rule which is a species of estoppel but falling short of the requirements of S. 115, Indian Evidence Act. If it is proved that the transfer was made with the consent of the rightful owner, the case would fall within the purview of S. 115, Indian Evidence Act, and the other conditions of S. 41 need not be satisfied. Such consent will estop the owner, even though the transferee made no enquiries as to ascertain that the transferor had power to make the transfer a condition which is essential for the application of S. 41."

12. Consent under coercion, fraud, misrepresentation and mistake.—It is conceived that the word "consent" referred to in the section should be a "free consent" as defined in S. 14 of the Contract Act, 1872. A consent caused by coercion, undue influence, fraud or misrepresentation is not a free consent under that section, and will not be a sufficient consent within the meaning of this section.

A consent under a mistake of law or even under a mistake of fact where the other party to the contract is not also under the same mistake, cannot be said to be

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transfer as required by law not effected — Insurance certificate and registration book made over to seller — Sale of car again by seller to third person — Prior purchaser is estopped by negligence or by holding out the ostensible authority of the seller as against the subsequent transferee from denying that the seller was the true owner.)

1954 All 595 (598) [AIR V 41 C 233].

1944 Mad 299 (300) [A I R V 31]. (*A* who was a Government servant sent money to his brother *B* and allowed him to purchase property in his own name and deal with it as his own — Held, *B* was an ostensible owner with the consent of *A*.)

1943 Oudh 398 (401) [AIR V 30] : 19 Luck 216. (One co-sharer though recognised as owner at first settlement was never in possession of his share and allowed other co-sharers to be in possession for a period of 40 years and without objecting to transfer effected by them — Held, the other co-sharers were ostensible owners by his conduct and acquiescence.)

1937 Pesh 58 (60) [A I R V 24] (DB). (House orally gifted to daughter-in-law in lieu of dower — Title deed in possession of her husband — Husband mortgaging it and house attached by mortgagee—Daughter-in-law held to have impliedly consented to her husband holding himself out as ostensible owner.)

1936 Oudh 87 (90) [A I R V 23] (DB). (Muhammadan widow allowing mutation in name of sons, and possession to remain with them — Held, sons were ostensible owners with consent of widow.)

1929 Rang 333 (335) [A I R V 16] : 7 Rang 576. (Where *K*, lessee of Government land, transferred the lease to *N* by registered deed but where *N* did not apply to get his name entered in the rolls as transferee, and did not also take steps to obtain possession of the land and further allowed the document of lease to remain in possession of *K*, *N* acts negligently and his consent to *K's* possession as ostensible owner must be implied from his acquiescence and failure to take reasonable precautions.)

(1910) 8 Ind Cas 606 (607) (Bur). (Piece of Government land in possession of wife many years before marriage—After marriage wife obtaining lease of land from Government — House built on such land — Subsequently wife mortgaging house without consent of husband — Held that husband must be held to have acquiesced in mortgage but not consented to the power of sale.)

Section 41 — Note 11

1. 1958 Pat 537 (540) [AIR V 45 C 172].
1957 Orissa 157 (159) [A I R V 44 C 43] : I L R (1957) Cut 585.
1948 Mad 320 (321) [AIR V 35 C 158] (DB).
1944 Mad 299 (301) [AIR V 31]. (Following AIR 1934 All 193.)
1943 Mad 459 (463) [AIR V 30].
1937 Pesh 58 (60) [AIR V 24] (DB).
† 1936 Lah 816 (818) [A I R V 23]. (The words "with the consent express or implied" in S. 41 do not govern the word "transfer," but have reference to the real owner allowing the transferor to hold himself out as an ostensible owner of the property.)
1934 All 193 (196, 197) [A I R V 21] : 56 All 582 (DB). (AIR 1929 All 943, Dissented from.)

2. 1933 Lah 258 (259) [AIR V 20].
1915 Mad 614 (617) [AIR V 2] (DB).
[*See also* ('23) 73 Ind Cas 711 (716) (Pesh).]

3. 1934 All 193 (196, 197) [A I R V 21] : 56 All 582 (DB).
[*See also* 1958 Pat 537 (540) [A I R V 45 C 172] (AIR 1934 All 193, Rel. on.)

not a free consent under the Contract Act.(1) Under this section there is no question as to the ostensible owner or the transferee from him being under the same mistake as the real owner may be under. Consequently, a consent by the person interested to the ostensible ownership of another is a valid consent notwithstanding such consent is given under a mistake of law or of fact. There has, however, been a difference of opinion on the point. In the undermentioned case(2) it was held by the Allahabad High Court that the consent referred to in the section is an *intelligent* consent, that a consent given by a person *under a mistake as to his legal rights* is not an intelligent consent and consequently the transferee from the ostensible owner is not protected under this section. The Judicial Commissioner's Court of Oudh assumed as correct, the test that the consent must be an intelligent one, but held that a consent is not rendered unintelligent by reason of the fact that it was given under a mistake.(3) The view that "consent" for the purposes of this section includes a consent given under a mistake has been taken in the undermentioned cases also(4) but the view has been rested not on the view that such a consent can be said to be not intelligent, but on the broad principle of the law of estoppel stated by their Lordships of the Privy Council in *Sarat Chunder Dey* v. *Gopal Chunder Laha*(5) in the following words :

> "The law of this country gives no countenance to the doctrine that in order to create estoppel the person whose acts or declarations induced another to act in a particular way must have been under no mistake himself, or must have acted with an intention to mislead or deceive. What the law and the Indian statute mainly regard is the position of the person who was induced to act; and the principle on which the law and the statute rest is, that it would be most inequitable and unjust to him that if another by a representation made, or by conduct amounting to a representation, has induced him to act as he would not otherwise have done, the person who made the representation should be allowed to deny or repudiate the effect of his former statement, to the loss and injury of the person who acted on it. If the person who made the statement did so without full knowledge, or under error, *sibi imputet*. It may in the result be unfortunate for him, but it would be unjust, even though he acted under error, to throw the consequences on the person who believed his statement and acted on it as it was intended he should do."

13. Attestation by person interested, if consent.—The attestation by a person of a document proves no more than that the signature of an executing party has been attached to a document in the presence of a witness. It does not involve the witness in any knowledge of the contents of the deed nor affect him with notice of its provisions.(1) In *Pandurang Krishnaji* v. *Markandeya Tukaram*(2) Lord Buckmaster observed :

> "They (i.e., their Lordships) think it is desirable to emphasize once more that attestation of a deed by itself estops a man from denying nothing whatever excepting that he has witnessed the execution of the deed. It conveys, neither directly nor by implication any knowledge of the contents of the document, and it ought not to be put forward alone for the purpose of establishing that a man consented to the transaction which the document effects. It is, of course, possible, as was pointed out by their Lord-hips in the case of *Banga Chandra Dhur Biswas* v. *Jagat Kishore Acharjya Chowdhuri*(3) that an attestation may take place in circumstances

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Section 41 — Note 12

1. See Sections 14, 20 and 21 of the Contract Act, 1872.
2. '06 3 All L Jour 534 (536).
3. 1919 Oudh 398 (400, 401) [AIR V 6] : 22 Oudh Cas 243 (DB).
4. 1938 Lah 86 (87) [AIR V 25] : ILR (1937) Lah 783 (DB).
1922 Nag 79 (80) [AIR V 9] : 18 Nag L R 27.
5. ✝ ('93) 20 Cal 296 (310 311): 19 Ind App 203 (PC).

Section 41 — Note 13

1. 1916 P C 110 (112, 113) [AIR V 3] : 44 Cal 186 : 43 Ind App 249.
('49) 2 Sau L R 203 (206).
1948 Nag 110 (117) [AIR V 35 C 40] : ILR (1947) Nag 510 (DB).
1944 All 42 (55) [AIR V 31] (DB).
Also see S. 3, Note 31 and S. 59, Note 9.
2. ✝1922 P C 20 (22) [AIR V 9] : 49 Cal 334 : 49 Ind App 16 : 18 Nag L R 1.
3. 1916 P C 110 (113) [AIR V 3] : 44 Cal 186 : 43 Ind App 249.

which would show that the witness did in fact know of the contents of the document, but no such knowledge ought to be inferred from the mere fact of attestation."

While therefore the mere fact of attestation does not import knowledge or consent on the part of the attestor, an attestation coupled with other circumstances may amount to proof of knowledge or consent.(4)

14. Motive of consent immaterial.—The observations of their Lordships of the Privy Council in *Sarat Chunder* v. *Gopal Chunder*,(1) referred to in Note 12, make it clear that in order to create an estoppel, it is not necessary that the person sought to be estopped must have acted with an *intention to mislead or deceive.* As has already been seen, this section also is based on the doctrine of estoppel, and the observations of their Lordships in *Sarat Chunder's case* would equally apply to cases under this section also.(2) It is, therefore, not necessary that the consent of the real owner to the ostensible ownership of the transferor should be with an intention to deceive the transferee in particular or anybody in general.(3) The estoppel against the real owner arises not because he had an intention to deceive the transferee, but because he by his conduct, however innocent it may be, allowed it to be possible for the transferor to hold himself out as a real owner of the property. Whenever one of two innocent persons must suffer by the act of a third, he who has enabled such third person to occasion the loss must suffer it.(4)

15. Consent must continue up to time of transfer. — A transferee cannot claim the benefit of the section by proving merely that his transferor was an ostensible owner at some date in the past.(1a) The consent of the person interested to the ostensible ownership of another must continue up to the time of the transfer.(1) If the consent is withdrawn before the date of the transfer, as by filing a suit for the recovery of the property, the transferee cannot get protection under this section.(2)

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4. 1928 P C 20 (20) [AIR V 15].
1956 Madh Bha 16 (17) [AIR V 43 C 3].
1948 Nag 110 (117) [AIR V 35 C 40] : ILR (1947) Nag 510 (DB).
1944 All 42 (55) [AIR V 31] (DB).
1940 Rang 126 (128) [AIR V 27] : 1940 Rang L R 180 (DB). (Property belonging to Burmese Buddhist husband and wife — Mortgage by husband — Wife signing deed after it is read and explained to her — *Held*, wife is estopped by her consent from denying husband's authority to mortgage her interest.)
† 1926 Oudh 131 (132) [AIR V 13].
[See however 1918 Lah 309 (310) [AIR V 5] (DB). (In so far as this decision seems to hold that mere attestation of real owner to transfer deed by ostensible owner is sufficient to create an estoppel, it is not good law.)]

Section 41 — Note 14

1. ✠ ('93) 20 Cal 296 (310, 311) : 19 Ind App 203 (PC). (Reversing 16 Cal 148.)
2. † 1938 Lah 86 (87) [AIR V 25] : ILR (1937) Lah 783 (DB). (AIR 1919 Oudh 398, Relied on.)
1922 Nag 79 (80) [AIR V 9] : 18 Nag L R 27.
3 1938 Lah 86 (87) [AIR 25] : ILR (1937) Lah 783 (DB).
1919 Oudh 398 (401) [AIR V 6] : 22 Oudh Cas 243 (DB).
[But see 1918 Oudh 214 (217) [AIR V 5]. (Observations tending to show that the consent must be with the intention to deceive others are not correct.)]
4. ('65) ILR (1965) 2 Punj 720 (735) (DB).
1919 Mad 247 (249) [AIR V 6] (DB).
† ('12) 16 Ind Cas 811 (815) (DB) (Cal).
(1902) 1902 App Cas 325 (333) : 71 L J K B 667, Farquharson Bros. & Co. v. King.
[*See also* 1923 Cal 240 (247) [AIR V 10] (DB).]

Section 41 — Note 15

1a. 1952 Nag 106 (111) [AIR V 39] : ILR (1953) Nag 684.
1. 1952 Kutch 55 (57, 58) [AIR V 39]. (Date of alienation is the material date for considering whether transferor was an ostensible owner.)
1952 Nag 106 (111) [AIR V 39] : ILR (1953) Nag. 684.
('49) 28 Pat 542 (551) (DB).
† 1934 All 193 (197) [AIR V 21] : 56 All 582 (DB). (AIR 1929 All 943, Explained.)
✠ [See however 1944 Mad 299 (391) [AIR V 31]. (The mere fact that the real owner had, prior to the transfer, unsuccessfully attempted to assert his exclusive rights to the property in certain criminal proceedings, will not affect the possession of the ostensible owner or invalidate the transfer effected by him. AIR 1923 Cal 240 and AIR 1940 Rang 184, Followed.)]
2. 1929 All 943 (945) [AIR V 16] : 32 All 139 (DB). (In this case it was held that the con-

The *death* of the real owner does not by itself show that his consent to the ostensible ownership of the transferor has been withdrawn. If a successor-in-interest or the heir of the real owner does not take any steps to assert his right and the ostensible owner transfers the property, the transfer will be binding upon the successor-in-interest or the heir of the real owner and the transferee will be protected under this section.(3)

16. **Section 52 and this section.**— Where a suit is instituted by the person interested against the ostensible owner challenging the latter's title to the property, it is clear that the consent, if any, which might have been given by the plaintiff before the date of the suit, to the ostensible ownership of the defendant is withdrawn by the institution of the suit. So that if the defendant transfers the property after the institution of the suit it cannot be said that at the time of the transfer, the defendant was the ostensible owner with the *consent* of the plaintiff. Section 41 cannot therefore apply to protect such transfers. Further, S. 52 will apply and will render such transfer ineffective against the rights of the plaintiff under the decree or order that may be passed in the suit.(1a) In the undermentioned cases(1) the view has, however, been taken that S. 52 *overrides* the provisions of S. 41 inasmuch as S. 41 is a *general* provition and S. 52 a special one, and a special provision will prevail over the general. The assumption underlying this view is that both the provisions may apply at the same time to the same set of facts. As has been seen above, on the institution of a suit by the real owner challenging the title of the ostensible owner, S. 41 ceases to apply and S. 52 begins to apply. There is no question of the two provisions applying to the same set of facts at the same time.

In *Zafrul Hasan* v. *Farid Uddin*,(2) the defendants had acquired interest in the property *pendente lite*. It was held by their Lordships of the Privy Council that from that fact it must be inferred that they were aware that the matter was in dispute and cannot avail themselves of this section. It is clear from this decision that S. 41 does not apply to the case of a transferee *pendente lite*. This case lends support to the view expressed above that in such a case there can be no question of Ss. 41 and 52 applying to the same set of facts at the same time.

17. **Ostensible owner, if includes mortgagee.**— A executes a fictitious mortgage in the name of *B*. *B* transfers his mortgage right to *C* who has acted *bona fide* after taking reasonable care to ascertain that *B* had power to transfer his mortgagee.

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sent which was to continue up to date of transfer should be consent to the transfer. This case was explained in AIR 1934 All 193 and the observation was held to be obiter.)

3. 1941 Cal 318 (319) [AIR V 28].
1921 Cal 549 (551) [AIR V 8] (DB).

Section 41 — Note 16

1a. 1961 Bom 288 (292) [AIR V 48 C 70] : ILR (1961) Bom 649. (A obtained possession of the suit premises from B under a decree for possession and inducted tenants thereon. The decree was subsequently set aside in appeal. B thereupon instituted restitution proceedings under S. 144, Civil P. C. claiming possession from those tenants. *Held*, that the tenants were not entitled to the protection of S. 41.)
1952 Nag 106 (110) [AIR V 39] : ILR (1953) Nag 684. (Transfer pendente lite — Transferee who has taken with a knowledge of the claim cannot invoke the provisions of S. 41.)

1. 1961 Punj 299 (301) [AIR V 48 C 90]. (Principle of estoppel in S. 41 must yield to doctrine of lis pendens in S. 52.)
1945 Nag 86 (90) (AIR V 32] : ILR (1944) Nag 852 (DB).
1929 All 943 (945) [AIR V 16] : 52 All 139 (DB).

2. 1946 P C 177 (177) [AIR V 33 C 51] : ILR (1945) Kar (PC) 161.
[*Note.*—The judgment says that the defendants cannot avail themselves of S. 41 "or S. 52" of the T. P. Act. The words "or S. 52" are a clear slip. The context shows that the meaning can only be that the defendants cannot avail themselves of S. 41 or avoid the effect of S. 52 of the T. P. Act. Ed.]

right. Is he protected under this section? In the undermentioned case(1) of the Calcutta High Court the learned Judges, Jack and Mitter, expressed different views. According to Mr. Justice Mitter, *B* is not the ostensible *owner* and that the assignment by him is not a transfer by an ostensible owner and therefore this section does not apply. To hold that the section would apply to a transfer by an ostensible mortgage would, according to him, be to enable the assignee to get a decree for money on a mortgage which was without consideration, and this could not have been intended by the Legislature. According to Mr. Justice Jack, this section would apply inasmuch as the mortgagee was the 'ostensible owner' of *the mortgage-right* which is immovable property. The view of Mr. Justice Mitter has been followed in the under-mentioned case(2) of the Madras High Court.

18. Ostensible owner need not be one who has no interest in the property. — It is not necessary for the section to apply, that the ostensible owner should be a person who has no interest at all in the property transferred. If he possesses some interest in the property but is held out by the person interested as being the full owner, the transferee will be protected by the section if the other requirements are fulfilled.(1) Thus, where the transferor had a mortgagee-interest in the property but with the consent of the person interested, held himself out to be the absolute owner of it and transferred the absolute interest in the property, it was held that the purchaser got the absolute ownership over the property and not merely the mortgagee-interest.(2)

19. "Transfer"— In the undermentioned case.(1) A who held a mortgage of certain properties died, and his daughter-in-law *B* was allowed by the real heir of *A* to hold herself out as the real heir. The mortgagor paid the mortgage amount to *B* in good faith. It was held that this section would apply so as to make the payment good as against the real heir of *A*. The grounds on which the decision proceeded were that on payment, the rights created by the mortgage were re-transferred by *B* to the mortgagor, that such re-transfer was a transfer by an ostensible owner to a person who has taken the transfer *bona fide*. It is submitted that this view is not correct for several reasons. On redemption of a simple mortgage in this country there is no re-transfer of any property by the mortgagee to the mortgagor. (See Notes on S. 60). Nor can the transfer, supposing there is a transfer, be said to be a "transfer for consideration" inasmuch as what is paid is merely in discharge of the debt and not in consideration of any transfer by the mortgagee. Nor can *B* be said to be the ostensible *owner* of any property transferred.

20. The transferee, if includes subsequent transferees from first transferee.—It was held by the Calcutta High Court in the case noted below(1) that the section in terms would apply not only to the first transferee from the ostensible owner but also to subsequent transferees from the first transferee provided that such subsequent transferee had acted in good faith and with reasonable care, even though the

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Section 41 — Note 17

1. 1930 Cal 92 (93, 94) [AIR V 17] (DB).
2. 1942 Mad 730 (730) [AIR V 29].

Section 41 — Note 18

1. 1928 Mad 778 (782) [AIR V 15] (DB).
†1917 Mad 775 (780) [AIR V 4] (DB).

[*See also* 1929 All 737 (739) [AIR V 16]. (Question raised but not decided.)]

2. † 1928 Mad 778 (782) [AIR V 15] (DB).

Section 41 — Note 19

1. 1927 Nag 86 (88) [AIR V 14].

Section 41 — Note 20

1. 1926 Cal 916 (918) [AIR V 13] (DB).

first transferee himself had notice of the defect in the title of the transferor. In a subsequent case,(2) however, it has been held by the same High Court that the section does not apply in terms to such cases, but that the principle underlying the section and formulated in *Ramcoomar's case*(3) would apply and the subsequent transferee would be protected.

21. **Transferee must have acted in good faith after making reasonable inquiry.** — As has been seen already in Note 2 in cases falling under this section, — which, in this respect, are unlike cases falling under S. 115 of the Evidence Act—the transferee will be protected only if he has acted in good faith after taking reasonable care to ascertain that the transferor had power to make the transfer.(1) Mere good faith alone is not sufficient. A transferee who has acted in good faith, but has *not* taken reasonable care to ascertain that the transferor had power to transfer the property is not protected.(2) Much less is he protected if he wilfully shuts his eyes and takes the transfer without any inquiry.(3) It has been held in the undermentioned case(4) that a transferee who has taken reasonable care, but does not act in good faith, is not also protected, though it is somewhat difficult to see how a person who has made a reasonable inquiry and found that the transferor had power to transfer the same can be said to be acting in bad faith. A transferee who neither makes reasonable inquiries nor acts in good faith is of course not protected.(5) A finding as to the

2. 1940 Cal 565 (568) [AIR V 27].
3. ('72) Ind Cas App Supp Vol 40 (43) (PC).

Section 41 — Note 21

1 1965 Punj 140 (145) [AIR V 52 C 44] (DB).
('63) ILR (1963) 13 Raj 377 (383).
1962 Pat 140 (146) [AIR V 49 C 33] (DB).
1949 Assam 17 (19) [AIR V 36 C 12] : ILR (1949) 1 Assam 1 (DB)
1948 Nag 110 (117) [AIR V 35 C 40] : ILR (1947) Nag 510 (DB).
('46) 1946 Marwar L R 48 (Civil) (49).
1938 Nag 142 (144) [AIR V 25] : ILR (1939) Nag 293.
1937 Pat 353 (357) [AIR V 24].
1928 Nag 308 (313) [AIR V 15].
('11) 35 Bom 342 (348) (DB).
† ('07) 9 Bom L R 388 (392) (DB).
[*See also* 1957 Andh Pra 288 (290) [AIR V 44 C 96]. (Section 43 compared with S. 41 — Requirement of due enquiry and good faith on part of transferee not necessary under S 43)
1927 Rang 238 (239) [AIR V 14]. (A transferring land to B under a pyatpaing — C purchasing it from B bona fide for value—A is estopped from claiming it from C.)
1916 Cal 598 (599) [AIR V 3] (DB). (Lessor not in possession of property as de facto landlord and in good faith Person inducted on land by him not accepting the settlement in good faith—Principle does not apply.)]

2 1965 Mad 432 (435) [AIR V 52 C 154] (DB).
1959 Assam 15 (20) [AIR V 46 C 7] : ILR (1957) 9 Assam 465 (DB).
1956 Assam 154 (156) [AIR V 43 C 44].
('50) 1950 Ker L T 23 (26) (DB). (Enquiry into vendor's title not made.)
1936 Nag 214 (216) [AIR V 23] : ILR (1936) Nag 177.
† ('01) 1 Low Bur Rul 196 (197) (DB).
[*See also* 1934 Oudh 233 (235) [AIR V 21] (DB). (Case of auction sale)
(1911) 34 Mad 159 (160) (DB). (Mere belief in transferor's representation not sufficient.)]

3. 1954 Orissa 244 (247) [AIR V 41 C 77] (DB). (Lands all along in possession of plaintiff and not of transferor—Transferee resident of same village — *Held* he must have been aware of plaintiff's possession and should have made enquiry about the real position regarding possession.)
1952 Nag 64 (65) [AIR V 39]. (Even on assumption that principle of this section applied to Court sale it was held on facts that auction purchaser was not protected.)
1935 Rang 423 (426) [AIR V 22] (DB).
† (1881) 18 Ch D 93 (102, 103) : 50 L J Ch 834, In re Morgan; Pillgrem v. Pillgrem.

4. 1934 Lah 658 (659) [AIR V 21].
Also see Note 22.

5. † 1920 Pat 1 (20) [AIR V 7] : 5 Pat L Jour 521 (SB). 1947 Mad 287 (296) [AIR V 34 C 142]: ILR (1947) Mad 574 (DB). (Title deed showing purchases by A and his son—Transferee making enquiry of A but not of A's son—*Held* inquiry was hopelessly inadequate and did not establish good faith.)
1943 Nag 113 (114) [AIR V 30]. (A person purchasing property fully knowing that the vendor had a title under a bogus sale-deed and with the intention of harassing the real owner is not protected under this section.)
[*See also* 1952 Nag 64 (64) [AIR V 39]. (A principle of equity can be invoked only in favour of person who is diligent.)]

presence or absence of good faith on the part of the transferee is a finding of fact.(6)

22. "Good faith." — Under the General Clauses Act, 1897, "a thing shall be deemed to be done in 'good faith' where it is in fact done *honestly*, whether it is done negligently or not."(1) This is the meaning that must be given to the expression in this Act,(2) though the description of 'good faith' in the General Clauses Act does not, in terms, apply to this Act. (See Note 8 on S. 51). The fact, therefore, that a person has not taken reasonable care, or in other words has acted negligently, is not sufficient to show that he has not acted in good faith. It has been held in the undermentioned case(3) that a person may act with reasonable care and yet may not be acting in good faith and that a finding that a person has not been negligent is not the same thing as a finding that he has acted in good faith.

Where the transferee has notice of the real owner's title to the property, it cannot be said that he has acted in good faith in purchasing the property from a person other than the real owner.(4) But where a transferor is found in possession of the property, is recorded as owner in the revenue registers and holds the title deeds of the property, and the transferee deals with him in respect of it, there is nothing to show want of good faith on his part.(5)

Where the transferee who had dealings with the family of which the transferor was the managing member, was found to have *colluded* with the managing member in creating evidence destroying the interest of the other members in the property, and took a mortgage of the property from such managing member alone without looking

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6. 1959 Cal 78 (81) [AIR V 46 C 22] (DB).
1948 Nag 367 (369) [AIR V 35 C 125]: ILR (1948) Nag 506.
1940 Nag 241 (245) [AIR V 27]: ILR (1942) Nag 24.
1927 Nag 41 (42) [AIR V 14].
[*See also* 1960 Raj 219 (221) [AIR V 47 C 55]: ILR (1960) 10 Raj 360 (DB). (Case under S. 14, Limitation Act.)]
[See however 1927 All 158 (159) [AIR V 14]. (The decision as to whether reasonable care has been taken is a mixed question of law and fact but it is a question of a kind in which the second appellate Court will be very reluctant to interfere with the decision of the lower Courts, unless very strong grounds are made out.)]

Section 41 — Note 22

1. Section 3 sub-s. (22) of the General Clauses Act, 1897.

2. See Section 51, Note 8.
[But see ('07) 9 Bom LR 388 (392, 393) (DB). (The view expressed that good faith in this section means taking reasonable care and caution is not corect.)]

3. † 1934 Lah 658 (659) [AIR V 21].
Also see Note 21.

4. 1963 S C 1917 (1919) [AIR V 50 C 276]: 1963 Supp 1 S C R 55. (Defect in vendor's title known to the purchaser—Purchase cannot be held to be one in good faith.)
1961 Pat 314 (316) [AIR V 48 C 94].
1957 Orissa 157 (158) [AIR V 44 C 43]: I L R (1957) Cut 585.
1952 Punj 289 (290) [AIR V 39]. (Transferee taking property with knowledge of title of the real owner and transferor.)
1950 All 109 (116) [AIR V 37 C 45]: ILR (1950) All 1001 (DB). (Purchase of property subject of waqf created by registered deed and referred to in transactions of parties—Purchase is not bona fide.)
('36) 1936 Mad W N 849 (849).
(1934) 151 Ind Cas 314 (315) (Rang).
1929 Sind 195 (197) [AIR V 16] (DB). (Deed of lease executed by benamidar is binding on real owner in the absence of notice to the lessee that he has withdrawn the authority from the benamidar or that there was reservation of it.)
1924 Lah 738 (741) [AIR V 11] (DB).
(1864) 1 Suth W R 324 (324) (DB). (One of the beneficial owners is a minor. The transferee took care to obtain consent of the other major beneficial owner; transferee not bona fide.)
[*See also* 1957 Andh Pra 288 (290) [AIR V 44 C 96]. (Section 43 compared with S. 41 — Knowledge by transferee of true facts relating to title of transferor does not affect the transferee's rights under S. 43.)
1925 Mad 902 (905) [AIR V 12].
1917 Mad 885 (885) [AIR V 4] (DB).]

5. †('04) 26 All 490 (493) (DB),
[*See also* 1952 Nag 106 (109) [AIR V 39]: ILR (1953) Nag 684. (Mere inspection of revenue records not sufficient enquiry — Transferee acting on the entry in village record of rights as evidence of transferor's title is not acting in good faith.)]

to the title deeds of the property, it was held that the transferee had not acted in good faith.(6) Similarly, where certain ladies who had succeeded to their father's estate allowed their paternal agnate to deal with the property as owner, and the transferee of the property from the paternal agnate belonged to the same caste and knew the family of the father of the ladies, it was held that in purchasing the property, the transferee did not act in good faith.(6a)

Where a person purchased property fully knowing that his vendor had a title under a bogus sale-deed and with the intention of harassing the real owner, it was held that the transferee had not acted in good faith.(7)

23. Reasonable care. — The reasonable care required by the section is not reasonable care *generally* or with regard to every aspect of the transaction but has reference only to the *ascertainment that the transferor had power to make the transfer*.(1) The degree of care required is that of an ordinary prudent man acting under the circumstances of the particular case.(2) The ordinary standard of diligence that would constitute 'reasonable care' for the purpose of ascertaining the transferor's power to transfer would be to *inquire* about the *title* of the transferor to the property, and to inspect the title deeds, if any, produced.(3) An enquiry into title involves an enquiry as to who is in actual possession of the property,(4) and an inspection of the records in the registration office.(4a) But it has been held by a Full Bench of the Lahore High Court that in those Provinces where oral transfers are permitted, inspection of the record in the registration office is not a *sine qua non* for the grant of the protection afforded by the principle of this section.(4b)

A transferee who does not make any enquiry into the *title* of the transferor as stated above cannot be said to have taken the reasonable care required by this section.(5) The mere fact that he entrusted the enquiry to a solicitor and acted upon

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6. 1920 Pat 1 (20) : 5 Pat L Jour 521 (SB).

6a. 1952 Kutch 55 (58) [AIR V 39].

7. 1943 Nag 113 (114) [AIR V 30].

Section 41 — Note 23

1. 1965 S C 295 (299) [AIR V 52 C 23] : (1964) 6 SCR 192.
1951 Nag 403 (406) [AIR V 38 C 126] : ILR (1950) Nag 25.
('46) 1946 Marwar L R 48 (Civil) (49).
1928 Mad 778 (780) [AIR V 15] (DB).

2. 1920 Pat 1 (20) [AIR V 7] : 5 Pat L Jour 521 (SB).
1947 Lah 147 (150) [A I R V 34 C 26] : I L R (1947) Lah 749 (FB).
1962 Pat 140 (146) [AIR V 49 C 33] (DB).
1961 Pat 16 (18) [AIR V 48 C 4].
('54) ILR (1954) 4 Raj 191 (196): AIR 1955 N U C 4652.
1952 Nag 106 (109, 110) [AIR V 39] ; ILR (1953) Nag 684.
1949 Assam 17 (20) [AIR V 36 C 12] : ILR (1949) 1 Assam 1 (DB). (Whether a particular transferee has acted like a reasonable and prudent man of business must depend on the circumstances of each case.)
1949 Cal 666 (673) [AIR V 36 C 190] (DB).
1948 Mad 320 (322) [AIR V 35 C 158] (DB).
1947 Bom 49 (53) [AIR V 34 C 14] : I L R (1946) Bom 984.
1943 Mad 459 (463) [AIR V 30].
1935 Rang 423 (425) [AIR V 22] (DB).
1934 All 193 (197) [AIR V 21] : 56 All 582 (DB).
1929 Cal 83 (86) [AIR V 16].
1926 Cal 916 (918) [AIR V 13] (DB).

3. 1949 Cal 666 (673) [A I R V 36 C 190] (DB).
('42) 1942 Nag L Jour 353 (354, 355).
1928 Mad 778 (780) [AIR V 15] (DB).
[*See also* 1959 Assam 15 (20) [AIR V 46 C 7] : I L R (1957) 9 Assam 465 (DB). (Finding that the transferee did not make any enquiry about the title of the transferor is one of fact.)]

4. 1961 Pat 314 (316, 317) [AIR V 48 C 94]. (Transferor not in possession—Plea under S. 41 not available.)
('09) 5 Low Bur Rul 125 (127) (DB).

4a. 1947 Bom 49 (54) [A I R V 34 C 14] : I L R (1946) Bom 984. (Omission to inspect amounts to gross negligence.)
1947 Lah 199 (210) [AIR V 34 C 39] (DB).
[*See also* ('50) 1950 Trav-Co L R 121 (124, 125) (DB).]

4b. 1947 Lah 147 (153) [AIR V 34 C 26] : I L R (1947) Lah 749 (FB). (Per Cornelius and Din Mohammad JJ., Mahajan J. Dissenting.)

5. 1915 P C 103 (105) [AIR V 2]. (On appeal from 10 Ind Cas 961).
1962 Pat 140 (146) [A I R V 49 C 33] (DB). (Failure to make enquiry into title of transferor

his opinion that everything was all right is not sufficient to constitute the reasonable care required, in the absence of proof that the solicitor properly discharged his duty.(5a) Nor is the mere fact that the transferee has satisfied himself that the transferor is in possession, or that his name is found in the revenue papers or tax registers, such an enquiry into title as to constitute the taking of reasonable care to ascertain that the transferor had power to transfer the property.(6)

—Transferee cannot be said to have acted in good faith and is not protected.)
1954 All 595 (597) [AIR V 41 C 233].
1952 Nag 106 (109, 110) [AIR V 39] : ILR (1953) Nag 684.
1952 Nag 64 (65) [AIR V 39]. (Principle of section applied to execution sale—Omission to make enquiry or to inspect jamabandi of the field concerned — Auction purchaser held not protected.)
1951 Nag 403 (406) [AIR V 38 C 126] : ILR (1950) Nag 25.
('50) 1950 Ker L T 23 (26) (DB). (Title deeds not examined.)
('46) 1946 Marwar L R 48 (Civil) (49).
1942 Oudh 313 (316) [A I R V 29] : 17 Luck 636 (DB).
1934 Pat 67 (68) [AIR V 21]. (Title deed not examined.)
1934 Bom 1 (5) [AIR V 21] (DB). (Title deed available but not examined.)
1933 Oudh 166 (169) [AIR V 20] (DB).
1930 All 422 (425) [AIR V 17]. (Documents of transfer executed from time to time were not examined to ascertain the title.)
1930 All 847 (848) [AIR V 17] : 52 All 248 (DB).
†1919 Mad 50 (50) [AIR V 6] (DB).
('12) 16 Ind Cas 825 (829) (DB) (Cal).
('11) 12 Ind Cas 858 (858) (Low Bur).
1929 Pat 305 (307) [AIR V 16] (DB).
[*See also* ('65) ILR (1965) 2 Punj 720 (735) (DB). (Purchase of Jagir land which is inalienable — Purchaser making no enquiry — Not protected.)]
[But see 1935 Lah 410 (411, 412) [A I R V 22]. (Enquiry into title not necessary in special circumstances.)
1937 Lah 272 (272, 273) [AIR V 24] (DB) (Title deeds not called for but transferor's name in revenue registers and acts of transferor suggesting ownership relied on—Held, S. 41 applied — Apart from S. 41, S. 115 of the Evidence Act directly applied to the case as the real owner directly induced the transfer.)]

5a. 1949 Cal 666 (673) [AIR V 36 C 190] (DB).
1940 Cal 565 (567) [AIR V 27] (DB).

6. 1965 S C 295 (299) [AIR V 52 C 53] : (1964) 6 S C R 192. (One co-sharer put in management of common property — Property entered into revenue records in his name —No other evidence that he was put forward as ostensible owner by other co-sharers — S. 41 does not afford any defence to transferee from such co-sharer.)
1920 Pat 1 (21) [AIR V 7]: 5 Pat L Jour 521 (SB) (Do.)
1960 Mad 399 (400) [AIR V 47 C 142]. (Transferee purchasing from Muslim co-owner relying on his possession and not making any enquiry — Held not entitled to protection under S. 41.)
1947 Lah 147 (153) [AIR V 34 C 26] : ILR (1947) Lah 749 (DB). (Reasonable care — Vendee accepting transfer of agricultural land on faith of entries in favour of his transferor in record of rights held protected under S. 41 — Further enquiry by vendee as to title of transferor held not necessary (Per Din Mohammad and Cornelius JJ.; Mahajan J. Dissenting) — Facts and circumstances of each case must be looked into in order to determine whether reliance on the record of rights only would afford sufficient protection to a transferee under this section. (Per Din Mohammad and Cornelius JJ.)
1952 Nag 106 (109) [AIR V 39] : ILR (1953) Nag 684. (Mere inspection of revenue records such as jamabandi not sufficient.)
1949 Cal 666 (673) [AIR V 36 C 190] (DB).
('46) 1946 Marwar L R 48 (Civil) (49).
('42) 1942 Nag L Jour 353 (354, 355). (Enquiry into revenue records only not sufficient.)
1942 Oudh 313 (316) [AIR V 29] : 17 Luck 636 (DB). (The mere inspection of Khewat in which the name of the transferor is found is not a sufficient inquiry.)
1934 Lah 885 (886, 887) [AIR V 21] : 16 Lah 313 (DB). (Municipal registers.)
1932 Nag 165 (168) [A I R V 19] : 28 Nag L R 227.
1930 All 521 (522) [AIR V 17] : (DB). (Inspection of khewat.)
1930 Oudh 184 (191) [AIR V 17] (DB). (Revenue record.)
†1929 Pat 305 (306) [AIR V 16] (DB).
1927 Mad 1138 (1139) [AIR V 14].
1927 Nag 41 (42) [AIR V 14]. (Revenue papers.)
1922 All 392 (393, 394) [A I R V 9] : 44 All 674 (DB). (House tax register.)
†1934 Oudh 165 (167) [A I R V 21] : 9 Luck 571 (Do.)
('67) 7 Suth W R 120 (122) (DB). (Mere looking into the Revenue records is not sufficient.)
('01) 1 Low Bur Rul 126 (197) (DB). (Inspection of revenue records alone —Inquiry held insufficient.)
('01) 23 All 442 (447) (DB) (Do.)
[*See* 1947 Bom 49 (54) [AIR V 34 C 14] : I L R (1946) Bom 984. (It may be that under certain circumstances an examination of the revenue records, coupled with fact of possession of transferor, would amount to sufficient enquiry. But it does not dispense with the duty to make an enquiry in the Sub-Registrar's office. Omission to make a search in the index maintained in the Sub-Registrar's office is gross negligence.)]

On the other hand, if there is an instrument constituting the transferor the ostensible owner and the power to transfer is given or possessed thereunder and the transferor is in possession, the transferee who rests satisfied with these must be deemed to have taken the reasonable care required and need make no further inquiries.(7) But if there are indications in the title deeds themselves or there are other circumstances such as the transferor not being in possession, which put the transferee on notice or further inquiry, the transferee cannot be said to have taken reasonable care unless he makes such further inquiry.(8)

It would seem that an alienee who misapprehends the construction and legal effect of his transferor's title deeds is not entitled to the protection of this section, the principle of *caveat emptor* applying in such cases.(8a)

The question whether the transferee has taken the reasonable care required by the section in any particular case is one of fact to be decided with reference to the circumstances of that case.(9) It has however been held in some cases that it is not a pure question of fact.(9a)

[But see 1940 Mad 523 (524) [AIR V 27]. (Having regard to provisions of Ch. 4, Madras Estates Land Act, patta is strong prima facie evidence of title and enables transferee from pattadar to claim protection of this section.)]

7. 1961 Pat 16 (18) [AIR V 48 C 4]. (If the ostensible owner is in possession and produces title deed transferee cannot be expected to make any searching enquiry — Held on facts that transferee did not take reasonable care.)
1928 Mad 778 (781) [AIR V 15] (DB).
†1923 Cal 240 (245, 246) [AIR V 10] (DB).
1916 Cal 745 (746) [AIR V 3] (DB). (A fictitiously mortgaged property to B— B obtained a decree on his mortgage and in execution purchased the property and obtained delivery of possession — It was held that it was sufficient to make B an ostensible owner of the property.)

8. 1961 Pat 16 (19) [AIR V 48 C 4].
1954 Orissa 244 (247) [AIR V 41 C 77]. (Transferee knowing that transferor was not in possession).
1952 Orissa 75 (80, 81) [AIR V 39] (DB). (Held on facts that there were sufficient facts putting transferee on further enquiry and that he did not make reasonable enquiry as required by S. 41.)
1928 Mad 778 (780) [AIR V 15] (DB).
1915 Low Bur 104 (105) [AIR V 2].
('09) 5 Low Bur Rul 126 (127) (DB). (Title deed in name of transferor — Possession with another — Further inquiry not made — No reasonable care.)
[*See also* 1914 Cal 331 (333) [A I R V 1] (DB). (Vendor not in possession — Purchaser must make enquiries.)

8a. 1944 Mad 237 (238) [AIR V 31]. (Mortgage by conditional sale misunderstood as absolute sale. Dissenting from dicta in A I R 1928 Mad 778.)

9. 1920 Pat 1 (20) [AIR V 7]: 5 Pat L J 521 (SB).
1961 Pat 16 (18) [AIR V 48 C 4].
1949 Assam 17 (20) [AIR V 36 C 12] : ILR (1949) 1 Assam 1 (DB).
1948 Nag 110 (118) [AIR V 35 C 40] : ILR (1947) Nag 510 (DB).
1943 Bom 419 (422) [AIR V 30].
1943 Mad 459 (463) [AIR V 30].
1943 Oudh 398 (401) [AIR V 30] : 19 Luck 216.
1940 Pat 480 (481) [AIR V 27] (DB).
1935 Lah 410 (412) [AIR V 22].
1934 All 193 (197) [AIR V 21] : 56 All 582 (DB).
('13) 21 Ind Cas 21 (23) (DB) (Mad).
('02) 1 Low Bur Rul 196 (197) (DB).
('01) 23 All 442 (447) (DB).
[*See also* ('07) 9 Bom L R 388 (392) (DB).]

9a. 1959 Assam 15 (19) [AIR V 46 C 7] : I L R (1957) 9 Assam 465 (DB). (Whether a transferee took reasonable care to ascertain that transferor had power to make the transfer, has no doubt to be determined with reference to the circumstances of the particular case, the test being whether he acted like a reasonable man of business and with ordinary prudence. But the question whether that test has or has not been properly applied in any particular case cannot be regarded as one of pure fact not open to review in a second appeal.)
1952 Nag 106 (109) [AIR V 39] : ILR (1953) Nag 684. (Reasonableness of enquiry under S. 41 is always a question of law.)
1949 Cal 666 (673) [AIR V 36 C 190] (DB).
('49) 2 Sau L R 203 (205).
1948 Mad 320 (322) [AIR V 35 C 158] (DB). (Whether a transferee from an ostensible owner took care to ascertain whether the transferor had the power to transfer has no doubt to be determined with reference to the circumstances of the particular case. But the question whether the transferee acted like a reasonable man of business and with ordinary prudence, cannot be regarded as one of pure fact not open to review in second appeal.)
1947 Bom 49 (53) [AIR V 34 C 14] : I L R (1946) Bom 984. (The finding as to what the transferee did or did not do to ascertain the power of the transferor to effect the transfer is one of fact but whether from that finding it can be said that reasonable and sufficient enquiry was

Illustrations

(1) *A* executed a sale deed in favour of *B* and put him in possession. *B* on the same date executed an agreement to reconvey the property to *A* within a certain time. The sale deed and the agreement to reconvey really constituted a mortgage. *C* purchased the property from *B* after inspecting the sale deed in favour of *B*. There were no indications in that deed to put him on notice or enquiry. It was held that he had taken the reasonable care required by the section and that it was not necessary for him to search for all records in the Registration Office relating to the property which if it had been done would have disclosed the agreement to reconvey.(10)

(2) *A*, a Muhammadan, gave certain property orally to *B* in lieu of her dower, but he continued in possession. His name also continued in the revenue record as owner of the property. *A* subsequently gave the same property to his daughter-in-law *C* by way of dower and she took the property in good faith believing *A's* assurance that he was the owner. It was held that the requirement of reasonable care was satisfied and *C* would be protected under the section.(11)

(3) *A* purchased property from *B* in whose name the title deed stood. The property was, however, in the *possession* of *C* at the time. *A* failed to make any inquiries as to how possession came to be with *C*, but merely relied on the title deed in the name of *B*. It was held that the purchase was not made with reasonable care and that *A* was not protected.(12)

(4) *K*, a Government lessee, sold the lease to *B*. *B* without getting the lease transferred to his name in Government papers sold it to *C*, who got his name recorded in Government papers. *B* subsequently re-purchased the lease from *C* but failed to get it retransferred to his name in Government papers. Possession was with *C*. *C* afterwards came to an arrangement with the Government, surrendered the lease and received in lieu of it several other leases. *D* purchased one of these from *C* on looking into Government papers only. *B* sued for possession on the strength of his purchase. It was held that *D* had done what a man of ordinary prudence would have done; that even if he had inquired further, he would only have found that the new lease was granted to *C* in lieu of an original lease which also was in his name; and that, therefore, *D* was entitled to protection under this section.(13)

(5) *A* sold property to *B* in 1881. *B* did not apply for mutation and did not get possession. After *A's* death his son *C* applied for mutation and got it mutated in his name without any objection from *B*. Possession also was with *C*. *A* transferee from him in 1915 was held to have taken reasonable care as even if he had made an enquiry he could not have discovered any trace of real owner's (i.e., *B's*) title.(14)

(6) *X* purchased property in the name of his major son *Y*. A house built on the property was recorded in the name of *Y* and was in his occupation. There was nothing to put the transferee on enquiry. *A* transferee from *Y* without any enquiry on his part was held to have taken the reasonable care required by this section.(15)

(7) *A* was the original grantee of certain land from Government. After *A's* death the grant was forfeited. Subsequently, by the efforts of one of the sons of *A*, namely, *M*, the

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made by the transferee as to attract the application of this section is a question of law.)

10. 1928 Mad 778 (782) [AIR V 15] (DB).
[*See also* ('11) 10 Ind Cas 779 (780).]
[See however 1944 Mad 237 (238) [AIR V 31]. (Transferee after perusing the document of title of his transferor wrongly concluding that it was an out and out sale though in fact it was a mortgage by conditional sale — Held, transferee is not protected as principle of caveat emptor applies to him. Dissenting from dicta in 1928 Mad 778 [AIR V 15].)
('86) 9 All 97 (103) (DB).]

11. 1925 Bom 299 (301) [AIR V 12] (DB).

12. 1961 Pat 314 (317) [AIR V 48 C 94].
1918 Lah 281(282) [AIR V 5]:1918 Pun Re No. 46.
†('12) 16 Ind Cas 811 (814) (DB) (Cal).
('11) 35 Bom 269 (271) (DB).
[*See also* ('72) 18 Suth W R 151 (152, 153) (DB).]

13. 1929 Rang 17 (19) [AIR V 16]: 6 Rang 643. (Affirmed in Letters Patent appeal in AIR 1929 Rang 333.)
[See however ('01) 23 All 442 (447) (DB). (Government official purchasing property and causing it to be recorded in the names of his sons—Vendee looking into revenue papers only —Held, vendee did not take reasonable care.)]
[But see †1940 Mad 523 (524) [AIR V 27]. (Transferee relying on patta granted under the Estates Land Act—Patta is prima facie evidence of title in such cases and transferee will be protected.)]

14. 1927 Oudh 448 (449, 450) [AIR V 14].

15. ('04) 26 All 490 (492) (DB).

grant was restored in 1905 but it was recorded in *M's* name alone in the Colonization Officer's papers and in revenue papers. *M* dealt with the property as his own. There were no suspicious circumstances prompting any enquiry. It was held that a transferee from *M* in 1916 relying on revenue entries was protected.(16)

(8) Certain property belonged to *A* and *B* and their mother *C* but was recorded in the revenue papers in the name of *A* and *B* only. Rent receipts were being signed by *A* and *B*, and kabuliyats taken in their name. Rent suits were being instituted only in their name. *A* stranger had no reason to doubt that the mother also may have an interest in the property, and there were no circumstances inviting any enquiry. It was held that a transferee from *B* had taken the reasonable care required by the section.(17)

(9) *A* purchased a mortgage bond in the name of *B*. *A* got a suit filed on the mortgage bond, and purchased in the name of *B* the property in execution of the decree obtained in the suit. *A* deposed in the suit that the mortgage bond was really purchased by *B*. Other persons interested in the property assailed this position but decrees were given on the basis that *B* was the real owner. It was held that a transferee from *B* had taken reasonable care and was protected under this section.(18)

See also the undermentioned cases.(19)

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16. 1927 Lah 666 (669) [AIR V 14] (DB).

17. 1929 Cal 83 (88) [AIR V 16] (DB).

18. 1938 Cal 602 (506) [AIR V 25] (DB).

19. *In the following cases it was held that reasonable care was not taken :*

1966 Pat 75 (79) [A I R V 53 C 17] (DB). (Plaintiff claiming title to land under registered lease — Lease executed by *C*, one of the proprietors of land as manager and on behalf of *B*—Entry of lease in Register making reference to an award — Held, bona fide enquirer was bound to make legitimate enquiry about award.)

1961 All 206 (214) [AIR V 48 C 55] (DB). (Mortgage of endowed property by shebait — Transferee put on guard so as to ascertain whether transferor was real owner—Deity, not a sentient to allow shebait to act as ostensible owner — Suit by deity to set aside mortgage and for possession, held not barred by S. 41.)

('62) 64 Punj L R 230 (235). (Person aware of prior registered sale deed taking transfer without any enquiry into transferor's title — Not entitled to benefit of the equitable rule in S. 41.)

1959 Assam 15 (20) [AIR V 46 C 7] : ILR (1957) 9 Assam 465 (DB). (Transferee getting the property merely relying upon the words of the transferor that the real owner was unheard of for a long time and that the transferor had been asserting his title to the property.)

('54) I L R (1954) 4 Raj 191 (196) : A I R 1955 N U C 4652 (DB).

1943 Lah 113 (118) [AIR V 30]. (1940 Lah 269 [AIR V 27], Reversed.)

1941 Lah 416 (418, 419) [AIR V 28]. (Nephew, a transferee — He is presumed to know the real owner.)

1940 Cal 565 (568) [A I R V 27] (DB). (Enquiry into title entrusted to a solicitor — Transferee acting upon his opinion is not protected.)

('37) 170 Ind Cas 590 (591) (DB) (Cal).

1937 Oudh 178 (180) [A I R V 24] : 12 Luck 731 (DB).

1935 Rang 423 (426) [AIR V 22] (DB).

1934 Rang 139 (143) [A I R V 21] (DB). (Tax receipt is not sufficient to prove title.)

1933 All 917 (918) [AIR V 20] (DB).

1931 Cal 144 (149) [A I R V 18] (DB). (Casual enquiries from the irresponsible person.)

1931 Oudh 253 (255) [AIR V 18] (DB).

1930 All 417 (419) [AIR V 17].

1930 All L Jour 964 (971) (DB).

1929 Rang 112 (113) [AIR V 16].

1929 Oudh 193 (203) [A I R V 16] : 4 Luck 452 (DB).

1929 Oudh 160 (162) [A I R V 16] : 4 Luck 597 (DB).

1927 All 158 (159) [AIR V 14].

1925 Cal 1034 (1035) [AIR V 12] (DB).

1925 Mad 95 (101) [AIR V 12] (DB).

1921 All 311 (311) [AIR V 8] : 43 All 263 (DB).

1919 Mad 247 (249) [AIR V 6] (DB).

1918 Lah 95 (99) [A I R V 5] : 1918 Pun Re No. 73 (DB).

1918 Lah 281 (282) [A I R V 5] : 1918 Pun Re No. 46.

1915 Mad 614 (618) [AIR V 2] (DB). (Purchaser looking only into Collector's certificate.)

1914 All 232 (234) [AIR V 1] : 36 All 308 (DB). (Suspicious circumstances existing—No enquiry made—Transferee not protected.)

1914 Low Bur 141 (142) [AIR V 1].

1914 Low Bur 225 (225) [AIR V 1] (DB).

('13) 21 Ind Cas 21 (23) (DB) (Mad).

('11) 11 Ind Cas 855 (856) (Low Bur).

('10) 6 I C 898 (900) (Bom).

('03) 26 Mad 509 (513) (DB).

('95) 5 Mad L Jour 86 (88) (DB).

('92) 14 All 362 (364, 365) (DB).

('86) 8 All 324 (331) (DB).

('74) 22 Suth W R 8 (8) (DB).

In the following cases it was held that reasonable care had been taken :

1965 Punj 140 (143) [A I R V 52 C 44] (DB). (Held on facts that the transferee had taken reasonable care.)

1944 All 42 (56) [A I R V 31] (DB). (Hindu widow inheriting property from her husband allowing her husband's brother's name to be recorded as owner and otherwise showing her consent to his dealing with property as his

24. **Plea of reasonable care and good faith when to be taken** — The plea that he had acted in good faith after taking reasonable care must be taken by the transferee in the trial Court itself.(1) It cannot be raised for the first time in appeal.(2) Where, however, the facts upon which such plea would have been based are on the record of the trial Court, the appellate Court will not only allow it to be raised(3) but even consider it on its own initiative,(4) the reason being that where a Court sees that

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own — No circumstances to put transferee on guard.)

1944 Mad 299 (302) [A I R V 31]. (One brother sending money to another for the latter to invest in his own name — Latter purchasing property in his own name and then mortgaging it to pay off a debt—Held that the mortgagee was protected in spite of there having been some abortive criminal proceedings by the real owner against the ostensible owner for recovery of possession.)

1943 Mad 459 (463) [AIR V 30]. (Husband putting property in wife's name and himself taking part in the transaction by the wife — No suspicious circumstances.)

1938 Bom 125 (131) [AIR V 25] (DB).

1938 All 64 (65) [AIR V 25]. (Transferee searched for the title in the registration office for a period of more than 12 years. He is deemed to have taken reasonable care.)

1937 Lah 272 (272, 273) [AIR V 24] (DB).

1936 Lah 405 (405) [AIR V 23] (DB).

1936 Lah 816 (818) [AIR V 23] (DB).

1936 Oudh 87 (91) [AIR V 23] (DB). (Sons were the ostensible owners — Their names were mutated with the consent of their mother—Mother cannot challenge the transfer by the sons.)

1935 Oudh 437 (440) [AIR V 22] : 11 Luck 376 (DB).

1935 Lah 821 (822) [AIR V 22] (DB). (Property purchased in name of one partner who deals with it as absolute owner — Transferee from such partner is protected under this section.)

1935 Lah 410 (412) [AIR V 22].

1934 Rang 313 (315) [AIR V 21] (DB).

1933 Lah 262 (263) [AIR V 20]. (Some co-sharers shown as owners in revenue records for number of years—Transfer by co-sharer—Vendee held stood in shoes of his venders.)

1933 Rang 361 (363) [AIR V 20] (DB).

1924 All 63 (63, 64) [AIR V 11] (DB). (Examination of the revenue record constitutes reasonable enquiry.)

1924 All 384 (387) [AIR V 11] : 46 All 377 (DB).

1923 All 583 (584) [AIR V 10] : 45 All 520 (DB).

1923 Cal 240 (245) [AIR V 10] (DB).

1923 Nag 15 (16) [AIR V 10]. (Ostensible owner's title deeds complete in themselves — No search in registration — Transferee takes reasonable care if he only examines the deeds.)

1918 Pat 79 (82) [AIR V 5] (DB).

1917 Cal 655 (656) [AIR V 4] (DB). (Mortgagee enquired and found the transferor's name entered into landlord's register with the consent of the real owner.)

1916 Oudh 319 (319, 320) [AIR V 3].

1914 Low Bur 42 (43) [AIR V 1].

('09) 1 Ind Cas 525 (528) (DB) (Cal).

(1903) I L R 27 Bom 103 (109, 110). (Estate taken by bona fide purchaser for value from a person holding legal estate only — Defect not ascertainable by reasonable diligence — Transferee gets complete title.)

('78) 1 Cal L R 466 (469) (DB).

Section 41 — Note 24

1. ('63) ILR (1963) 13 Raj 377 (383).

1962 Pat 392 (394) [AIR V 49 C 104] : 42 Pat 579 (DB).

1961 Pat 314 (317) [AIR V 48 C 94]. (Question of applicability of S. 41 should be specifically pleaded and strictly proved.)

1959 Cal 69 (70) [AIR V 46 C 16] (DB). (The decision of a plea of protection under S. 41 depends on several questions of fact each of which requires careful examination. Such a plea should be clearly taken in the pleading and put in issue between the parties.)

1955 Pat 189 (192) [AIR V 42 C 43].

('49) 28 Pat 542 (550) (DB).

† 1941 Pesh 59 (60) [AIR V 28] (DB). (If the plea is taken in trial Court, that Court can apply this section even though a specific issue on the point was omitted to have been framed by that Court and if substantial justice had been done such a technical omission will not be fatal to the suit.)

[*See also* 1963 S C 1917 (1919) [AIR V 53 C 276] : 1963 Supp 1 S C R 55. (Bona fide purchase in good faith—Finding not based on evidence—Impact of S. 41, T. P. Act also not considered by lower appellate Court—Finding cannot bind the High Court in second appeal.)]

2. ('63) ILR (1963) 13 Raj 377 (383).

1962 Pat 392 (394) [AIR V 49 C 104] : 42 Pat 579 (DB). (The reason is obvious. Unless a party pleads facts to make out a case under this section, the other party is taken by surprise, inasmuch as he is unable to adduce any evidence to demolish such a plea.)

1959 Cal 69 (70) [AIR V 46 C 16].

('41) 45 Cal W N 735 (738).

1940 Pat 620 (621) [AIR V 27] (DB).

1931 Bom 227 (227) [AIR V 18] (DB).

1929 Pat 305 (307) [AIR V 16] (DB). (Plea taken in the lower Court but abandoned in the lower appellate Court—It cannot be taken again in the second appeal.)

1928 Nag 308 (313) [AIR V 15].

1917 Mad 926 (928) [AIR V 4] (DB).

('05) 28 Mad 122 (123) (DB).

3. 1949 Assam 17 (18) [AIR V 36 C 12] : ILR (1949) 1 Assam 1 (DB).

('36) 38 Pun Law Rep 90 (91).

4. 1940 Lah 252 (253) [AIR V 27].

the rights of one of two innocent parties must be sacrificed, it is entitled to consider whether anything in the conduct of the party who comes to Court and asks for relief debars him from asserting his rights.(5) The fact that a plea under this section has been found against in a former litigation with certain vendees from the same ostensible owner is no bar to the raising of the plea by other vendees in a subsequent litigation.(6)

Where a party takes a plea of estoppel it is not necessary to detail in the pleadings all the ingredients of S. 41 as such. It is enough if he relies on a general law of estoppel and the facts pleaded by him satisfy S. 41.(7)

24a. Transferee's title to be considered with reference to date of transfer. — The title of the transferee who is protected under this section has to be considered with reference to the date of transfer. Thus, where the real owner is a coparcener in a joint Hindu family and his share is transferred by the ostensible owner, the transferee becomes entitled to the share of the real owner at the date of transfer irrespective of its decrease or increase by any subsequent birth or death in the family.(1)

25. Burden of proof. — In cases falling under S. 115 of the Evidence Act, where a person has *intentionally* induced another to act, the *onus* is on the person so inducing, to show that the other person knew the truth and therefore cannot rely upon the plea of estoppel. But in cases falling under this section where there is no *intentional* inducement by the person interested in the property, to the transferee of such property, the law, as has been seen in Note 2, is more favourable to the person interested, and the *onus* is cast upon the *transferee* to show that he acted in good faith after taking reasonable care.(1) Where the transferee has let in his evidence as to his having acted in good faith after taking reasonable care, the *onus* will shift to the real owner to show that the transferee had notice of the defect in the transferor's title or of circumstances which if prosecuted would have led to a discovery of such

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5. ('10) 7 Ind Cas 442 (445) (DB) (All).
† ('95) 17 All 280 (281).
6. 1944 All 42 (59) [AIR V 31] (DB).
7. ('42) 1942 Nag L Jour 405 (406).

Section 41 Note 24a

1. 1943 Mad 459 (464) [AIR V 30].

Section 41 Note 25

1. ('83) 13 Cal L R 280 (282) (PC). 1965 S C 295 (299) [A I R V 52 C 53]: (1964) 6 S C R 192. (One co-sharer put in management of common property—Property entered into his name in revenue record — Transferee from him has to prove that he was ostensible owner with consent of his co-sharers and that he took reasonable care to ascertain his title.)
1963 S C 1917 (1919) [A I R V 50 C 276] : (1963) Supp 1 S C R 55.
1965 Mad 432 (438) [AIR V 52 C 154] (DB).
('63) ILR (1963) 13 Raj 377 (383).
1962 Punj 46 (47) [AIR V 49 C 12].
1956 Assam 154 (156) [AIR V 43 C 44].
1952 Nag 106 (108) [AIR V 39] : ILR (1953) Nag 684.
1948 Mad 320 (323) [AIR V 35 C 158] (DB).
1944 Mad 237 (238) [AIR V 31]. (Alienee must show in the first instance that owner has held out some other person as ostensible owner of property.)
1941 Cal 318 (319) [AIR V 28].
1934 Lah 658 (659) [AIR V 21],
1934 Oudh 165 (167) [AIR V 21] : 9 Luck 571.
1934 Pat 67 (68) [AIR V 21].
1930 All 847 (848) [A I R V 17] : 52 All 248 (DB).
1929 Cal 636 (638) [AIR V 16] (DB).
1929 All 737 (739) [AIR V 16].
1927 Nag 41 (42) [AIR V 14].
1923 Nag 15 (16) [AIR V 10].
('72) 18 Suth W R 151 (151) (DB).
[*See* 1944 All 42 (54) [AIR V 31] (DB). ("It is for the party relying on S. 115, Evidence Act or S. 41, Transfer of Property Act, to establish the facts which according to him enable him to the benefit of the rules laid down in those sections.")]
[*See also* ('03) 5 Bom L R 991 (993).
1914 Mad 470 (471) [AIR V 1]: 38 Mad 783.

defect.(2) It is, however, necessary that the existence of circumstances must not be asserted generally but some circumstances must be specifically pointed out as the starting point of an enquiry which might have led to the discovery of the real owner's title.(3)

In the undermentioned case,(4) however, it was held that the burden of proof that the transferee had acted in good faith after taking reasonable care, lay on the real owner and not on the transferee. The High Court of Madras also has taken a similar view in the case noted below,(5) resting it on the observations of their Lordships of the Privy Council in *Ramcoomar's case*.(6) Section 41, was, however, not referred to. It is submitted that this view is not correct. Their Lordships of the Privy Council in *Ramcoomar's case*(7) observed that when "a third person purchases the property for value from the apparent owner *in the belief* that he is the real owner" the real owner cannot recover on his secret title unless he can show he had direct or constructive notice or that there existed circumstances which ought to have put him upon an enquiry which, if prosecuted, would have led to a discovery of it. Their Lordships were clearly referring to a stage where after the transferee had shown that he purchased the property *in the belief* that the transferor was the real owner, the onus shifted to the real owner. In the first instance the *onus* would be on the transferee to show that he *believed* that the transferor was the real owner, and it is this aspect that is found in the requirement under this section that the transferee acted in good faith after taking reasonable care. The position is made very clear by Patanjali Sastri J. in a decision of the Madras High Court.(8)

Transfer by person having authority to revoke former transfer.

42. Where a person transfers any immoveable property, reserving power to revoke the transfer, and subsequently transfers the property for consideration to another transferee, such transfer operates in favour of such transferee (subject to any condition attached to the exercise of the power) as a revocation of the former transfer to the extent of the power.

Illustration.

A lets a house to *B*, and reserves power to revoke the lease if, in the opinion of a specified surveyor, *B* should make a use of it detrimental to its value. Afterwards *A*, thinking that such a use has been made, lets the house to *C*. This operates as a revocation of *B*'s lease subject to the opinion of the surveyor as to *B*'s use of the house having been detrimental to its value.

1. **Scope of the section.**—A transfer of property under which title is intended to pass cannot, as a general rule, be revoked by the transferor. Thus, a person who has executed a sale of his property cannot re-call the deed on the ground that he

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2. 1950 Orissa 143 (145) [AIR V 37 C 23].
1948 Mad 320 (323) [AIR V 35 C 158] (DB).
1944 All 42 (58) [AIR V 31].
1944 Mad 237 (238) [AIR V 31].
1940 Rang 184 (186) [AIR V 27].
1931 Oudh 419 (421) [AIR V 18] (DB).
1929 Cal 636 (638) [AIR V 16] (DB).
[*See also* 1922 Nag 226 (226) [AIR V 9].]

3. ✠('72) Ind App Sup Vol 40 (45) (PC).
1952 Orissa 75 (80) [AIR V 39] (DB).
1937 Pat 353 (355) [AIR V 24].
1932 Cal 167 (169) [AIR V 19] : 58 Cal 1371.
1929 Cal 83 (86) [AIR V 16] (DB).
† 1926 Cal 916 (918) [AIR V 13] (DB).
✠ 1923 Cal 240 (245) [AIR V 10] (DB).

4. ('02) 1 Low Bur Rul 160 (161) (DB).
5. 1917 Mad 775 (780) [AIR V 4].
6. ('72) Ind App Sup Vol 40 (43, 44) (PC).
7. ('72) Ind App Sup Vol 40 (43, 44) (PC).
8. 1948 Mad 320 (323) [AIR V 35 C 158] (DB).

intended the deed to be operative only in the event of the transferee outliving him.(1)

The general rule is, however, subject to certain exceptions. A *gift* can be revoked in any of the cases (save want or failure of consideration) in which if it were a contract, it might be rescinded.(2) *Every transfer* of property can be revoked, if the transferor has *reserved a power to revoke* it. In the case of transfers for *consideration*, the power of revocation reserved may be either at the *will or pleasure* of the transferor, or may be *subject to a condition*. In the case of a gift such power must be subject to a condition not depending upon the *will* of the donor. A power to revoke a gift depending on the will of the donor renders the gift itself void, so that there is no transfer of property at all in such a case.(3)

This section provides that where a power of revocation has validly been reserved in a transfer of property, a subsequent transfer for consideration operates, subject to any condition attached to the exercise of the power, as an exercise of the power so reserved. It is based on certain provisions of the English Statute, 27 Eliz., C. 4, which, before the passing of this Act were applicable to presidency towns in India, but which have been now repealed by this Act. They were to the following effect :

> "If any person or persons ..... shall make any *conveyance*, *gift*, etc. ..... with any clause, provision, article or condition of revocation, ... at his or *their will or pleasure* of such conveyance, etc.. and after such conveyance, etc., so made or had, shall or do bargain, sell, demise, etc., the same lands, etc., to any person ....., for money or other good consideration ..... that then the said former conveyance, assurance, gift, etc., ... shall be deemed, taken and adjudged to be void, frustrate and of none effect, by virtue and force of this present Act."

The distinction between the provisions of the said statute and the provisions of this Act is as follows :

(1) A clause of revocation under the statute must depend only on the *will or pleasure* of the transferor, whereas under the present section the exercise of the power may be made subject to a *condition*.

(2) The statute applied to *gifts* also in which there was a power to revoke *at pleasure*. Under this Act such a reservation would render the gift itself void. (See Section 126).

The section applies to *all* transfers of property reserving a power of revocation including *gifts* provided in the latter case, the power of revocation does not depend upon the mere will or pleasure of the donor. So that a gift, reserving a power of revocation on the happening of a contingency, will under the provisions of this section be revoked by the donor subsequently transferring the property for consideration. In the undermentioned case,(4) however, it was held by the Lower Burma Chief Court that an exercise of the power of revocation cannot be inferred from the mere fact that the donor conveyed the property to a stranger. It is not clear whether, at the date of the decision, this section was extended to Lower Burma.

Section 42 — Note 1

1. ('09) 32 Mad 325 (326) (DB). (If the parties intended title to pass, the fact that no consideration was paid, does not prevent title from passing.)

2. See Section 126.

3. See Section 126.

4. 1915 Low Bur 86 (87) [A I R V 2] : 8 Low Bur Rul 185. (An express act of revocation was held to be necessary.)
Also see S. 126, Note 15.

43. Where a person [a][fraudulently or] erroneously represents that he is authorized to transfer certain immoveable property, and professes to transfer such property for consideration. such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists.

Transfer by unauthorized person who subsequently acquires interest in property transferred.

Nothing in this section shall impair the right of transferees in good faith for consideration without notice of the existence of the said option.

Illustration.

A, a Hindu who has separated from his father *B*, sells to *C* three fields, *X*, *Y* and *Z*, representing that *A* is authorized to transfer the same. Of these fields *Z* does not belong to *A*, it having been retained by *B* on the partition; but on *B*'s dying *A* as heir obtains *Z*. *C*, not having rescinded the contract of sale, may require *A* to deliver *Z* to him.

a. *Inserted* by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), S. 13.

Synopsis

1. Legislative changes. *[Omitted.]*
2. Scope of the section.
3. Distinction between this section and S. 18, Specific Relief Act, 1877.
4. Section presupposes valid contract to transfer.
5. Transfer must be for consideration.
6. Illustration and S. 6(a). See Note 7 on Section 6.
7. "Fraudulently or erroneously represents".
8. "At the option of the transferee."
9. "On any interest which the transferor may acquire."
10. Transfer by person having partial interest in property, who subsequently acquires larger interest.
11. "At any time during which the contract of transfer subsists."
12. "Transfer" and "transferee."
13. Second paragraph.

1. Legislative changes.– *(Omitted.)*

2. Scope of the section. — This section, considering its scope on its terms, clearly applies whenever a person transfers property to which he has no title, on a representation that he has a present and transferable interest therein, and acting on that representation, the transferee takes a transfer for consideration. When these conditions are satisfied and the transferee subsequently acquires the property the transferee becomes entitled to it if the transfer has not in the meantime been thrown up or cancelled and is subsisting. There is an exception in favour of transferees for consideration in good faith and without notice of the rights under the prior transfer. But apart from that the section is unqualified and absolute in its operation and applies to all transfers which fulfil the conditions prescribed therein.(1aa) The principle underlying the section is derived partly from the English Common law doctrine of "estoppel by deed," and partly from the equitable doctrine that "equity treats that as done which ought to be done."(1a)

Section 43 — Note 2

1aa. 1962 S C 847 (850) [A I R V 49 C 119] : 1962 Supp (2) S C R 554. (Hence it applies equally to a case where the defect in title of the transferor arises by reason of his interest in the property being that of an expectant heir as it would where the defect arises by reason of the transferor having no interest at all in the property—AIR 1953 Mad 637 (FB), Affirmed: Held that AIR 1933 Mad 795 was rightly overruled by that case.)

1a. 1956 All 225 (228) [A I R V 43 C 98] : ILR (1956) 1 All 313(FB). (Held overruled by AIR 1962 S C 847 on another point in AIR 1965 All 504.)

1953 Bom 101 (103) [AIR V 40 C 33].

Estoppel by deed.

Where in a deed made between parties and verified by their seals, there is a statement of fact, an estoppel under the English Common law results and is called "estoppel by deed."(1) The statement admits of no contradictory proof, but it is necessary that the averment should be certain, precise and unambiguous and not implied.(2) Where a person makes a grant by deed of property to which he has no title at the time, and avers therein that he *has title* to it and subsequently acquires a title to it, the interest so acquired is said to "feed the estoppel" and the grant then takes effect in interest without any further act being necessary to be done by the grantor.(3) The grantor and his privies including *purchasers for value without notice*, will be estopped from saying that he had no interest at the time of the grant.(4)

Equity treats that as done which ought to be done.

A transfer of what is not in existence will, in England, be treated as a *contract* to transfer the property which is to come into existence in the future. When it does come into existence, equity, treating that as done which ought to be done, fastens upon the property and then the contract to transfer will become a completed transfer(5) inasmuch as, in equity, a contract to transfer property in existence will create an equitable interest in the property itself.(6) But equity will not apply this principle against subsequent transferees for value without notice.(7) In *Holroyd* v. *Marshall*(8) Lord Westbury observed as follows :

> "It is quite true that a deed which professes to convey property which is not in existence at the time is as a conveyance void at law, simply because there is nothing to convey. So in equity a contract which engages to transfer property, which is not in existence, cannot operate as an immediate alienation merely because there is nothing to transfer. But if a vendor or

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1. Halsbury, Laws of England, Vol. 13, P. 323.

2. Halsbury: Laws of England, Vol. 13, Page 366.

1962 Ker 313 (317) [AIR V 49 C 89] : ILR (1962) 2 Ker 130 (FB).

1956 All 225 (226) [AIR V 43 C 98] : ILR (1956) 1 All 313 (FB). (Held overruled by AIR 1962 S C 847 in AIR 1965 All 504.)

('53) 1953 B L J R 227 (229).

(1878) 10 Ch D 15 (24) : 27 W R (Eng) 210, General Finance, Mortgage and Discount Co. v. Liberator, Permanent Building Society.

3. Halsbury, Laws of England, Vol. 13, Page 374.

1947 P C 99 (104) [A I R V 34 C 29] : ILR (1947) Kar (PC) 203: ILR (1947) Lah 399. (Sale by part owner on representation as sole owner — Subsequent acquisition of share by vendor —Vendee could claim such share by virtue of the Evidence Act, S. 115.)

1920 P C 216 (218) [AIR V 7].

1965 All 504 (508) [AIR V 52 C 140]. (Professed transfer of Bhumidari interest though transferor in fact possessed only the non-transferable interest of Sirdar at the time — Transferor subsequently acquiring Bhumidari interest — That interest will be deemed to have passed under the transfer.)

1964 Him Pra 19 (26) [AIR V 51 C 9].

1963 All 599 (601) [AIR V 50 C 175].

1962 Ker 313 (316) [AIR V 49 C 89] : ILR (1962) 2 Ker 130 (FB).

1960 Andh Pra 592 (597) [AIR V 47 C 191] (DB).

1956 All 225 (228) [AIR V 43 C 98] : ILR (1956) 1 All 313 (FB). (Held overruled by AIR 1962 S C 847 on another point in AIR 1965 All 504.)

('53) 1953 B L J R 227 (229).

1952 Nag 29 (30) [A I R V 39] : ILR (1952) Nag 629.

1951 Pat 315 (316) [AIR V 38 C 69] (DB).

1923 Cal 535 (536) [AIR V 10] (DB).

4. Halsbury, Laws of England, Vol. 13, Page 368.

[*See* (1915) 84 L J K B 462 (472) : (1915) 1 K B 400 (415), Poulton v. Moore.]

5. See Section 5 Note 7 and S. 6, Note 3.

1965 All 504 (508) [AIR V 52 C 140]. (Professed transfer of Bhumidar interest by person having only the non-transferable interest of a Sirdar — Subsequent acquisition of Bhumidar interest by him — That interest will be deemed to have passed to the transferee under the transfer.)

1960 Cal 609 (616) [AIR V 47 C 167] (DB).

1951 Pat 315 (316) [AIR V 38 C 69] [DB).

1925 Oudh 120 (124) [A I R V 12] : 27 Oudh Cas 175 (DB). (Relief for recovery of property on such contract is not a relief for specific performance.)

('07) 29 All 163 (164) (DB).

6 See Notes on Section 54.

7. See Snell, Principles of Equity, 11th Edn., Page 41.

8. (1860-62) 138 R R 108 (112) : 10 H L C 191.

mortgagor agrees to sell or mortgage property, real or personal, of which he is not possessed at the time, and he receives the consideration for the contract, and afterwards becomes possessed of property answering the description in the contract, there is no doubt that a Court of equity would compel him to perform the contract, and that the contract would, in equity, transfer the beneficial interest to the mortgagee or purchaser immediately on the property being acquired."

The view was re-affirmed by the House of Lords in *Tailby* v. *Official Receiver*(9) where Lord Macnaghten said :

"Long before *Holroyd* v. *Marshall*(10) was determined, it was well settled that an assignment of future property for value operates in equity by way of agreement, binding the conscience of the assignor, and so binding the property from the moment when the contract becomes capable of being performed, on the principle that equity considers as done that which ought to be done, and in accordance with the maxim which Lord Thurlow said he took to be universal, 'that whenever persons agree concerning any particular subject, that, in a Court of equity, as against the party himself, and any claiming under him, voluntarily or with notice, raises a trust' : *Legard* v. *Hodges*."(11)

The Common law doctrine of estoppel by deed with its technicalities has been held not to be applicable as such to this country.(12) A recital in a document in this country may be evidence against the person making it but does not work any estoppel except where the provisions of S. 115 of the Evidence Act apply. The estoppel laid down by this section is not a rule of evidence preventing a party from alleging and proving the truth of facts but it is a kind of estoppel which affects legal relations.(12a)

Nor is the doctrine that a contract to transfer creates an *equitable interest* in the property in favour of the transferee, applicable in this country,(13) although the equitable principle that a Court of equity will compel a party, who has contracted to transfer what is not in existence, *to perform his promise* if he subsequently acquires it, is recognised in this country and finds expression in S. 18 of the Specific Relief Act, 1877.(13a) (Now S. 13 of the Specific Relief Act, 1963.)

In so far as the subsequently acquired property passes to the transferee *without any further act being* done by the transferor, this section may be said to reproduce the Common law doctrine of "feeding the estoppel."(14) But in so far as it does not

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9 (1888) 37 W R (Eng) 513 (516, 517, 518) : 58 L J Q B 75. (Overruling Belding v. Read, (1865) 13 L T 66.)

10. (1860-62) 138 R R 108 (112) : 10 H L C 191.

11. (1789) 1 Ves Jun 478.

12 ('80) 6 Cal L R 528 (532, 533) (PC).
1955 All 288 (291) [AIR V 42 C 85] : I L R (1955) 1 All 587 (FB).
(1864) 2 Mad H C R 174 (175) (DB).
[See however 1917 Cal 432 (434) [A I R V 4] (DB). (The observation that the Indian Courts have been applying the English doctrine of feeding the estoppel does not appear to be correct.)]

12a. 1962 Ker 313 (317) [AIR V 49 C 89] : ILR (1962) 2 Ker 130 (FB).
1964 Mad 122 (126) [AIR V 51 C 37] : ILR (1964) 1 Mad 85 (DB). (While estoppel in this section has the effect of transferring the property the moment transferor obtains it the rule in S. 115, Evidence Act merely precludes the denial of the truth of his representation by the transferor.)

13. See Notes on Section 54.

13a. 1955 Mys 8 (11) [AIR V 42 C 5] : I L R (1955) Mys 1. (Rule in the section is only an extension of the law of specific performance of contracts.)

14. ('64) ILR (1964) 2 All 191 (285) (DB).
1964 Him Pra 19 (26) [AIR V 51 C 9].
1963 All 599 (601) [AIR V 50 C 175].
1962 Cal 12 (16) [AIR V 49 C 5] : I L R (1961) 2 Cal 558 (DB).
1962 Ker 313 (316) [AIR V 49 C 89] : ILR (1962) 2 Ker 130 (DB).
1956 All 225 (229) [AIR V 43 C 98] : ILR (1956) 1 All 313 (FB). (Held overruled on another point by AIR 1962 S C 847 in AIR 1965 All 504.)
1955 All 288 (291) [AIR V 42 C 85] : ILR (1955) 1 All 587 (FB).
('53) 1953 B L Jour 227 (229).
1934 Rang 51 (58) [AIR V 21].
[*See also* 1921 P C 138 (141) [AIR V 8].
1921 P C 112 (118) [AIR V 8] : 48 Cal 1 : 47 Ind App 239.
('62) 1962 All L Jour 53 (55) (DB). (Sale in auction of insolvent's property without leave of Court — Property purchased by creditor decree-holder himself — Court has power to validate sale by subsequent order — Receiver reporting to Court to accept sale — Court ordering that sale may be confirmed if purchaser paid a certain sum — Amount paid

operate against *bona fide* transferees for consideration it is dissimilar to the Common law doctrine.(14a) In so far, again, as it purports to transfer the property to the transferee *without further conveyance* it is similar to the equitable doctrine that a transfer of property not in existence creates an equitable interest therein in the transferee when it is subsequently acquired.(15) But in so far as the transfer takes place only *at the option of the transferee* and not immediately on such subsequent acquisition, it differs from the equitable doctrine.(15a)

The section has been treated in some cases(16) as branch of the law of estoppel by reason of the fact that an erroneous representation is a necessary element that must be established before the section can apply. In the undermentioned case(17) Mookerjee, J., stated that the foundation of the doctrine stated in *Holroyd* v. *Marshall*(18) is traceable to two sources : one that equity treats that as done which ought to be done, and the other, estoppel the principle of which is explained in S. 43. It is submitted that the section is based neither purely on the doctrine of estoppel nor purely on the equitable doctrine, but as has been seen already, partly on both.

A charge is not a case of transfer of interest in immovable property and this section will not apply to a case of charge for earnest money paid for purchase of immovable property to which the vendor has no title.(19)

3. Distinction between this section and Section 18, Specific Relief Act, 1877. —As has been seen in Note 2, this section and S. 18 of the Specific Relief Act, 1877, may be traced to the same principle of equity, namely, that equity will compel a party who has contracted to transfer what is not in existence to perform his promise if he subsequently acquires it. The main differences, however, between them are as follows :

(1a) It is an essential condition for the application of this section that there should be a *fraudulent or erroneous representation* on the part of the transferor that he is authorised to transfer the property; under S. 18 of the Specific Relief Act, 1877 this is not necessary.(1aa)

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by auction-purchaser utilised by receiver for payment to creditor of insolvent—Effect of the order of Court was to validate the sale by ratification—Subsequent acceptance of the sale by the receiver by his act amounted to feeding the estoppel, a principle recognised by this section.)]

14a. 1956 All 225 (229) [AIR V 43 C 98] : I L R (1956) 1 All 313 (FB). (Held Overruled by AIR 1962 S C 847 on another point in AIR 1965 All 504 .

('55) ILR (1955) Nag 204 (207) (DB).

15. 1923 Cal 535 (536) [AIR V 10] (DB).
1919 Pat 68 (69) [AIR V 6].

15a 1967 Ker 58 (59) [A I R V 54 C 18] : ILR (1966) 2 Ker 221 (DB).

1962 Ker 313 (318) [AIR V 43 C 89] : ILR (1962) 2 Ker 130 (FB). (On exercising the option the interest passes without further conveyance.)

1956 All 225 (229) [AIR V 43 C 98] : ILR (1956) 1 All 313 (FB). (Held in AIR 1965 All 504 that this case stands overruled by AIR 1962 S C 847 on another point.)

('55) ILR (1955) Nag 204 (207) (DB).

16. †1917 Nag 215 (225, 231) [AIR V 4] : 13 Nag L R 130 (FB). (Per Stanyon, A. J. C.—Mitra, A. J. C., contra.)

1960 Andh Pra 592 (597) [AIR V 47 C 191] (DB).

1952 Nag 29 (31) [AIR V 39] : I L R (1952) Nag 629.

1929 Oudh 185 (187) [A I R V 16] : 4 Luck 622 (DB).

1919 Mad 121 (123) [AIR V 6] (DB).

17. ('07) 7 Cal L Jour 387 (393) (DB).

18. (1860-62) 138 R R 108 (112) : 10 H L C 191.

19. 1962 Cal 12 (16) [AIR V 49 C 5]: ILR (1961) 2 Cal 558 (DB). (Doctrine of feeding the estoppel is based on the doctrine of feeding a grant which must be of an interest in immoveable property.)

Section 43 — Note 3

1aa. 1967 Bom 267 (269) [AIR V 45 C 57] : ILR (1966) Bom 997. (Impliedly overruled by A I R 1964 S C 1789 on another point.)

1959 Orissa 169 (171) [A I R V 46 C 49] : I L R (1959) Cut 81 (DB). (Reversed on another point in AIR 1964 S C 1789).

(1) Section 18 of the Spocific Relief Act applies only where the matter is *still in the stage of contract.* It does not apply where *an actual transfer has been made* of property not in existence.(1a)

It has however been held by the undermentioned Full Bench case of the Madras High Court that where a person having no title to movable property sells or plodges it to a *bona fide* purchaser or pledgee, the subsequently acquired title by the former enures to the benefit of the latter. 1b)

(2) Section 18 of the Specific Relief Act applies to contracts to transfer both *movable as well as immovable property*, while this section is limited in its operation to transfers of *immovable* property.

(3) Section 18 of the Specific Relief Act is limited to contracts to *sell or let* property and not to other kinds of transfers such as mortgages. The reason is that there can be no specific performance of a contract to borrow money.(1) This section, on the other hand, applies to all kinds of transfers for consideration such as exchanges (2) and mortgages(3) But neither this section nor S. 18, Specific Relief Act, applies to the case of a charge for the earnest money paid for the purchase of property to which the vendor has no title.(4)

The Specific Relief Act, 1877, has now been repealed by the Specific Relief Act, (42 of 1963) and S. 13 (a) of the latter Act which corresponds to S. 18 (a) of the former Act, deals specifically with the contract to sell or lease *immovable* property only and is confined to the acquiring of interest subsequent to the *contract* and not after the sale or lease.

4. **Section presupposes valid contract to transfer.** – As has been seen in Note 2, the doctrine of equity on which this section is based rests upon the principle that a transfer of non-existent property is regarded as a *contract* to transfer such property which is enforceable on the subsequent acquisition thereof. This involves that the contract should be a valid one enforceable by law.(1a) The words "during which the *contract* of transfer subsists" used in the last portion of the first paragraph show that the transfer must have resulted from a "contract" which as defined in the Contract Act, 1872, means an 'agreement enforceable by law."

1a 1964 S C 1789 (1791, 1792) [AIR V 51 C 249]: 1964 (7) S C R 858. (AIR 1959 Orissa 169, Reversed —The decision in AIR 1967 Bom 267 which relies on the Orissa case is no longer good law.)

1b. 1924 Mad 438 (442) [AIR V 11] : 46 Mad 852 (FB). (On the principle of feeding the title or forwarding title.)

1. 1959 Orissa 169 (171) [AIR V 46 C 49] : ILR (1959) Cut 81 (DB). (Reversed on another point in AIR 1964 S C 1789.)
1920 Lah 74 (78) [AIR V 7] (DB).

2. 1921 Cal 748 (749) [AIR V 8] (DB).

3. ('03) 26 All 82 (86) (FB). (If the transferor acquires the interest in a benami transaction the principle applies.)
1931 Nag 51 (54) [AIR V 18] : 27 Nag L R 199.
1915 Mad 972 (974) [AIR V 2] (DB).
1919 Cal 1024 (1025) [AIR V 6] (DB).
'08) 1908 All W N 155 (156). (Principle of the section applies even if the interest is devolved on the transferor after the mortgage-decree.)
('81) 3 All 805 (808) (DB).
('79) 4 Bom 34 (36) (DB).

4. 1962 Cal 12 (16) [AIR V 49 C 5] : ILR (1961) 2 Cal 558 (DB). (This section does not apply because the case is not one of sale or conveyance. S. 18, Specific Relief Act does not apply because it is a case of no title and not a case of sale by a person with an "imperfect title".)

Section 43 — Note 4

1a. 1962 Ker 313 (317) [AIR V 49 C 89] : I L R (1962) 2 Ker 130 (FB). (Transfer forbidden by law.)
1960 Cal 609 (616) [AIR V 47 C 167] (DB).
('54) ILR (1954) Mad 537 (565) (DB).
1925 Oudh 120 (124) [AIR V 12] : 27 Oudh Cas 175 (DB).

It follows that where the transferor is a person *incompetent* to contract the transferee cannot get the benefit of this section.(1b) Thus, a transferee from a *minor* cannot rely on this section.(1) It has been held in the undermentioned case(2) that a judgment-debtor, a decree passed against whom has been transferred to the Collector for execution and to whom para. 11, Sch. III of the Code of Civil Procedure, 1908, (Since repealed by Act 66 of 1956) applies, is a person incompetent to contract to the extent stated in the said paragraph, and that a transfer made by him in contravention thereof is not capable of being made good under this section. But a person who is adjudicated an insolvent, does not thereby become incompetent to contract, and, consequently, transferee from him of property which has vested in the Court or Official Receiver is entitled under this section to get the property, if the insolvent gets back the property after his discharge.(3)

The section will not also apply where the contract implied in the transfer is void for some other reason than the incompetency of the parties to contract, *e.g.*, where a transfer is for a consideration which is forbidden by law or is of such a nature which if permitted, would defeat the provisions of any law.(4) See also the undermentioned

1924 Oudh 209 (216) [AIR V 11] (DB). (A contract which is ab initio void cannot be validated by S. 43.)

1b. 1962 S C 847 (851) [AIR V 49 C 119] : 1962 Supp (2) S C R 554. (Section 43 deals with transfers failing for want of title and not want of capacity in transferor — Affirming AIR 1953 Mad 637 held that AIR 1933 Mad 795 was rightly overruled by that decision on another point.)

1954 All 452 (453) [AIR V 41 C 188].

1. 1937 All 610 (618) [AIR V 24] : I L R (1937) All 860 (FB).

[*See also* 1918 P C 168 (169) [AIR V 5] : 46 Cal 183 : 45 Ind App 219 : 14 Nag L R 181. (36 Bom 510, Overruled.)]

2. 1917 Nag 215 (228) [AIR V 4] : 13 Nag L R 130 (FB).

3. 1954 Mad 604 (615) [AIR V 41 C 220] : I L R (1954) Mad 80 (FB). (AIR 1933 All 449, Rel. on.)

1934 Lah 809 (811) [AIR V 21] : 16 Lah 392 (DB).

1933 All 449 (451) [AIR V 20] : 55 All 503 (DB).

[*See also* 1948 Mad 430 (432) [AIR V 35 C 207] : ILR (1948) Mad 872 (DB). (Sale-deed executed before insolvency proceedings but registered during pendency of such proceedings—Even assuming that sale took place doing insolvency proceedings, the sale was binding as between the parties—There is no statutory prohibition against sale of property by insolvent after insolvency proceedings have been initiated — Vesting of property in Official Receiver is for benefit of creditors and except in so far as the transaction affects the rights of the creditors it is not invalid.)

4 [1917 Nag 215 (217, 226) [AIR V 4] : 13 Nag L R 130 (FB).

1918 Mad 123 (126) [AIR V 5] : 41 Mad 418 (FB). (No equities arise out of a transaction which is prohibited by law on grounds of public policy.)

1928 Oudh 344 (345) [AIR V 15] : 3 Luck 636 (DB). (The provisions of S. 43 can have no application to a case of a transfer of property which cannot be transferred under the provisions of the law.)

1928 Oudh 153 (154) [AIR V 15].

1921 Mad 410 (411) [AIR V 8] : 44 Mad 946 (DB). (Usufructuary mortgage of unenfranchised service inam is void.)

1915 Mad 998 (1001) [AIR V 2] : 39 Mad 930 (DB). (Alienation of service inam is unlawful.)

('08) 30 All 38 (39) (DB). (Mortgage executed by a mortgagor who was at the time disqualified under S. 8 of the Jhansi Incumbered Estates Act, 1882, is a contract for an unlawful consideration within meaning of S. 23 of the Contract Act.)

('13) 19 Ind Cas 881 (882) (DB) (Mad). (Alienation of service inam land—Alienation forbidden by law.)

[But see 1967 All 531 (532) [AIR V 54 C 158] : 1967 All W R (H C) 198 : 1967 All L J 315 (DB). (Transfer by Sirdar—Transferors subsequently acquiring rights of bhumidhar—Benefit of S. 43 is available to transferee.)

1965 All 504 (506) [AIR V 53 C 140]. (Incompetency arising because of the interest possessed by transferor at the time of professed transfer being one not transferable in law—Such incompetency subsequently removed — Application of S. 43 does not lead to a conflict between S. 43 and S. 6 — AIR 1956 All 225 held overruled by AIR 1962 S C 847.)

('50) ILR (1950) All 311 (315). (Though the transfer of a grove standing on occupancy holding at the time when the existing law barred it as bad it becomes valid in view of S. 43 when by a later law the bar is removed.)

1922 Lah 287 (289) [AIR V 9] : 3 Lah 92 (DB). (Grant of land to *A* under Government Tenants (Punjab) Act under which transfer of tenancy was barred — Agreement between *A* and *B* that latter should help to reclaim the land and get half share of whatever was got by them—*B* receiving only half share of produce until proprietary rights were added to the grant - *Held*,

cases.(5)

5. Transfer must be for consideration. — The section applies only to transfers for consideration.(1) It does not apply to *gifts*. This follows from the principle underlying the section that a transfer of non-existent property is regarded as a *contract* to transfer which will be enforced on the property coming into existence. There cannot be a valid *contract* to transfer unless it is supported by consideration. Where, therefore, a reversioner has joined in the execution of a gift deed executed by a Hindu widow, the fact that he purports to be one of the donors will not affect his interest under this section and he will not be debarred from claiming the property if succession opens in his favour.(2)

6. Illustration and Section 6 (a).—See Note 7 on Section 6.

7. "Fraudulently or erroneously represents." — This is an essential condition for the application of the section. The transferee who wishes to get the benefit of the section must, therefore, show that there was an erroneous or fraudulent representation on the part of the transferor *that he is authorised to transfer the property*.(1)

B was entitled to half share of the added rights the transfer of which was not barred by the Act and the fact that those were preceded by inalienable tenancy did not fetter his rights.)]

[See however ('08) 18 Mad L Jour 247 (249) (Alienation of service inam land — Subsequent enfranchisement—Section 43 applies.)]

5. 1957 All 484 (485) [AIR V 54 C 142]. (The section provides in effect that an agreement to sale property to which the seller has no title may be enforced against him in the future if he acquires an interest in the property.)

1960 Cal 609 (616) [AIR V 47 C 167] (DB). (Transfer of non-existent property is not prohibited by law and hence S. 43 or its underlying principle can be applied for giving effect to the same.)

('54) ILR (1954) Mad 537 (565) (DB).

1924 Oudh 209 (210) [AIR V 11] (DB). (Contract purporting to transfer property inalienable under law—It cannot be given effect to against another property subsequently acquired by transferor.)

1921 Cal 591 (2) (506) [AIR V 8] : 48 Cal 536 (DB). (Assignment of property expressly rendered inalienable by law—S. 43 has no application.)

1917 Oudh 230 (231, 232) [AIR V 4] : 20 Oudh Cas 155. (Mortgage of reversionary interest is void under S. 6.(a). Hence, transferee cannot claim benefit of S. 43.)

('13) 25 Mad L Jour 635 (636) (DB). (Alienation of service inam being void this section cannot be invoked.)

Section 43 — Note 5

1. 1962 Ker 313 (316) [AIR V 49 C 89] : ILR (1962) 2 Ker 130 (FB). (Partition between A and B — A taking larger share of property, assigning certain other property, representing he is the owner, to make up deficiency in B's share—*Held*, there was transfer for consideration and S. 43 applied.)

1955 All 288 (291) [(S) AIR V 42 C 85] : ILR (1951) 1 All 587 (FB).

('64) ILR (1964) 2 All 191 (285) (DB). (Trust deed executed without consideration — Section does not apply.)

1959 Orissa 169 (171) [AIR V 46 C 49] : ILR (1959) Cut 81 (DB). (Reversed in AIR 1964 S C 1789 on another point.)

1959 Pat 278 (282) [AIR V 46 C 75] : 37 Pat 1078 (DB).

1957 Andh Pra 288 (291) [AIR V 44 C 96].

1951 Assam 20 (23) [AIR V 38 C 8] : ILR (1950) 2 Assam 1 (DB).

('09) 31 All 53 (55) (DB).

2. 1955 All 288 (291) [(S) AIR V 42 C 85] : ILR (1955) 1 All 587 (FB).

Section 43 — Note 7

1. ('93) 20 Cal 1 (7) : 19 Ind App 221 (PC).

1953 Mad 637 (639) [A I R V 40 C 250] : I L R (1953) Mad 427 (FB). (Absence of such representation —S. 43 will not apply.)

('64) 1964-1 Andh W R 300 (305).

1963 Pat 277 (282) [AIR V 50 C 79] (DB). (Transferee cannot raise it as a new question for the first time in Letters Patent appeal.)

1963 Mad 37 (38, 39) [AIR V 50 C 15]. (There is no representation by her as to her title being anything more than limited.)

1963 Pat 375 (380) [AIR V 50 C 110] (DB).

('63) ILR (1963) Cut 146 (152).

1959 Mad 131 (136) [AIR V 46 C 42] (DB).

1959 Orissa 169 (171) [AIR V 46 C 49] : ILR (1959) Cut 81 (DB). (Reversed on another point in AIR 1964 S C 1789.)

1958 Mad 255 (259) [AIR V 45 C 78] : ILR (1958) Mad 354 (DB).

1957 Andh Pra 288 (290) [AIR V 44 C 96].

('55) ILR (1955) Cut 163 (168) (DB). (Erroneous representation with regard to some other matter and not with regard to transferor's authority —Section cannot apply.)

1951 Assam 20 (23) [AIR V 38 C 87] : ILR (1950) 2 Assam 1 (DB).

('49) 1949 Bur L R (HC) 625 (630) (DB).

1946 Mad 107 (108) [AIR V 33 C 63].

The word "representation" in this section must bear the same meaning as it bears under the law of contract (1a). It need not be in any particular form. It can be by word of mouth or by a document(1b) and may be express or implied.(1c). It may be based both on facts and on inferences drawn from documents of title.(2) A recital or statement in the document of transfer that the transferor is entitled to the property transferred, is a representation that he is authorised to transfer it.(3) But what the sale deed professes to transfer is not the *only* thing to be considered in applying the section. Facts mentioned by the transferor to the transferee at the time if admissible in evidence, must also be taken into consideration.(3a) The representation by the transferor, if erroneous or fraudulent will entitle the transferee to protection. The word "fraudulently" did not occur in the section as it stood prior to the amendment of 1929, but it was held in cases arising thereunder that while an "erroneous" representation need not be a false one(4) it included a false or fraudulent representation also.(5) The amendment only gives effect to this view.(5a) In their Report, the Special Committee observed as follows :

1946 Sind 99 (103) [AIR V 33 C 30] : ILR (1945) Kar 455. (Vendor professing to sell as guardian of another and not on his own account — Section not applicable.)

1944 Mad 530 (530) [A I R V 31]. (S. 43 applies only when a party in possession of special knowledge makes an incorrect representation to the other party to the contract, where by the other party is induced to enter into the contract and the party making the representation gets the benefit of it.)

1941 Oudh 123 (125) [AIR V 28] : 16 Luck 484.
1935 All 244 (246) [AIR V 22] : 57 All 474.
('30) 1930 Mad W N 1054 (1057).
1923 Cal 165 (165) [AIR V 10] (DB).
1918 Mad 383 (387) [AIR V 5] (DB).
1915 Cal 751 (755) [AIR V 2] (DB).
('05) 32 Cal 832 (836) (DB).
(1909) 31 All 53 (55).

[*See also* 1918 P C 140 (145) [AIR V 5] : 46 Cal 566 : 46 Ind App 1. (Sale by limited owner — Her daughter's son joining in execution of sale deed — Absence of evidence that vendee was induced to alter his position by the erroneous representation of grandson — *Held*, latter was not estopped from challenging the sale.)
1923 Cal 423 (424) [AIR V 10] (DB).]

1a. 1952 Nag 29 (30) [AIR V 39] : ILR (1952) Nag 629.

1b. 1962 Ker 313 (317) [AIR V 49 C 89] : ILR (1962) 2 Ker 130 (FB). (Partition between A and B — A taking larger share of properties — Other properties of A assigned to B to make up deficiency in his share — Partition deed containing statement that A was entitled to the assigned properties — *Held*, that amounted to representation by A to B although the statement was in a partition deed.)

1957 Andh Pra 288 (291) [AIR V 44 C 96].
1952 Nag 29 (30) [AIR V 39] : ILR (1952) Nag 629.

1c. 1957 Andh Pra 288 (291) [AIR V 44 C 96].
1956 All 225 (230) [AIR V 43 C 98] : ILR (1956) 1 All 313 (FB). (Representation by seller will be presumed unless the contrary is stated in the deed of sale—*Held*, overruled by AIR 1962 S C 847 on another point in AIR 1965 All 504.)
1952 Nag 29 (30) [AIR V 39] : ILR (1952) Nag 629. (Silence to a question or even a nod or smile could be sufficient.)
1951 Assam 20 (23) [AIR V 38 C 8] : ILR (1950) 2 Assam 1 (DB). (Transfer for consideration necessarily involves a representation by transferor that he has power to transfer.)

2. ('53) 1953 B L J R 227 (229). (Absence of evidence of actual representation — Still the Court held on the consideration of the nature of the deed (which was of mortgage) and the words used in it that there was an erroneous or fraudulent representation by the mortgagor that he had the right to mortgage the property.)
1930 All 786 (790) [AIR V 17] (DB).

3. 1952 Nag 29 (30) [AIR V 39] : ILR (1952) Nag 629.
1937 Oudh 127 (128) [AIR V 24] (DB). (Section 43 does not impose on the transferee any duty to make any enquiries about the interest of the transferor.)
1927 Mad 649 (649) (DB).
('08) 18 Mad L Jour 247 (249) (DB). (Overruled on another point in AIR 1918 Mad 123 (FB).)

3a. 1946 Mad 107 (108) [AIR V 33 C 63]. (Sale deed saying that it was free of encumbrances but vendor expressly telling vendee that the property was subject to a charge decree — No misrepresentation—S. 43 not applicable.)

4. 1920 Lah 74 (78) [AIR V 7] (DB).
1915 Mad 1085 (1086) [AIR V 2] (DB). (Section 43 does not say anything about the belief of the transferee in the truth of the erroneous representation.)

5. † ('92) 20 Cal 296 (312) : 19 Ind App 203 (PC).
1965 All 504 (505) [AIR V 52 C 140]. (AIR 1962 S C 847, Foll.)
('85) 7 All 864 (866) (DB).

5a. 1962 S C 847 (852) [AIR V 49 C 119] : 1962 Supp (2) S C R 554. (A I R 1953 Mad 637 (FB),

"Section 43 refers to a person making an *erroneous* representation that he is authorised to transfer certain immovable property. The underlying principle is also applicable to a case when the representation is fraudulent. The expression 'erroneously' has, in fact, been construed to include all representations whether tainted or untainted with fraud. It is, however, desirable to make the meaning clear by using the word 'fraudulently' along with the word 'erroneously'."

The expression "fraudulently or erroneously" connotes that the transferee is *not aware* of the real facts and acts on the representation made.(6) Where, therefore, the real facts were known to the transferee there cannot be a "fraudulent or erroneous representation" by the transferor within the meaning of this section.(7) A contrary view had however been taken in the undermentioned cases(8) to the effect that the section would protect a transferee even though he was aware of the want of title in the transferor. But this contrary view now stands overruled by the undermentioned Supreme Court case(8aa) which has laid down that a transferee who as a fact

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Affirmed; Held, that it rightly overruled AIR 1933 Mad 795 on a different point.)
1965 All 504 (505) [AIR V 52 C 140].

6. 1953 Mad 637 (639) [AIR V 40 C 250] : ILR (1953) Mad 427 (FB).
1934 All 969 (970) [AIR V 21].
1930 All 115 (116) [AIR V 17] (DB).
1925 All 102 (102) [AIR V 13] : 48 All 150 (DB).
† 1925 Pat 470 (471) [AIR V 12] : 4 Pat 478 (DB).
('11) 34 Mad 159 (160) (DB).
('10) 34 Bom 175 (182) (DB).

7. 1962 S C 847 (852) [AIR V 49 C 119] : 1962 Supp (2) S C R 554. (Affirming AIR 1953 Mad 637 (FB), Held that the decision rightly overruled AIR 1933 Mad 795 on a different point.)
1917 Nag 215 (226) [A I R V 4] : 13 Nag L R 130 (FB). (Misleading of the transferee is important. 3 C P L R 72, Overruled.)
1965 All 504 (506) [AIR V 52 C 140]. (*Held* AIR 1956 All 225, stands overruled in view of A I R 1962 S C 847.)
1963 Pat 277 (282) [AIR V 50 C 79] (DB).
1960 Cal 609 (616) [AIR V 47 C 164] (DB).
('55) 1955 Raj L W 491 (495) : AIR 1965 N U C 4050.
1953 Mad 637 (639) [AIR V 40 C 250] : I L R (1953) Mad 427 (FB).
1952 Nag 29 (31) [AIR V 39] : ILR (1952) Nag 629. (Transferee who can be fixed with constructive notice of prior registered sale deed under S. 3 cannot exercise option under S. 43.)
1951 Nag 241 (244) [AIR V 38 C 61] : ILR (1951) Nag 12.
1948 Nag 122 (123) [AIR V 35 C 43].
1944 Mad 530 (530) [AIR V 31].
1943 Oudh 196 (204) [AIR V 30] : 19 Luck 37 (DB). (Hindu widow surrendering part of estate to some of the presumptive reversioners—Transfer by the surrenderee—Transferee knowing all facts—Section 43, Applies.)
1938 All 22 (24) [AIR V 25] : ILR (1938) All 63 (DB).
1937 Pat 469 (471) [AIR V 24] (DB).
1936 All 557 (560) [AIR V 23].
1935 All 244 (246) [AIR V 22] : 57 All 474. (Parties knowing transferor has only spes successionis but fraudulently clothing transaction in the garb of out and out sale of the property — Transferee not entitled to protection under S. 43.)
1934 Oudh 112 (114) [AIR V 21] : 9 Luck 359 (DB).
1931 All 275 (276) [AIR V 18] (DB).
† 1929 All 589 (591) [AIR V 16] (DB).
† 1927 Mad 458 (459) [AIR V 14].
1925 Oudh 16 (18) [AIR V 12] (DB).
1923 Cal 165 (165) [AIR V 10] (DB).
✠1920 Mad 659 (659) [AIR V 7] (DB).
1919 Mad 145 (146) [AIR V 6] (DB).
1918 Pat 534 (536) [AIR V 5] (DB).
1914 Mad 648 (650) [AIR V 1] : 37 Mad 38 (DB). (Case under S. 115, Evidence Act.)
('11) 9 Ind Cas 662 (662) (DB) (Cal).
('10) 34 Bom 175 (182) (DB).
('09) 31 All 53 (55) (DB).
('05) 32 Cal 832 (836) (DB).
('04) 7 Oudh Case 98 (100) (DB).
[*See also* ('71) 15 Suth W R P C 16 (18) : 13 Moo Ind App 585 (PC).]

8. 1962 Ker 313 (317) [A I R V 49 C 89] : I L R (1962) 2 Ker 130 (FB).
1956 All 225 (230) [(S) A I R V 43 C 98] : I L R (1956) 1 All 313 (FB). (Knowledge of transferee becomes material only where there is collusion between him and the transferee — Only then will he be disentitled to the benefit of S. 43. 48 All 150; A I R 1934 All 969; A I R 1938 All 22; A I R 1926 All 102; A I R 1941 Oudh 196, Overruled; 34 Mad 159, Dissented from. But it was held in AIR 1965 All 504 that this case stands overruled by AIR 1962 S C 847.
1957 Andh Pra 288 (290, 291) [A I R V 44 C 96]. (Considerations governing personal estoppel under S. 115, Evidence Act cannot be imported into S. 43, T. P. Act.)
1951 Assam 20 (23) [AIR V 38 C 8] : ILR (1950) 2 Assam 1 (DB).
1936 Oudh 313 (316) [A I R V 23] : 12 Luck 215 (DB).
† 1917 Oudh 50 (52) [AIR V 4] : 20 Oudh Cas 72.
[*See* ('80) 4 Bom 34 (36) (DB).
('80) 2 All 718 (720) (DB).
('91) 14 Mad 459 (462) (DB).
('80) 5 Cal 253 (255) (DB).]

8aa. 1962 S C 847 (852) [AIR V 49 C 119] : 1962 Supp (2) S C R 554. (While affirming AIR 1953

knows that the transferor did not possess the title which he represents cannot claim the benefit of this section. So also where the transferee does not solely rely on the representation by the transferor and makes inquiry from other sources and is satisfied that the transferor was authorised to transfer the property there can be no question of the transferee having acted on or being induced by the such representation.(8aaa)

It is, however, not necessary that the transferee should have made *any inquiry* or *taken reasonable care* to ascertain that the transferor had power to transfer the property, as is required by S. 41.(8a) If he believes in the representation and acts upon it he is entitled to protection, even though, if he had been more careful he might have found out that the representation was not true.(9) A contrary view has been expressed in the undermentioned cases.(10) It is submitted that it is not correct.

The burden of proof is initially on the transferee to prove that there was a fraudulent or erroneous representation. The production of the instrument of transfer containing the representation will shift the burden on to the transferor who has then to show that the transferee was aware of the true facts.(11)

The question whether there has been a fraudulent or erroneous representation is one of fact.(12) It has been held in the undermentioned cases(13) that where a transferee takes a transfer from a person who is a limited owner or from one who under the law governing him is not authorised to transfer the property except under certain circumstances, the transferee will be presumed to be aware of the defect in title and that this section would not apply to such cases.

Mad 637 (FB) held that it rightly overruled AIR 1933 Mad 795 on another point.)

8aaa. ('54) ILR (1954) Mad 557 (565) (DB).

8a. 1965 All 504 (506) [AIR V 42 C 140].
1960 Cal 609 (616) [AIR V 47 C 167] (DB).
1957 Andh Pra 288 (290) [AIR V 44 C 96].
1955 Mys 8 (12) [A I R V 42 C 5] : I L R (1955) Mys 1.
1952 Nag 29 (30) [A I R V 39] : I L R (1952) Nag 629.
1946 Mad 107 (107) [A I R V 33 C 63]. (There is no duty cast on the vendee to make any enquiries in the case in which S. 43 applies and mere notice of encumbrances on vendee's part would not make transaction of sale any the less a sale free from encumbrances, when the document says so.)
1924 Oudh 209 (214) [AIR V 11] (DB).

9. ('37) 172 Ind Cas 707 (708) (Cal).
1937 Oudh 127 (128) [AIR V 24] (DB).
1930 All 786 (790) [AIR V 17] (DB).
1924 Oudh 209 (214) [AIR V 11] (DB).
('11) 34 Mad 159 (160) (DB).

10 1946 Sind 99 (103) [AIR V 33 C 30] : I L R (1945) Kar 455. ("Section 43 of the Transfer of Property Act was inapplicable, as the use of words "not in his senses" in the sale-deed put on the transferees the duty of an enquiry.")
1915 Mad 1085 (1087) [A I R V 2] (DB). (Purports to allow earlier decisions though the correctness of the view is doubted.)

11. ('63) ILR (1963) Cut 146 (152).
1963 Pat 277 (282) [A I R V 50 C 79] (DB). (Transferee invoking S. 43 must plead and prove such representation by transferor.)

1960 Cal 609 (616) [AIR V 47 C 167] (DB). (Plea by lessor that lessee knew about his lack of title — Burden of proof is on lessor — Effect of representation is not effectively destroyed by merely placing title deeds with transferee unless transferee takes on express understanding that representation may or may not be correct.)
1922 Cal 542 (543, 544) [AIR V 9] (DB).

12. ('55) ILR (1955) Cut 163 (168) (DB).
1936 Pesh 103 (105) [A I R V 23] (DB). (Representation by husband transferring property of father in lieu of dower that he is authorised to do so is a misrepresentation within the meaning of this section — Section applies in favour of wife when husband becomes owner on death of his father.)
(1908) 18 Mad L Jour 247 (249) (DB). (Immovable property in the shape of inam land — Sale of — Transferor's statement in sale deed that the inam had fallen to his share amounts to a representation that he was authorised to transfer that property.)
1923 Cal 165 (165) [AIR V 10] (DB).
[*See also* 1963 Pat 277 (282) [A I R V 50 C 79] (DB). (Absence of pleading and proof of erroneous representation — Question will not be allowed to be raised for the first time in Letters Patent appeal.)]

13. 1963 Mad 37 (38, 39) [AIR V 50 C 15].
1958 Mad 255 (259) [AIR V 45 C 78] : ILR (1958) Mad 354 (DB). (Hindu widow.)
1941 Oudh 123 (125) [A I R V 28] : 16 Luck 484. (AIR 1934 All 969 and A I R 1927 Oudh 177, Foll.)

8. "At the option of the transferee."— Under the English Common law doctrine of estoppel by deed, the estate subsequently acquired *automatically* passes to the transferee. So also under the English equitable doctrine the transferee gets the beneficial interest in the property as soon as it is acquired by the transferor. In this respect this section differs from the English law. The transferee must, under this section *exercise his option* whether he will take the benefit of the section. Till then the property acquired by the transferor will not pass to the transferee.(1) That option accrues to the transferee by the terms of the section *proprio vigore* and not by anything that he has to do.(1a) The exercise of the option need not be in any particular form, but may be gathered from the acts and conduct of the transferee. The transferee need only require or demand of the transferor that such interest shall pass to him.(1ab)

The occasion for exercising the option under this section arises only when a real interest in the properties concerned becomes vested in the transferor.(1b) But it is not necessary that the option should be exercised *immediately* on the acquisition of the property by the transferor. He is at liberty to exercise it *at any time* during which the contract of transfer subsists.(2) As to how long the contract to transfer subsists, see Note 11. If the transferee claims title to the property after the vesting he must be held to have exercised the option to which he is entitled under this section.(2a)

The word "option" shows that the law has only specified one of the various remedies open to the transferee. The transferee can repudiate the contract or he may elect to ask for damages. This he can do under the general law. The relief provided in the first paragraph of this section is additional and it enables him to get at the property itself.(3)

9. "On any interest which the transferor may acquire." — The section will operate on the subsequently acquired interest, in whatever manner such acquisition is made whether by inheritance(1) or by transfer *inter*

Section 43 — Note 8

1. 1956 All 225 (229) [A I R V 43 C 98) : I L R (1956) 1 All 313 (FB). (Held in A I R 1965 All 504 that this case has been overruled on another point by AIR 1962 S C 847.)
1967 Ker 58 (59) [AIR V 54 C 18] : ILR (1966) 2 Ker 221 (DB).
('55) ILR (1955) Nag 204 (207) (DB).
1930 Nag 204 (204, 205) [A I R V 17] : 27 Nag L R 1.
[See however 1954 Mad 861 (863) [A I R V 41 C 288] : ILR (1954) Mad 791 (DB). (Operation on interest of transferor can commence when transferor himself acquired title to the property.)]

1a. 1967 Ker 58 (59) [A I R V 54 C 18] : I L R (1966) 2 Ker 221 (DB).

1ab. 1967 Ker 58 (59) [AIR V 54 C 18] : I L R (1966) 2 Ker 221 (DB).
1952 Nag 29 (30) [A I R V 39] : I L R (1952) Nag 629. (Vendor selling property to S which had already been sold by him to B — B filing suit and claiming possession purports to exercise his option.)

1b. 1962 Ker 313 (318) [AIR V 49 C 89] : I L R (1962) 2 Ker 130 (FB).

2. 1952 All 301 (303) [AIR V 39].
1917 Oudh 50 (53) [AIR V 4] : 20 Oudh Cas 72.

2a. 1962 Ker 313 (318) [AIR V 49 C 89] : I L R (1962) 2 Ker 130 (FB).

3. 1952 Nag 29 (30) [A I R V 39] : I L R (1952) Nag 629.

Section 43 — Note 9

1. 1962 S C 847 (853) [A I R V 49 C 119] : 1962 Supp(2) S C R 554. (Transfer of property by sale — Transferor having spes successionis in selling property — Transferor representing that he has present interest in property—S. 43, and not S. 6 (a), applies. 1933 Mad 795 [AIR V 20], Overruled.)
1953 Mad 637 (639) [A I R V 40 C 250] : I L R (1953) Mad 427 (FB). (Transfer by reversioner —Transferee not aware of true fact namely that which is transferred is only spes successionis and that transferor has no authority to transfer the property—He can invoke S. 43 against the transferor when he becomes entitled to the property.)
1964 Mad 122 (124) [AIR V 51 C 37] : ILR (1964) 1 Mad 85 (DB). (Mortgagor representing he has right to tranfer the property mortgaging property of mother to which he has only spes successionis —Property subsequently inherited by him—S. 43 applies.)
('55) 1955 Ker L Tim 7 (9) : A I R 1955 N U C 5091 (DB).

vivos(2) or by court auction purchase(2a) or any other way. Thus, where the guardian of a minor sells property belonging to the minor and the latter, after attaining majority sells the same to *X* and subsequently gets the sale by the guardian set aside *X* would be entitled to the property under this section.(3) Similarly, where *A* and *B* were partners, and *A* sold the property of the firm to *X*, and in subsequent arbitration proceedings, the property fell to the share of *A*, it was held that the transferee *X* would under S. 43 be entitled to the property.(4) See also the undermentioned cases.(5)

('47) 49 Pun L R 302 (304). (Where a son mortgages a share in property belonging to his father representing himself as owner and subsequently inherits that share from father, principle of S. 43 comes into play and though he cannot pass title from date of mortgage, executant becomes mortgagor from date of father's death.)

1939 Pat 116 (117) [AIR V 26] (DB). (Daughter becoming life holder of property of her deceased father — Maternal grandsons of deceased mortgaging the property representing they had the right — Daughter challenging the sale under the mortgage decree dying during pendency of the litigation — Transfer and sale becomes good to the extent of the share devolving on the mortgagor grandsons.)

('37) 1937 Mad W N 416 (417, 418).

1935 All 244 (246) [AIR V 22] : 57 All 474.

1933 Mad 856 (857) [AIR V 20]. (Father for himself and his son selling property treating it as if it belonged to them though they were at the time only presumptive reversioners—Son cannot, by virtue of this section, question the sale after acquiring title as reversioner on the ground of absence of title at the time of sale.)

1931 Nag 51 (54) [AIR V 18] : 27 Nag L R 199.

1927 Cal 665 (668) [AIR V 14] (DB). (A Hindu mortgaging joint family property—Share acquired by inheritance after institution of suit on mortgage, will be liable.)

1925 Cal 1205 (1206) [AIR V 12] (DB). (Reversioner joining the widow in conveyance—Reversioner estopped from challenging transaction.)

1924 All 362 (365) [AIR V 11] : 46 All 310 (DB).

1917 Mad 926 (928) [AIR V 4] (DB).

('82) 1882 Bom P J 157 (DB).

('83) 1883 Bom P J 121 (DB).

('10) 6 Ind Cas 37 (38) (DB) (All). (Widow transferring property during minority of son — Son dying afterwards and widow becoming entitled to the property.)

2. 1914 Cal 638 (640) [AIR V 1] (DB).

2a. ('11) 33 All 382 (384) (DB).

3 1933 Bom 42 (43) [AIR V 20] (DB).

4. 1940 All 453 (455) [A I R V 27] : ILR (1940) All 674 (DB).

5. 1963 All 599 (601) [AIR V 50 C 175]. (Joint property — One of co-sharers selling a portion of the property — After partition transferees become the owners of the co-sharer's share under S. 43.)

1963 Pat 277 (282) [A I R V 50 C 79] (DB). (Transferee from sole co-parcener in joint Hindu family consisting of himself and widow having interest under Hindu Women's Right to Property Act can take aid of S. 43 in respect of widow's interest after her death if other conditions are satisfied.)

1962 Ker 313 (316) [AIR V 49 C 89] : ILR (1962) 2 Ker 130 (FB). (Property belonging to one member given to certain member in partition in absolute right in order to make up deficiency in his share — Transaction held amounted to partition and assignment — S. 43 held applied — Allotment of property was operative—On interest that became subsequently available for parties to effectuate the allotment.)

('58) 1958 Ker L T 836 (837). (Suit for redemption on basis of usufructuary mortgage executed on a certain date — Defendants generally contending that on date of mortgage plaintiff had no right to execute it—One of them the decree-holder purchaser in execution of a mortgage decree also contending that he is at best a Kanom tenant and is not bound by the mortgage—Held that the plaintiff's suit being one for redemption of the mortgage he cannot claim benefit under S. 43 from the fact of the Kanom right having been allotted to his Tavazhi in partition.)

('55) 1955 All L Jour 760 (762).

1950 Assam 59 (69) [AIR V 37 C 21] : ILR (1949) 1 Assam 59 (DB).

1937 All 287 (288) [A I R V 24] (DB). (Case under Agra Tenancy Act — Non-transferable holding mortgaged in 1915—Law changed in 1926 under which the holding became transferable—Section 43 applied.)

1934 Cal 82 (84) [AIR V 21] (DB). (Landlord settling land with A when tenant had not abandoned holding—Subsequent abandonment by tenant entitling landlord to settle with strangers—A gets a title under S. 43.)

1928 Oudh 13 (15) [AIR V 15]. (Wife mortgaging property of husband who has not been heard of for more than 7 years—Presumption of his death can be made when suit on mortgage is brought and hence mortgage must be deemed to be operative at that date.)

1925 Mad 249 (252) [AIR V 12]. (Sale by receiver before vesting order—Subsequent vesting order completes title of transferee.)

1922 Lah 287 (289) [A I R V 9] : 3 Lah 92 (DB). (A granted lands under Government Tenants (Punjab) Act which barred the transfer of the tenancy — Agreement between him and B that latter should help to reclaim the land and receive half of whatever was got—Proprietary rights also conferred on A subsequently—Held B was entitled to claim half share of the rights and there was no bar under law against A transferring the proprietary rights.)

But the interest acquired must be the *same* as that purported to be transferred. The section will not operate on any *other* property acquired by the transferor.(6) It is, however, not necessary that the *whole* of the interest purported to be transferred should have been acquired. The transferee will be entitled to whatever interest the transferor acquires, even though it be less than that purported to be transferred.(7)

The subsequent interest must have been acquired in the *same capacity* as the one in which the transferor purported to transfer. The section will have no application if the transferor who has purported to transfer property in his personal capacity subsequently acquires the same *as trustee* for another.(8)

Where the transferor never acquires any interest in the property transferred subsequent to his transfer, the section can, of course, have no application.(9) Where the transferor never got actually any title to the property after his transfer, but was a

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1921 Cal 582 (583) [AIR V 8] (DB). (Acquisition under will.)
('02) 5 Oudh Cas 335 (340). (Partition.)
1919 Pat 409 (411) [AIR V 6] : 4 Pat L Jour 505 (DB). (Grant of permanent lease by goantia of village who had no proprietary interest in the village—Subsequent conferment by Government of proprietary right on transferor—Section 43 will apply.)
('12) 36 Bom 515 (518) (DB). (Person entitled to beneficial interest in the property mortgaging it—Mortgagor is bound under S. 43 to satisfy the claim of the mortgagee out of the beneficial interest when he subsequently gets the same.)
(1908) 18 Mad L Jour 247 (248) (DB). (Transfer of service inam — Transfer though barred at the time transferor subsequently acquiring right to alienate due to enfranchisement of the inam — Held transferee becomes entitled to demand that the transfer should operate on that alienable interest of the transferor.)
(1904) 1 All L Jour 564 (568) (DB). (Mortgage — One-third share of mortgaged property subsequently purchased in execution of his money decree by the decree-holder — Mortgagor selling the entire property to mortgagee in satisfaction of his mortgage decree — Auction-purchaser under money decree not consenting to sale — Mortgagor has right to contribution from him to the extent of one-third share of mortgage debt — This right devolves on the mortgagee under S. 43.)

6. † 1934 All 731 (732) [AIR V 21].
1924 Oudh 209 (216) [A I R V 11] (DB) (Contract transferring property inalienable under laws cannot be given effect to as against another property acquired by transferor.)
1921 Mad 384 (385) [A I R V 8] : 44 Mad 167 (DB).
(1900) 1900 Pun Re No. 32, page 112 (114) (DB).

7. ('53) 1953 B L J R 227 (230).
1927 Rang 100 (102) [A I R V 14] : 4 Rang 532 (DB). (Subsequent to mortgage the mortgagor obtaining charge over some of the property for the first time—Mortgagee entitled to the charge.)
1924 Oudh 209 (213) [AIR V 11] (DB).
(1910) 2 Ch 342 (346) : 79 L J Ch 746, In re Bridgwater's Settlement; Partridge v. Ward.
† ('02) 26 Bom 379 (385) (DB). (Subsequent acquisition of a lien on the property — Lien passes to transferee.)
('89) 2 C P L R 90 (92). (Subsequently acquired interest of mortgagor in mortgaged property—Mortgagee can claim lien on such interest.)

8. 1929 Oudh 185 (187) [A I R V 16] : 4 Luck 622 (DB). (Sale of property as co-sharer—Subsequent acquisition as reversionary heir.)
1914 Cal 321 (323) [AIR V 1] (DB).
[*See also* 1929 Nag 340 (343) [AIR V 16]. (Dispute between A transferee from widow and B co-widow of transferor as to title compromised by each promising not to contest right of the other to the property—A's father subsequently acquiring indefeasible title to property in course of law—Compromise between A and B effects no transfer of property—A's claim to property also is not through the widow but as heir of his father — S. 43 does not apply to case.)
(1882) 20 Ch D 753 (760) : 47 L T 157. (In re D'Epineuil Tadman v. D'Epineuil.)]

9. 1958 Mad 255 (259) [A I R V 45 C 78] : ILR (1958) Mad 354 (DB). (Alienee from Hindu widow before S. 14 of Hindu Succession Act — No question of subsequent acquisition of title by her to the property sold arises after that Act — S. 43 does not apply.)
1958 Mad 459 (460) [AIR V 45 C 154]. (Sale by Hindu widow before passing of S. 14, Hindu Succession Act — Widow cannot get any absolute title to that property under that section — Hence there is no question of the vendee getting benefit under S. 43 in respect of any subsequently acquired title.)
1957 Andh Pra 280 (281) [A I R V 44 C 93] (DB). (Transfer by Hindu limited owner of property before Hindu Succession Act — Section 14 of that Act does not apply and the widow gets no absolute estate — Transferee cannot therefore avail of S. 43, T. P. Act.)
1927 Rang 14 (18) [A I R V 14] : 4 Rang 291 (DB). (Land taken possession of by Collector under award in land acquisition proceedings — Co-owner has no title to land to mortgage it —

party to a compromise under which the title was vested in a third person, it was held that the section had no application.(10)

See also the undermentioned case.(11)

10. Transfer by person having partial interest in property, who subsequently acquires larger interest. — The English Common law doctrine of estoppel by deed does not apply where a transferor has some interest in the property transferred though he purports to transfer a larger interest.(1) Under this section, however, where a person having some interest in property purports to transfer a larger interest in the property on the fraudulent or erroneous representation that he is entitled thereto, and subsequently acquires a larger interest in the property, the transferee would be entitled to claim the property under this section.(2)

11. "At any time during which the contract of transfer subsists."—One of the two essential conditions which must be present for getting benefit under this section is that the contract of transfer should subsist at the time when the claim for recovery of the property is made.(1a) A contract must be held to be "subsisting" so long as it is not *rescinded* or *extinguished* in some other manner.(1b) A transferee who finds subsequent to his transfer that the transferor had no title to transfer may rescind the contract and sue for damages.(1c) He cannot, subsequent thereto, exercise his option to enforce his rights under this section against any property acquired by the transferor after the date of his transfer.

A *decree* obtained in a suit by the transferee to enforce his rights under the transfer does not *extinguish the contract* of transfer, though the contract gets *merged* in the decree.(1) The contract subsists so long as the decree is not fully satisfied. Thus,

Government withdrawing acquisition proceedings on offer by owner to gift the land to the Government—Withdrawal has no effect and no interest vests in the owner thereby which the mortgagee can attach.)

1924 Bom 300 (301) [AIR V 11](DB). (Transferor merely a party to a compromise vesting title in third party — No estoppel and S. 43 does not apply.)

[*See also* 1925 Nag 259 (260) (AIR V 12].

10. 1924 Bom 300 (301) [AIR V 11] (DB).

11. (1913) 35 All 541 (542) (DB). (Joint vendors of property — They are jointly liable to make good the property out of what they had at the time of sale or which they subsequently acquire.)

Section 43 — Note 10

1. Halsbury, Laws of England, Vol. 13, page 373.

2 1965 All 504 (508) [AIR V 52 C 140]. (Professed transfer of interest of Bhumidhar by person having non-transferable interest of Sirdar — Transferor subsequently acquiring interests of Bhumidhar—Interest of Bhumidhar will be deemed to have passed to transferee.)

1964 Mad 122 (124) [AIR V 51 C 37]: ILR (1964) 1 Mad 85 (DB).

('61 1961 Jab L Jour 1292 (1295).

('55) 1955 Ker L T 7 (9) (DB).

1951 Pat 315 (316) [AIR V 38 C 69] (DB).

('50 1950 Bur L R (H C) 163 (176) (DB).

1918 Cal 419 (420) [AIR V 5] (DB).

1917 Cal 467 (469) [AIR V 4] (DB). (Mortgage by person having no transferable interest in property mortgaged — Subsequent acquisition of transferable interest.)

1915 L B 77 (79) [AIR V 2] (DB). (Mortgagee transferring as absolute owner and then acquiring equity of redemption.)

('12) 36 Bom 515 (518) (DB). (Person entitled to the beneficial interest in property which is under a charge created by decree must satisfy mortgage out of the beneficial interest on getting it.)

†('08) 7 Cal L Jour 381 (383) (DB). (Person who had merely a ghatwali interest in certain land mortgaged it on the representation that it was his jagir and subsequently got a mokarari title to it.)

[*See also* 1914 Cal 617 (618) [AIR V 1] (DB). (Permanent sub-lease — Original lease merely temporary, but renewed from time to time — This enures for the benefit of sub-lessee.)]

Section 43 — Note 11

1a. 1962 S C 847 (850) [AIR V 49 C 119] : 1962 Supp (2) S C R 554.

1964 Mad 122 (124) [AIR V 51 C 37]: ILR (1964) 1 Mad 85 (DB).

1954 All 452 (453) [AIR V 41 C 188].

1b. 1962 Ker 313 (316, 318) [AIR V 49 C 89] : ILR (1962) 2 Ker 130 (FB).

1c. 1952 Nag 29 (30) [AIR V 39] : ILR (1952) Nag 629.

1. ('95) 18 Mad 492 (495) (DB).

where a mortgagor mortgaged property to which he was not entitled at the time but, after the mortgagee had obtained a decree on the mortgage, he acquired the same, it was held that such property was liable to be proceeded against by the mortgagee in execution of his decree.(2) Similarly a pre-emptor who has obtained a decree for pre-emption and deposited the pre-emption amount in Court but who is unable to obtain possession of the property due to defect in title of the vendor is entitled to obtain possession from the vendor by invoking the benefit of this section when the latter subsequently becomes the owner of the property and enters into possession.(2a) But where the decree was satisfied by sale in execution thereof, it was held that a subsequent acquisition by the mortgagor did not accrue for the benefit of the mortgagee.(3)

In their Report on the amending Bill of 1929, the Special Committee expressed the opinion that the view that the contract of transfer subsists even after the decree in a suit to enforce the transferee's rights, was not correct. They observed as follows:

> "The words 'during which the contract of transfer subsists' are appropriately used and are clearly intended to mean that it is at the option of transferee either to enforce the transfer or to repudiate the contract. In ILR 18 Mad 492, the Madras High Court has laid down in general terms that the contract of transfer subsists so long as the decree obtained in a suit to enforce a transfer has not been fully satisfied and that until then the transferee is entitled to claim the benefit of any subsequent acquisition of interest in the property by the transferor. This does not appear to us to be sound although, having regard to the terms of the decree which was passed in that suit, the decision itself cannot be said to be incorrect. Once a decree has been passed in a suit brought on the transaction as a completed transfer, the contract must be taken to have merged in the decree whereupon new rights arise not under the contract, but under the decree.
>
> "With a view to meet the observations of the Madras High Court we think that the following paragraph should be added to the section after the words "till the contract of transfer subsists," viz.—
>
> "Where a suit is brought by the transferee to enforce his rights under the transfer, the transferee shall be entitled to claim any interest which the transferor may acquire in such property at any time prior to the passing of any decree in such suit, from which no appeal lies, and not thereafter'."

The opinion so expressed by the Special Committee was not concurred in by the Select Committee. In their Report on the same Bill, they observed:

> "In regard to the amendment ..... we think that it will unnecessarily restrict the operation of the principle of "the estate feeding the title." A limitation of the right of a transferee to an interest which may accrue to his transferor up to the date of the decree in a suit instituted to enforce that right might work injustice, and we do not think that the decision in 18 Mad 492 is sufficient justification for any amendment of the section in this respect."

It has been held in the undermentioned case(4) that a contract which is void *ab initio* cannot be said to be a subsisting contract. In that case a Hindu coparcener in the Province of Oudh purported to alienate his share without the consent of his coparceners. It was held that such a transfer was void under the Hindu law and that

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2. 1964 Mad 122 (125) [AIR V 51 C 37] : ILR (1964) 1 Mad 85 (DB).
('08) 1908 All W N 155 (156). (18 Mad 492, Followed.)
('95) 18 Mad 492 (495) (DB).
('90) 3 C P L R 72 (73). (Overruled on another point in AIR 1917 Nag 215 (FB).)
[*See also* 1935 All 269 (270) [AIR V 22] (DB). (The main ground of the decision however was that on general principle the mortgagor cannot deny the title of the mortgagee to the property mortgaged.)]

2a. 1954 All 452 (453) [AIR V 41 C 188]. (Decree for pre-emption does not put an end to the contract of sale. It only substitutes the pre-emptor in the place of vendee with all his rights and liabilities.)

3. 1964 Mad 122 (125) [AIR V 51 C 37] : ILR (1964) 1 Mad 85 (DB).
† ('11) 10 Ind Cas 443 (443) (All).

4. 1941 Oudh 123 (126) [AIR V 28] : 16 Luck 484.

S. 43 had no application to the case. It is submitted that this view is not correct. The fact that a person may have no right or power to transfer certain property does not render a *contract* to transfer property void on that ground. There are numerous cases on the other hand in which S. 43 has been applied to transfers of undivided property where the transferor subsequently became entitled to it.(5)

Where *A* grants a lease of land belonging to Government and subsequently the Government declares the land to be at its disposal, it has been held by the High Court of Madras that the tenancy terminates by such declaration, and that, consequently, if the Government grants the land subsequently to the lessor, the lessee cannot claim the land under this section.(6)

12. "Transferor" and "transferee." — Unless a statute expressly or by necessary implication precludes the application of provisions awarding rights to or imposing civil liabilities on the privies of the person to whom the rights are given or on whom the liabilities are imposed, the privies are entitled or bound, as the case may be, to the extent to which the original parties are so entitled or are so bound.(1) Consequently, this section will, subject to the second paragraph, operate also against the privies of the transferor. It can be taken advantage of by the privies of the transferee.(2)

The word "transferee" does not include a Court auction-purchaser. There is no transfer by act of parties, no representation by the judgment-debtor, and no acting by the purchaser on such belief. The equitable doctrine underlying the section can have no application to such cases.(3) A sale by the Official Receiver appointed by a Court under its insolvency jurisdiction is not a transfer by order of Court, but it is one by act of parties and this section applies to such transfers. Thus, if the Official Receiver sells

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5. 1937 Pat 546 (549) [AIR V 24] : 16 Pat 230 (DB). (AIR 1930 All 852, Followed.)
1923 Oudh 265 (270) [AIR V 10] : 26 Oudh Cas 245 (DB). (AIR 1922 Pat 347, Followed.)
1922 Pat 347 (348) [AIR V 9] (DB).
1914 Oudh 426 (429) [AIR V 1].
✠('07) 7 Cal L Jour 644 (646, 647) (DB). (On the severance of the Hindu family by partition the prior mortgage became perfected as regards the share of the mortgagor.)
('91) 14 Mad 459 (462) (DB). (Coparcener in Madras selling family land — Sale valid only to the extent of his share — Subsequent acquisition of further interest in the property passes to transferee.)
[*See also* 1956 Bom 624 (625) [AIR V 43 C 248]. (If family property sold by son as if he was absolute owner — Suit by vendee and vendor for possession against existing tenant of family after terminating tenancy — Father's death during pendency of suit — *Held*, suit being one filed against a trespasser and not against vendor for recovery of the whole property doctrine of feeding the grant by estoppel against vendor cannot be availed of by the vendee to recover the whole property from the tenant.)
1920 Pat 433 (439) [AIR V 7] : 5 Pat L Jour 605 (DB).
1937 Pat 563 (566) [AIR V 24] : 16 Pat 622 (DB). (Mortgage of undivided share — Subsequent partition but mortgagee not party to it — Mortgagee can seize only that property which falls to mortgagor's share.)]

6 ✠1915 Mad 1085 (1087) [AIR V 2] (DB).
[*See also* 1918 Mad 383 (387) [AIR V 5] (DB).]

Section 43—Note 12

1. ✠1915 Mad 1085 (1086) [AIR V 2] (DB).
2. 1963 Mad 37 (38) [AIR V 50 C 15]. (Heir or person claiming under alienor.)
✠1915 Cal 751 (755) [AIR V 2] (DB). (Heirs of transferor bound.)
1915 Mad 1085 (1088) [AIR V 2] (DB).
1914 All 366 (367) [AIR V 1) : 36 All 141 (DB). (Persons claiming under transferor bound.)
('72) 4 N W P H C R 11 (12) (DB). (Old case—Nothing about notice to the purchaser.)

3. ('64) 1964-1 Andh W R 300 (305). (*A* obtaining money decree against *B*—*C* agreeing with *B* to sell certain property to *B* — *A* attaching that property in execution before sale is completed — Subsequent sale by *C* to *B* — Does not enure to the benefit of *A* or auction purchaser — S. 43, T. P. Act or equitable rule of estoppel feeding the grant held not applicable.)
1954 Mys 142 (144) [AIR V 41 C 59]: ILR (1953) Mys 530.
1952 All 287 (288) [AIR V 39].
1938 Lah 360 (361) [AIR V 25].
✝('13) 40 Cal 173 (184) (DB).
('79) 4 Cal 677 (682) (DB).

property before a vesting order is made in his favour, and subsequently a vesting order is made, the purchaser will be entitled to the property under this section.(4)

13. **Second paragraph.**—The second paragraph makes it clear that the equity in favour of the transferee cannot be enforced against a person who has taken a subsequent transfer from the transferor in good faith, for consideration, and without notice of the option vested in the transferee.(1) If, therefore, the subsequent transferee has notice of the option, he cannot claim the benefit of the second paragraph.(2) The subsequent transferee will be deemed to have had notice of the existence of the option if he had knowledge of the previous transaction,(2a) and in such a case it is not necessary to establish that the subsequent transferee had known that the transferor's title was defective on the date of the first transfer, that the transferor later acquired interest which he had previously purported to transfer and that the transferee had exercised his option by electing to hold the transfer bound by the bargain.(2b)

It has been doubted by the High Court of Allahabad whether the word "transferee" in the second paragraph would include a court auction-purchaser of the transferor's property inasmuch as what is purchased in court auction is merely the right, title and interest of the transferor.(3) In the undermentioned case of the same High Court,(4) *A* mortgaged to *B* certain property to which he had no title but subsequently acquired it. Before *B* sued on his mortgage the property was sold in court auction to *C* who took with knowledge of all the facts. It was held that *C* was estopped from denying the validity of the mortgage in favour of *B*. There was, however, no reference to S. 43.

Where the equity in favour of a first transferee in the shape of the option mentioned in the first paragraph does not exist the equity mentioned in this paragraph does not come into play and it will not be necessary for the person who has taken a subsequent transfer to resort to this paragraph for protection.(5)

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4. 1927 Mad 1 (3) [AIR V 14]: 50 Mad 135 (FB). 1927 Mad 1091 (1092) [AIR V 14] (DB).

Section 43—Note 13

1. 1962 S C 847 (850) [AIR V 49 C 119] : 1962 Supp (2) SCR 554.
1956 All 225 (229) [AIR V 43 C 98] : ILR (1956) 1 All 313 (FB). (Held overruled on another point by AIR 1962 S C 847 in AIR 1965 All 504.)
1952 All 301 (302) [AIR V 39].
1952 Nag 29 (30) [AIR V 39] : ILR (1952) Nag 629.
†('11) 14 Oudh Cas 295 (299) (DB).
('02) 29 Cal 355 (361) (DB).

2. 1929 Mad 890 (892) [AIR V 16] (DB).
1919 Cal 1024 (1025) [AIR V 6] (DB).

2a. 1967 All 531 (532) [AIR V 54 C 158] (DB). (Sections 43 and 3 — Notice — Meaning of — Transfer in favour of first transferee effected by registered deed — First transferee found to be in possession of land in question when subsequent transferee obtained transfer deed in respect of it — Held subsequent transferee could not be said to be transferee without notice.)
1952 All 301 (303) [AIR V 39]. (But from the mere fact of the registration of the first mortgage of a property of which a part was acquired only subsequently by the mortgagor it cannot be assumed that the second mortgagee of that part had notice of the option especially when the second mortgage was not made subject to the first mortgage and there is no mention in the second mortgage deed about the first mortgage.)

2b. 1952 All 301 (303) [AIR V 39].

3 1935 All 234 (235) [AIR V 22] (DB).

4. ('81) 3 All 805 (808) (DB).

5 1952 Nag 29 (30) [AIR V 39] : ILR (1952) Nag 629.

44. Where one of two or more co-owners of immovable property legally competent in that behalf transfers his share of sueh property or any interest therein, the transferee acquires, as to such share or interest, and so far as is necessary to give effect to the transfer, the transferor's right to joint possession or other common or part enjoyment of the property, and to enforce a partition of the same, but subject to the conditions and liabilities affecting, at the date of the transfer, the share or interest so transferred.

Transfer by one co-owner.

Where the transferee of a share of a dwelling house belonging to an undivided family is not a member of the family, nothing in this section shall be deemed to entitle him to joint possession or other common or part enjoyment of the house.

Synopsis

1. Scope of the section.
2. Immovable property. See Section 3.
3. "Legally competent in that behalf."
4. "Right to joint possession or other common or part enjoyment."
5. Right to enforce a partition—General.
6. Right to joint possession and partition under Hindu law.
7. "Subject to the conditions and liabilities."
8. Second paragraph—General.
9. "Dwelling-house."
10. "Undivided family."

1. Scope of the section. — This section deals with the rights and liabilities of a transferee from a co-owner, as to the *enjoyment* of the property transferred. The first part of the section merely incorporates the general principle that a person who takes a transfer from another steps into the shoes of his transferor, and is clothed with all the *rights* and becomes subject to all the *liabilities* of his transferor. In short, he becomes as much a co-owner as his transferor was before the transfer.(1)

The second part provides an exception to the general rule stated above and is based on convenience. It is designed to prevent an outsider from enforcing his way into a dwelling-house in which other members of the transferor's family have a right to live.(2) The effect of it is to compel a *stranger* transferee of a *dwelling-house* belonging to an undivided family, to enforce his rights in regard to such share only by a partition.

Although this section in terms may not apply to a sale in execution of a decree yet the principle underlying the section is applicable to an execution sale.(3)

Section 44 — Note 1

1. 1965 Mad 389 (39[illegible]) [AIR V 52 C 132] : I L R (1965) 2 Mad 521. (Transfer of property by one of the co-owners — Transferee is entitled for possession and declaration that the interest of transferor has been conveyed to him.)
1952 All 650 (652) [AIR V 39] (DB). (Permanent lease of proprietary right by one of co-sharers without consent of other co-sharers — Transferee is entitled to remain in occupation of plot to the extent of share of his transferor co-sharer.)
1935 Lah 651 (652) [AIR V 22].
1935 Mad 1059 (1061) [AIR V 22].
1932 All 393 (400) [AIR V 19] : 54 All 628 (DB).
('30) 125 Ind Cas 739 (740) (Cal).
† 193[illegible] Oudh 475 (478, 479) [AIR V 17] (DB).
1924 Mad 741 (746) [AIR V 11] (DB).
1917 Nag 45 (46) [AIR V 4] : 14 Nag L R 101.
1915 Mad 447 (448) [AIR V 2] (DB).
1915 Mad 453 (454, 455) [AIR V 2] : 39 Mad 265 (DB). (Purchaser from co-owner cannot claim mesne profits from others unless he gets partition.)
('08) 18 Mad L Jour 258 (258) (DB).
('68) 10 Suth W R 441 (441) (DB). (A party who purchases the rights of one of a number of co-sharers comes into all arrangements made in respect to the collections.)

2. 1953 Cal 259 (260) [A I R V 40 C 94] : I L R (1954) 1 Cal 384 (DB).
1940 Rang 53 (54, 55) [AIR V 27].

3. 1962 Orissa 147 (149) [AIR V 49 C 56].
1948 Cal 61 (62) [A I R V 35 C 27] (DB). (Whatever might be said about cases where the stranger purchaser of a share of a dwelling

2. Immovable property. — See section 3.

3. "Legally competent in that behalf." — These words must be interpreted in the light of the provisions of S. 7 which provides that every person competent to contract and entitled to transferable property or authorised to dispose of transferable property not his own, is competent to transfer such property in the circumstances, to the extent and in the manner allowed or prescribed by any law for the time being in force. A coparcener in a Mitakshara joint Hindu family, for instance, cannot according to the law prevailing in all the provinces, make a *gift* or a *bequest* of his share in the family property except with the consent of the other coparceners.(1) Nor can such a coparcener even make a transfer of his share for *consideration*, according to the law prevailing in some provinces, without the consent of the other coparceners.(2) In either case, the coparcener cannot, in the absence of such consent, be said to be "legally competent to make the transfer" within the meaning of this section, and the transferee cannot claim the rights accorded to him under this section.

According to the law prevailing in some provinces in India, a coparcener of a Hindu joint family *can* alienate his share in the joint family property for consideration.(3) Such a coparcener will be a person "legally competent to make the transfer" within the meaning of this section.

The interest of a co-sharer in common property can be sold, mortgaged or leased to another co-sharer or to a stranger. The fact that common property has not been divided by metes and bounds and allotted in severalty to the co-sharers does not stand in the way of the interest of one sharer being conveyed to a stranger or another co-sharer.(4) But where one co-sharer landlord in exclusive possession of a plot of the joint land lets it out to a tenant without the consent of the other co-sharer landlords, such a tenancy will not bind the latter.(5) A surrender of his share by one of several tenants to the landlord is within this section.(6)

4. "Right to joint possession or other common or part enjoyment." — Every joint owner or co-owner of property has a proprietary right in the *whole* estate.(1) This right, however, operates only to prevent any co-owner from setting up a

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house who has obtained joint possession peacefully is sought to be ejected by other coparceners, a suit for joint possession by auction purchaser against the other coparceners would not lie.)

Section 44 — Note 3

1. See Note 7 on Section 7.

2. See Note 7 on Section 7.

3. See Note 7 on Section 7.

4. 1965 J and K 2 (6) [A I R V 52 C 2]. (Compromise decree for possession — Decree-holders holding specific shares in the undivided and joint property, under the terms of decree — Two decree-holders, out of three, transferring their interest to lessees-judgment-debtors — Transfer is not invalid and the judgment-debtors would be entitled to joint possession of the property along with the other co-owner or his transferees.)

1957 Andh Pra 619 (624) [AIR V 44 C 205].

5. 1952 All 650 (652) [A I R V 39] (DB). (Lease in such a case must be confined to the interest which the lessor could transfer.)

('51) 17 Cut L T 358 (359).

6. 1957 Bom 217 (218) [AIR V 44 C 75] : I L R (1957) Bom 371 (DB).

Section 44 — Note 4

1. 1967 J and K 17 (18) [AIR V 54 C 7].

1936 Mad 666 (667) [AIR V 23].

1934 Lah 1 (3) [AIR V 21] (DB).

1930 Sind 34 (36) [AIR V 17] : 24 Sind L R 208 (DB). (Legitimate use of property does not constitute invasion of co-sharer's right.)

† 1924 Cal 792 (793) [A I R V 11] (DB). (The joint proprietary right is however merely a right and must not be confounded with the manner of enjoying that right.)

1917 Nag 45 (46) [A I R V 4] : 14 Nag L R 101. (Do.)

('11) 7 Nag L R 82 (84).

('09) 5 Nag L R 105 (106).

[*See also* 1952 Trav-Co 195 (198) [A I R V 39] (DB). (A co-owner can maintain a suit for possession of the entire property against a trespasser on his own behalf. (Kunhi Raman and P. Subramaniya Iyer JJ.)

claim to any parcel of the common property as his exclusive property, during the period of common ownership.(2) In other words, a co-owner gets a cause of action to claim joint possession, when his right to enjoy the property in common is *denied* or there is an *ouster*. (For a discussion of what amounts to *ouster*, see the A.I.R. Commentaries on the Limitation Act, 4th (1965) Edn. Articles 64 and 65, Notes 35 and 36).

A co-owner or his transferee, if *ousted* from joint possession, is entitled to enforce his right to *joint possession* by a suit, and is not necessarily forced to sue *for partition*.(3)

But where there is no ouster and the co-owners have been enjoying the common property in separate plots for the sake of convenience, the Court will not decree to one co-owner joint possession of the portion in the actual cultivation of the other.(4) The

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2. ✠1924 P C 144 (146) [AIR V 11] : 51 Cal 631 : 51 Ind App 293.
1924 Cal 792 (793) [AIR V 11] (DB).
1920 Cal 610 (612) [AIR V 7] : 47 Cal 182 (DB). (If he occupies it exclusively he has to account to the others.)
1917 Nag 45 (46) [AIR V 4] : 14 Nag L R 101.
('12) 13 Ind Cas 376 (377) (DB) (Cal).
(1900) 1900 All W N 81 (81, 82) (DB).
See also the cases cited in foot-note (4).

3. 1956 Cal 625 (627) [AIR V 43 C 178].
('49) 8 J & K L R 34 (35).
1932 All 81 (81) [A I R V 19]. (Decree for joint possession cannot be refused merely on ground that it would be impracticable or inadmissible.)
1927 Cal 936 (937) [A I R V 14] (DB). (26 Cal 553, Foll.)
1915 Cal 264 (264) [A I R V 2] (DB). (If not satisfied with delivery of possession of undivided share he can sue for partition.)
('99) 26 Cal 553 (555) (DB).
('96) 18 All 361 (363). (Stranger building upon property — Purchase from stranger by some co-sharers — Remaining co-sharers can sue for joint possession of land on which building was erected.)
('95) 20 Bom 467 (468, 469) (DB).

4. 1924 P C 144 (146) [A I R V 11] : 51 Cal 631 : 51 Ind App 293 (PC).
✠ '89) 18 Cal 10 (21) : 17 Ind App 110 (PC). (But the person in exclusive possession is liable to pay compensatian for the exclusive use.)
('04) 26 All 588 (591) (FB). (Co-owner in joint possession illegally ousted from it— He is entitled to be restored to joint possession.)
('62) 1962 B L J R 277 (279).
('51) 55 Cal W N (3 D R) 159 (164).
1934 All 193 (196) [AIR V 21] : 56 All 582 (DB).
1932 All 81 (81, 82) [AIR V 19].
1930 Sind 34 (35, 36) [AIR V 17] : 24 Sind L R 208 (DB).
1927 Oudh 467 (467, 468) [AIR V 14] : 2 Luck 740 (DB). (Mortgagee with possession from co-sharer cannot be ejected by another co-sharer.)
1926 Rang 137 (138) [AIR V 13]: 4 Rang 103 (DB).
1925 Cal 1027 (1028) [AIR V 12] (DB).
1925 Cal 272 (272, 273) [A I R V 12]. (Mutual arrangement to possess separately alone will support suit for separate possession; otherwise the remedy is by partition.)]
1925 Cal 235 (237) [AIR V 12] (DB).
1924 All 923 (924) [AIR V 11]. (Decree for joint possession refused — Proper remedy held to be partition.)
1924 All 880 (881) [AIR V 11].
1924 Cal 792 (793) [AIR V 11] (DB).
1923 All 446 (447) [AIR V 10]. (One co-sharer in sole actual possession of plot ousted therefrom by another co-sharer — Former is entitled to actual possession which he had before and not merely to joint possession.)
1923 All 445 (445, 446) [AIR V 10] : 45 All 157 (DB).
1923 All 416 (416) [AIR V 10]. (One co-sharer wrongfully cultivating parti land and getting it recorded in his name—Another co-sharer can get decree for joint possession.)
1919 Cal 992 (993) [AIR V 6] (DB).
1919 Oudh 303 (303, 304) [A I R V 6]. (One co-sharer in exclusive possession for long time — Remedy of other co-sharers is partition.)
1918 Oudh 288 (289) [AIR V 5] : 21 Oudh Cas 214. (Exclusive possession by one co-sharer for long time without any let or hindrance by other co-sharers —Latter have no right to eject him— Their remedy is by partition.)
1918 Pat 175 (178) [AIR V 5] (DB).
1917 Cal 345 (346, 347) [AIR V 4] (DB). (One co-owner claiming adversely portion of joint property — Other co-owner is entitled to decree for joint possession.)
1918 Cal 19 (20) [AIR V 5] (DB). (Do.)
† 1917 Nag 45 (46, 47) [AIR V 4] : 14 Nag L R 101.
1914 Cal 283 (284, 285, 286) [AIR V 1] (DB).
('12) 34 All 150 (154) (DB). (A plaintiff who has never been in possession but is entitled to possession jointly with other persons can be granted a decree for joint possession.)
('12) 34 All 113 (115) (DB). (Joint owners in exclusive possession of separate plots in abadi — They are entitled to continue such possession so long as such possession does not interfere with user of other owners of what is in their possession.)
('11) 7 Nag L R 82 (84).
('07) 5 Cal L Jour 267 (268, 269) (DB).
('05) 27 All 88 (90, 92) (DB).
('05) 2 All L Jour 481 (482).
('05) 1905 All W N 160 (161) (DB). (Decree declaring but not restoring joint possession and

proper remedy of the former would be to sue for partition.(5) So also, if instead of remaining himself in exclusive possession of his separate plot, the co-owner transfers it, his transferee cannot be disturbed by the other co-owners until a final partition between the co-owners takes place.(5a) It has, however, been held that the fact that the cosharers may have been holding specified plots in their separate possession for convenience would not entitle the transferee from one of the cosharer tenants to a decree for declaration of title and khas possession of a specified plot in the absence of a binding partition between the cosharers.(5b)

As to the mode of executing a decree for joint possession, see the A.I.R. Commentaries on the Code of Civil Procedure, 7th (1963) Edn., O. 21, R. 35, Note 6.

Under this section a usufructuary mortgagee of a share in immovable property acquires his transferor's right to joint possession or other common or part enjoyment of the property, and so long as the mortgage subsists, the mortgagor cannot exercise any joint possession or common enjoyment of that property with his co-owners. If he attempts to exercise any such right, he is liable to be ejected at the instance of his own mortgagee.(6)

5. Right to enforce a partition—General.—In all cases of joint ownership, each party has a right to demand and enforce partition; in other words, a right to be

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entitling plaintiff to ask accounts of profits can be granted.)
('05) 1905 All W N 119 (120).
('04) 27 All 153 (154, 155) (DB). (Dispossessed co-owners held entitled to decree for joint possession.)
('01) 1901 All W N 48 (48, 49). (Share in undivided mahal taken possession of by some of the co-sharers to the exclusion of other co-sharers—Latter are entitled to decree for joint possession.)
(1900) 14 C P L R 76 (78).
('98) 2 Cal W N 229 (232) (DB). (Decree for partial ejectment and joint possession.)
('94) 1894 All W N 166 (167) (DB).
('73) 5 N W P H C R 122 (127) (DB).
('72) 18 Suth W R 12 (13) (DB). (Other co-sharer's remedy is only by way of an application for partition.)
('70) 13 Suth W R 322 (322, 323) (DB). (But the case is different if there is direct infringement of clear and distinct right.)
[*See* 1931 Nag 40 (41) [AIR V 18]: 26 Nag L R 345. (Common land brought under cultivation by co-sharer—Suit for joint possession must be brought without delay.)]
('71) 5 Beng L R (App) 25 (26) (DB). (One of several co-sharers cannot without consent of others interfere with the enjoyment of property by a tenant who derives his title from all.)
[*See also* ('06) 11 Cal W N 143 (145) (DB). (Separate leases by different co-sharers of lands in their exclusive possession— One of the lessees cannot sue for joint possession with other — His proper remedy is suit for partition.)
('05) 32 Cal 837 (848, 849) (DB).
('98) 1898 Pun Re No. 16, p. 33 (38).
('68) 9 Suth W R 291 (291) (DB). (Proprietors are not entitled to oust their co-proprietors from lands which the latter have as tenants brought under cultivation.)]

5. ✱1924 PC 144 (145, 156) [AIR V 11]: 51 Cal 631: 51 Ind App 293.
1935 Pesh 126 (128) [AIR V 22] (DB). (Claim for possession by one co-sharer against another can be met only by partition.)
1934 All 193 (196) [AIR V 21]: 56 All 582 (DB).
1933 All 519 (521) [AIR V 20]: 55 All 728. (Excluded co-sharer can recover compensation; partition is not his only remedy.)
('26) 95 Ind Cas 845 (846) (Oudh). (1924 P C 144 [AIR V 11], Followed.)
1925 Cal 1027 (1028) [AIR V 12] (DB).
1924 Cal 792 (793) [AIR V 11] (DB).
1919 Oudh 303 (303) [AIR V 6].
1918 Pat 175 (178) [AIR V 5]: 3 Pat L Jour 426.
1918 Oudh 288 (289) [AIR V 5]: 21 Oudh Cas 214.
('07) 5 Cal L Jour 267 (268) (DB). (18 Cal 10 (PC), followed.)
('06) 11 Cal W N 143 (145) (DB). (Lessee from co-owner improving land in belief that it was exclusive share of his lessor—Lessee from other co-owner cannot be given joint possession but may sue for partition.)
('01) 28 Cal 223 (227) (DB).
('72) 18 Suth W R 12 (13) (DB).

5a. 1939 All 415 (426) [AIR V 26]: ILR (1939) All 607 (FB). (Co-sharer in part enjoyment of joint land—His transferee is entitled to the same part enjoyment — Provisions of S. 118 of U. P. Land Revenue Act do not affect provision of T. P. Act about transfer of co-sharer's interest in land with all that is attached to it.)
1950 Pepsu 5 (5, 6) [AIR V 37 C 3]: 1 Pepsu L R 312.

5b 1950 Assam 1 (5) [AIR V 37 C 1]: I L R (1949) 1 Assam 40 (DB).

6. 1944 Pat 341 (343) [AIR V 31] (DB). (As the mortgagor co-sharer has no right to present possession, he cannot claim partition.)

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placed in a position to enjoy his own right separately and without interruption or interference by others.(1) Under the section not only the transferee of a share, but also a transferee of any *interest* therein can sue for partition.(1a)

To entitle a person to claim partition, it is thus not necessary that the parties should have *identical* interests.(2) A subordinate tenure-holder under a co-owner is as much entitled to claim partition against the properties as a purchaser from a co-owner.(3) So also, a lessee for a term of years,(4) a mortgagee entitled to possession,(5) and a life-tenant(6) have all been held entitled to partition in so far as it is necessary to give effect to the transfer. But a mortgagee who is not entitled to possession is not entitled to sue for partition as it cannot be said that partition is necessary to give effect to his mortgage.(6a)

It is not in every case that partition will be decreed, irrespective of the *convenience* of the parties.(7) In *Hemadri Nath Khan* v. *Ramani Kant Roy*,(8) a Full Bench case, it was contended that there could be no partition between parties who did not own *co-ordinate* interests. Justice Bannerji observed as follows :

> "The only reason that might be urged in its support is, that if partition can be enforced as between co-owners whose interests are not co-ordinate in degree, parties having permanent interest may be put to frequent and needless expense and trouble by having to watch partition proceedings instituted at the instance of co-owners with temporary interests, such proceedings not leading to any division of the property which can have a lasting effect . . . . . I think the Court must in each case determine whether, having regard to the nature of the interests owned

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Section 44 — Note 5

1. Spencer, Equitable Jurisdiction of the Court of Chancery, Vol. 1, Page 653.
Story, Equity Jurisprudence, Ss. 648 & 649.
('36) 40 Cal W N 1203 (1204, 1205) (DB). (A market or market land is not impartible.)
1915 Lah 416 (417) [AIR V 2] : 1915 Pun Re No. 87 (DB).
('06) 28 All 627 (629) (DB).
† ('69) 3 Beng L R (App) 120 (121) (DB).
[*See also* ('06) 10 Cal W N 839 (840) (DB).]

1a. 1940 Mad 491 (492) [AIR V 27]. (If it is necessary to give effect to the transfer.)

2. *('10) 37 Cal 918 (927) : 37 Ind App 198 (PC). (24 Cal 575 (FB) approved—Nor is it necessary that the interest should be of a permanent nature, e.g., a mukarrari interest.)
('97) 24 Cal 575 (583) (FB). (20 Cal 379 overruled—Zamindar held entitled to sue putnidar for partition.)
1918 Bom 251 (252) [AIR V 5] : 42 Bom 87 (DB). (Suit by one co-tenant against lessee of others to recover share of tenancy by partition is maintainable.)
1916 Cal 891 (892) [AIR V 3] (DB). (Permanent tenure-holders are entitled to seek partition as against co-sharers of their lessors.)
1916 Pat 259 (261) [AIR V 3] : 1 Pat L Jour 441 (DB). (Lessee for a term of years.)
('09) 2 Ind Cas 641 (644) (DB) (Cal). (Life-tenant.)
('06) 3 All L Jour 474 (475). (Lessee of undivided portion of house can sue for partition.)
('05) 1 Cal L Jour 40 (42) (DB). (Kaemi mourasi mirasdars.)
('03) 27 Mad 361 (366) (DB). (Lessee for a term of years.)
(1852) 51 E R 733 (735) : 16 Beav 147 (151), Heaton v. Dearden.
(1813) 35 E R 214 (214, 215) : 1 Ves & B 551, Baring v. Nash.
[*See also* 1926 Cal 1076 (1077) [AIR V 13] (DB). (Suit by occupancy tenant for partition against landlord.)
1933 Bom 121 (122) [AIR V 20] (DB). (Under Hindu law, mortgagee from one coparcener can maintain suit for partition of joint family property.)
('83) 10 Cal 97 (102) (DB).]

3. ('05) 1 Cal L Jour 40 (42) (DB). (Kaemi Mourasi Mirasdars.)

4. 1957 Andh Pra 619 (619) [AIR V 44 C 205] (DB).
1916 Pat 259 (261) [AIR V 3] : 1 Pat L Jour 441 (DB).
('03) 27 Mad 361 (366) (DB).
†(1852) 51 E R 733 (735) : 96 R R 69, Heaton v. Dearden.

5. 1933 Bom 121 (122) [AIR V 20] (DB).

6. ('09) 2 Ind Cas 641 (644) (DB) (Cal).

6a. 1940 Mad 491 (492) [AIR V 27].

7. †('97) 24 Cal 575 (582, 583) (FB).
1957 Andh Pra 619 (624) [AIR V 44 C 5) (DB).
1929 Cal 710 (712, 713) [AIR V 16] : 57 Cal 715 (DB). (There is no fixed rule that property held in temporary right cannot be partitioned.)
1916 Pat 259 (261) [AIR V 3] : 1 Pat L Jour 441 (DB).
('07) 34 Cal 1026 (1028) (DB).
('05) 1 Cal L Jour 40 (41) (DB). (Partition of portion of joint estate.)

8. ('97) 24 Cal 575 (582, 583) (FB).

> by the parties, and to all other circumstances necessary to be taken into consideration, *the balance of convenience* is in favour of allowing partition, and if it determines that question in the affirmative, the mere fact of the parties owning interests which are not co-ordinate in degree, ought not to be a bar to partition."

Accordingly, a claim to partition will be refused on the ground of inconvenience, where the plaintiff owns an interest of a *temporary*, *precarious* or *qualified* character, but will be generally allowed where the parties have *permanent* titles.(9) There is, however, no fixed rule of law that a property *held in a temporary right* cannot be partitioned.(10) In the undermentioned case(11) while holding that a monthly tenant was entitled to partition, Justice Ghose remarked::

> "In the circumstances of this case I consider that the mere fact that technically the holding is a monthly tenancy should not debar the plaintiffs from their lawful right to partition."

There are, no doubt, observations in *Bhagwat Sahai* v. *Bepin Behari Mitter*,(12) a Privy Council decision, which lend support to the view that parties claiming partition must have *permanent* titles. But their Lordships expressly refrained from adopting as a general rule of law that a temporary interest could not be partitioned.

In order to succeed in a suit for partition, there must not only be the unity of title or interest—they need not be of the same degree—but also the unity of possession. Thus, if the plaintiff is not in joint possession, either actual or constructive, but is entitled to joint possession, then he must frame the suit as one for joint possession and partition.(13) Where a co-owner mortgages his share with possession, it cannot be said that the mortgagor co-owner, so long as the mortgage subsists, has a unity of possession with his co-owners. The mortgagor, therefore, cannot claim partition so long the mortgage remains unredeemed.(13a)

The right to partition cannot be denied on the ground that the title on which it is based is liable to forfeiture in the events which have not occurred.(14)

A partition effected at the instance of a person having a *temporary* interest, lasts only till the expiry of that interest.(15)

6. Right to joint possession and partition under Hindu law. — As has already been seen in Note 3, a coparcener of a joint family governed by the Mitakshara School of law is competent according to the law prevailing in some provinces, to transfer *for value* his own interest in the coparcenary property without the consent of other coparceners. But as regards the rights of the purchaser to joint possession and partition, the law as administered in Madras differs from that which prevails in other provinces.

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9. ('97) 24 Cal 575 (582, 583) (DB).
1922 Cal 345 (347) [AIR V 9] : 49 Cal 37 (FB). (Title not made precarious by virtue of the periodical settlement for the assessment of revenue—Partition is possible.)
1916 Cal 124 (126) [A I R V 3] : 43 Cal 1118 (DB).
('05) 9 Cal W N 699 (702) (DB).

10. See for instance the cases cited in foot-notes (3) to (6) and foot-note (11).

11. 1929 Cal 710 (713) [AIR V 16] : 57 Cal 715 (DB).

12. ('10) 37 Cal 918 (927) : 37 Ind App 198 (PC). (9 Cal W N 699, reversed on facts—Interest of mokararidar held not of a temporary and qualified character.)

13. 1937 Pat 525 (526) [AIR V 24] (DB). (AIR 1936 Pat 422 reversed—Vendor found never in possession of share sold — Purchaser held not entitled to partition unless actual possession of share recovered.)
1928 Rang 73 (76, 77) [AIR V 15] : 5 Rang 785.
1923 Pat 162 (163) [AIR V 10] (DB).
1918 Cal 393 (394) [AIR V 5] (DB).

13a. 1944 Pat 341 (343) [AIR V 31] (DB).

14. ('10) 37 Cal 918 (927) : 37 Ind App 198 (PC).

15. ('03) 27 Mad 361 (366) (DB).

Right to joint possession.

According to the High Courts of Madras and Andhra Pradesh the only right which the transferee gets is an *equity* to stand in his transferor's shoes and to work out his rights by means of a partition. The transferee does not acquire an interest in the property and is not entitled to possession.(1) According to the High Court of Bombay,(2) and the Judicial Commissioner's Courts of Nagpur(3) and Sind(3a) where the transferee is a *stranger* and *has not obtained possession*, he is not entitled to possession. But where he *has obtained possession*, the non-alienating coparceners, according to the High Court of Bombay, may sue either for joint possession with the transferee(4) or to recover the possession of the whole alienated property.(5) If they sue for joint possession, the Court is bound to decree it.(6) In the latter case, the Court is not bound to eject the transferee and may allow him to hold the property as tenant-in-common till partition.(7)

Right to partition.

According to the High Courts of Bombay(8) and Madras,(9) where a coparcener transfers his interest in a specific property, a suit for partition by the transferee must be one for the *general* partition of the entire property, and not for partition of the specific property. According to the law prevailing in Allahabad(10) and Calcutta,(11)

Section 44 — Note 6

1. 1917 Mad 111 (111) [AIR V 4] (SB).
1959 Andh Pra 523 (526) [A I R V 46 C 152] (FB). (That equity is not available to alience from the alienee—(1958) 1 Andhra W R 85, overruled.)
1926 Mad 683 (686) [AIR V 13] : 49 Mad 596 (DB).
1923 Mad 467 (468) [AIR V 10] (DB).
1915 Mad 50 (51) [AIR V 2] (DB).
1914 Mad 440 (441, 444) [AIR V 1] : 38 Mad 684 (DB). (Alienee cannot sue for allotment of his share but for partition of whole family property.)
('12) 16 Ind Cas 698 (700) (DB) (Mad). (Per Sundaram Aiyar, J.)
[*See* 1923 Mad 55 (56) [AIR V 10] : 46 Mad 54 (DB). (Insolvency of managing member of joint Hindu family—Official Assignee is entitled to joint possession.)
('06) 29 Mad 294 (295) (DB). (Purchaser at court-sale of the share of an undivided member of a joint Hindu family acquires only a right to sue for partition.)]

2. 1922 Bom 137 (137) [AIR V 9] : 46 Bom 28 (DB).
1919 Bom 84 (85) [AIR V 6] : 43 Bom 472 (DB).
1918 Bom 101 (104) [AIR V 5] : 43 Bom 17 (DB).
('89) 1889 Bom P J 323 (DB).
('88) 1888 Bom P J 57 (DB). (Mortgagee of a share in specified fields forming part of undivided family estate cannot be awarded possession thereof.)
('86) 1886 Bom P J 105 (DB).
('85) 1885 Bom P J 176 (DB).
('85) 1885 Bom P J 157 (DB).
('80-81) 5 Bom 496 (498, 499) (DB).
[*See also* 1916 Bom 130 (132) [AIR V 3] : 41 Bom 347 (DB).
('80-81) 5 Bom 499 (503, 504) (DB). (Purchaser at auction-sale of the share of a coparcener is not entitled to possession but must sue for partition.)]

3. 1934 Nag 132 (133) [AIR V 21] : 30 Nag L R 29 (DB).
†1929 Nag 60 (61) [AIR V 16] : 25 Nag L R 28.
† ('13) 9 Nag L R 18 (23).
('02) 15 C P L R 156 (156, 158).

3a. 1915 Sind 1 (2) [AIR V 2] : 10 Sind L R 34 (DB).

4. ('80) 5 Bom 493 (495) (DB).
('78) 2 Bom 676 (678) (DB). (1 Bom 95, followed.)
('76) 1 Bom 95 (96) (DB).

5. †1926 Bom 399 (399, 400) [AIR V 13] : 50 Bom 204 (DB).

6. See the cases cited in foot-note (4).

7. See Mulla, Principles of Hindu Law, 9th Edition, 1940, Section 261 (1), Pages 297 to 299.

8. † ('99) 24 Bom 128 (130, 133) (DB).
('98) 23 Bom 184 (186, 187) (DB).
('82) 1882 Bom P J 148 (148) (DB).
('75) 1875 Bom P J 140 (140) (DB).
[*See also* ('85) 1885 Bom P J 237 (237) (DB).]

9. ('10) 34 Mad 269 (274, 275) (FB).
1960 Mad 341 (348) [AIR V 47 C 117]. (Benami purchaser of undivided interest of coparcener—Suit by for partition in his own name — Title of benamidar not repudiated by real owner—Suit maintainable.)
† 1914 Mad 440 (443) [AIR V 1] : 38 Mad 684 (DB).
('97) 20 Mad 243 (244, 245) (DB). (13 Mad 275, followed.)
('90) 13 Mad 275 (276) (DB).

10. ('06) 28 All 39 (40, 41) (DB). (The purchaser is not bound to include in his suit for partition the whole of the property.)

11. ('35) 62 Cal 655 (657).

the transferee may claim partition of the specific property without suing for general partition. He has, also, on general partition, the equitable right to have that property assigned to the transferring coparcener's share, if that could be done without prejudicing the rights of the other coparceners.(12) The non-alienating coparceners may also sue for a partition of the specific property alienated without suing for general partition.(13) So also, a transferee from a coparcener can maintain a suit for partial partition confined to the property in the possession of another transferee from the remaining coparceners.(14)

Before the amending Act of 1929, the second chapter of this Act and, therefore this section, did not affect any rule of Hindu law. The Hindu law rules as set out above were not, therefore, affected by the section.(15) The amendment of S. 2 by the omission of the word "Hindu" now makes this section directly applicable even to cases governed by the Hindu law. If, therefore, there is a conflict between the Hindu law rules as set out above and the right of the purchaser under this section, this section will no doubt prevail. There does not, however, appear to be any such conflict. The rights of the transferee under this section to joint possession and partition are "subject to the conditions and liabilities affecting, at the date of the transfer, the share or interest transferred;" these words clearly save the special rules of Hindu law in such matters.(16)

7. "Subject to the conditions and liabilities." — The rights of the transferee are "subject to the conditions and liabilities" that attach at the date of the transfer to the share or interest so transferred. Thus, a mortgagee from a co-owner of his share in one of several items of property belonging to the co-owners, will take it only subject to the right of the other co-owners to enforce a partition. If in such partition, the mortgaged property is allotted to another co-owner, the latter takes the property free of the mortgage, and the mortgagee can proceed only against the substituted properties in the hands of the mortgagor.(1) Similarly, the purchaser of the

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12. 1934 Nag 132 (134, 135) [AIR V 21] : 30 Nag L R 29 (DB).
1931 Bom 218 (219, 220) [AIR V 18].
1927 Mad 1084 (1086) [AIR V 14].
† 1926 Mad 774 (776) [AIR V 13] : 50 Mad 320 (DB).
† 1924 Mad 81 (81, 83) [AIR V 11] : 46 Mad 815 (DB).
† 1923 Mad 467 (468, 471) [AIR V 10] (DB).
1922 Bom 137 (137) [AIR V 9] : 46 Bom 28 (DB).
† 1915 Sind 1 (2) [AIR V 2] : 10 Sind L R 34 (DB).
('07) 17 Mad L Jour 617 (618) (DB). (25 Mad 690, Followed.)
('76) 1876 Bom P J 77 (77) (DB).
('74) 11 Bom H C R 76 (82).
('74) 11 Bom H C R 72 (74).
[But see 1934 Bom 329 (334, 335) [AIR V 21] (DB).(AIR 1920 Mad 316, followed—Principle of substitution cannot be extended to strangers.)]

13. ✠('11) 34 Mad 259 (275, 276) (FB).
1960 Mad 341 (348) [AIR V 47 C 117].
1918 Bom 101 (104) [AIR V 5]: 43 Bom 17 (DB).
('82) 5 Mad 196 (197) (DB).
[*See* 1927 Mad 528 (529) [AIR V 14]. (In this case the suit was for partial partition and it was decided that alienee could not raise an objection that the suit was not maintainable.)]

14. 1924 Nag 337 (338) [AIR V 11].
† ('13) 9 Nag L R 145 (147).
[*See* ('11) 34 Mad 269 (275) (FB). (15 Mad 234 and 13 Mad L J 477, Followed.)]

15. 1917 Mad 111 (111) [AIR V 4] (SB).
('90) 13 Mad 275 (276, 277) (DB).

16. 1952 Mad 419 (434) [AIR V 39]: ILR (1952) Mad 835 (FB).
1964 Orissa 43 (44, 45) [AIR V 49 C 19] : ILR (1963) Cut 855 (DB).

Section 44 — Note 7

1. 1933 Lah 682 (685) [AIR V 20] (DB).
1919 Oudh 329 (330, 331) [AIR V 6].
1916 Mad 323 (324, 325) [AIR V 3] : 39 Mad 283 (DB).
1914 Oudh 426 (429) [AIR V 1].
† ('07) 6 Cal L Jour 46 (49, 50) (DB).
('02) 24 All 483 (486) (DB).
(1900) 1900 Pun Re No. 32, p. 112 (115) (DB).
† ('95) 18 Mad 316 (318, 319) (DB).
('93) 20 Cal 533 (536) (DB).
('93-1900) 1893-1900 Low Bur Rul 189 (190).
('83) 1883 Pun Re No. 81, p. 260 (261, 262) (DB).

undivided interest of a Hindu coparcener of a joint Hindu family takes it subject to the liability of the coparcener of paying his father's debts and to all the equities available to the other members of the family.(2)

The transferee cannot, however, be saddled with new conditions or liabilities not existing *at the date of the transfer*.(3) The purchaser of the undivided interest of a member of a joint Hindu family is entitled to have his share ascertained with reference to the state of the joint family property *at the date of the transfer* and is not affected by the subsequent birth of other coparceners.(4)

8. **Second paragraph — General.** — The second paragraph of the section provides an exception to the rule stated in the first paragraph. Where a share in a *dwelling-house* belonging to an *undivided family* has been transferred to a *stranger*, the transferee cannot claim joint possession or other common or part enjoyment of the house; he can enforce his rights with regard to such share only by a suit for *partition*.(1) The principle underlying the provision is that it is inequitable to permit

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See Domat, Civil Law, Section 1671.

('73) 1 Ind App 106 (119) (PC). (4 Beng L R App 97, Reversed.)

† ('98) 23 Bom 385 (392, 393) (DB). (For the purpose of such re-adjustment, a partition once made is liable to be re-opened.)

('78) 4 Cal 510 (513, 514) (DB).

[*See also* 1963 Andh Pra 119 (120, 121) [AIR V 50 C 42] (DB). (Purchaser at court auction of undivided share in specific item — Specific item not allotted to share of judgment-debtor at partition — Purchaser cannot seek remedy of substituted security.)

1929 Pat 208 (209) [AIR V 16] : 8 Pat 258 (DB). (Co-sharer not a party to settlement is not bound by the settlement made by other co-sharers.)

1922 Oudh 46 (47) [AIR V 9]. (Sale of plots by co-sharer of patti — Vendee is entitled to have his possession maintained subject to the result of any partition that may take place among the co-sharers.)

1914 Mad 440 (441) [AIR V 1] : 38 Mad 684 (DB).

('11) 9 Ind Cas 67 (68, 69) (DB) (Cal). (Case not one of encumbrance strictly so called but rather a case of an anomalous burden.)]

Also see S. 73, Note 1.

2. ✠1927 Mad 471 (472, 473) [AIR V 14] : 50 Mad 535 (FB).

('12) 14 Ind Cas 524 (526, 527) (DB) (Mad).

('74) 11 Bom H C R 76 (82).

[*See also* ('03) 28 Bom 201 (208) (DB). (11 Bom H C R 72 and 76, Followed.)

('96) 1896 Bom P J 384 (DB). (Purchaser from sharer bringing suit to have his vendor's share in family property divided off is liable to be met with allegation of the exhaustion of his vendor's share.)]

3. † 1925 Nag 68 (71) [AIR V 12].

('81) 5 Bom 496 (498).

[*See also* 1935 Pesh 161 (162) [AIR V 22] (DB). (A mortgagee of property who obtains a decree on basis of his mortgage and becomes its owner by purchase in court-auction is not affected by a mortgage created subsequent to his mortgage.)]

4. ✠('12) 35 Mad 47 (51, 52, 55, 61) (FB). (14 Mad 408 (FB) not approved.)

†1936 Nag 34 (37) [AIR V 23]: 31 Nag L R (Supp) 124 (DB). (35 Mad 47 (FB), followed.)

1927 Mad 1084 (1086) [AIR V 14]. (Do.)

1924 Mad 81 (81) [AIR V 11] : 46 Mad 815 (DB). (Do.)

†1916 Bom 130 (131, 132) [A I R V 3] : 41 Bom 347 (DB).

('12) 14 Ind Cas 524 (526, 527) (DB) (Mad).

[*See also* ('05) 15 Mad L Jour 486 (486). (25 Mad 690 (FB), followed.)

('02) 25 Mad 690 (704, 721) (FB). (A purchaser for value of the interest of an undivided coparcener who dies before partition is effected, does not lose the benefit of his purchase and he may apply for partition afterwards.)]

('02) 25 Mad 697*n* (DB), Valluri Venkatasami v. Garla Ademma.

('02) 25 Mad 697*n* (DB), Muthuramien v. Subbaramaniya.

(1884) 7 Mad 588 (590) (DB).

[But see 1933 Mad 158 (162) [A I R V 20] : 56 Mad 534 (DB). (14 Mad 408 (FB), followed.)

('96) 21 Bom 797 (806) (DB). (Purchaser is liable to have his share diminished before partition by the birth of other coparceners if he stands by and does not insist on an immediate partition.)]

Section 44 — Note 8

1. ('08) 30 All 324 (327) (FB). (Words 'undivided family' apply even to Mahommedans.)

1958 Pat 550 (553) [AIR V 45 C 178].

('54) 20 Cut L T 462 (466).

1950 Cal 111 (114) [AIR V 37 C 33] : ILR (1951) 1 Cal 103 (DB).

1948 Cal 61 (63) [AIR V 35 C 27] (DB). (Principle of S. 44 applies to involuntary sales—Stranger purchasing at court-sale share of coparcener in tank enjoyed as part of a family dwelling house—Suit by him for joint possession against other coparceners is not maintainable.)

†1916 Cal 170 (172) [AIR V 3] (DB).

[*See also* ('41) 46 Cal W N 407 (408) (DB). (It was held in this case that assuming that the

a stranger to intrude himself upon the privacy of an undivided family residence.(1a) In *Balaji Anant* v. *Ganesh Janardan*,(2) Westropp, C. J., observed as follows :

> "We. . . . . ' .deem it a far safer practice, and less likely to lead to serious breaches of the peace, to leave a purchaser to a suit for partition than to place him by force in joint possession with members of a Hindu family, which may be not only of a different caste from his own, but also different in race and religion."

The second paragraph not only takes away the right of the stranger transferee of an undivided share of a family dwelling-house from a co-owner to ask for joint possession but at the same time creates a right in favour of the other co-owners who are affected by the transfer. The other co-owners can maintain a suit for injunction restraining the stranger transferee from exercising any act of joint possession in respect of the share transferred,(2a) or if he has taken possession of the portion of the dwelling-house, they are entitled to get a decree for eviction against him.(2b)

The right of a stranger transferee to have the house partitioned is, however, subject to S. 4, Partition Act (IV of 1893). Under that section, a stranger transferee claiming partition by metes and bounds may be compelled, at the option of the other members of the family, to forego his legal right to such partition and to accept pecuniary compensation in lieu thereof.(3) This section does not make any distinction between the stranger purchaser coming before the Court as a plaintiff or as a defendant the other co-owner's rights are the same in both the cases.(4)

9. **"Dwelling-house."** — The word "house" embraces not merely the actual structure or building, but includes also adjacent buildings, cartilage, garden, courtyard, orchard and *all that is necessary for the convenient use and occupation of the house*, but not that which is only for the personal use and convenience of a particular occupier.(1) The question whether all that is attached to a house is required for its convenient use is to be determined on the facts and circumstances of each case as established by the evidence let in.(2) In the undermentioned case,(2a) a big tank appertaining to a dwelling-house was held to be a part of it. But, once a garden or open land or a tank is dissociated from the structure or building, it is no longer a dwelling-house either on the theory of convenience or physical affinity or appurtenance or on the theory of

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principle of the section applies to transfers in execution of a decree, an injunction can be granted against the transferee only when the transferee obtains decree for actual possession.)]

1a. 1958 Pat 550 (553) [AIR V 45 C 178].
1953 Cal 259 (260) [AIR V 40 C 94] : ILR (1954) 1 Cal 384 (DB).

2. ('81) 5 Bom 499 (504, 505) (DB).

2a. 1967 Orissa 139 (142) [AIR V 54 C 61] : 33 Cut L T 1163. (1951 Cal 412 [AIR V 38], Dissented from.)
1958 Cal 614 (615) [AIR V 45 C 147]. (AIR 1952 Cal 253; Rel. on; AIR 1951 Cal 412 Dissented from.)
1952 Cal 253 (255) [AIR V 39] : I L R (1951) 2 Cal 263.
[But see 1951 Cal 412 (413, 414) [A I R V 38 C 110].

2b. 1967 Orissa 139 (142) [AIR V 54 C 61].

3. 1967 Mad 156 (158) [AIR V 54 C 45]. (Under S. 4, Partition Act, co-owner can buy off the stranger purchaser if he seeks partition.)
1967 Mad 76 (77) [AIR V 54 C 20].
1952 Cal 253 (254) [AIR V 39] : ILR (1951) 2 Cal 263.
1917 All 2 (3) [AIR V 4] : 39 All 672 (DB).
[*See also* 1961 Orissa 203 (204) [AIR V 48 C 78]. (S. 4, Partition Act is only an extension of privilege given to share-holders by S. 44, T. P. Act— It was presumably enacted to afford benefits of law of pre-emption to other communities in India so far as dwelling-house is concerned.)]

4. 1967 Orissa 139 (142) [AIR V 54 C 61].

Section 44 — Note 9

1. 1941 Pat 4 (5) [AIR V 28]. ("Dwelling house" includes land and appurtenances necessary for its enjoyment.)
†1938 Pat 13 (14) [AIR V 25].
1928 Cal 539 (542) [AIR V 15]. (7 Ind Cas 436, followed.)
1919 Cal 1055 (1056) [AIR V 6]: 45 Cal 873 (DB).
✠('10) 7 Ind Cas 436 (441, 442) (DB) (Cal).

2. †1935 Mad 628 (631, 632) [AIR 22].
1928 Cal 539 (542) [AIR V 15].

2a. 1952 Cal 253 (254) [AIR V 39] : I L R (1951) 2 Cal 263.

physical integrity of parts or components.(2b)

In order that a house may be the "dwelling-house" of a family, it is necessary that it must be *used* for dwelling purposes. A hut which was capable of being used as a dwelling-house but which was not so used for a number of years was held not to be a "dwelling-house."(3) It is, however, not necessary that the family which owns the house should itself actually or constantly occupy it.(4) It may be occupied by tenants. The mere grant of a tenancy of the ordinary kind, as distinguished from a permanent and irrevocable lease, will not change the character of the house, which is otherwise a dwelling-house.(4a) In the undermentioned case(5) of the Madras High Court, Walsh, J., observed as follows :

> "The word 'dwelling-house' has a perfectly well known and plain meaning and does not necessarily connote a dwelling-house occupied by an undivided family, who also own it. The Legislature might quite easily have used the term 'family dwelling-house', if it had wished to do so, but it contented itself with the simple word 'dwelling-house.' So also the words 'belonging to an undivided family' are quite unqualified and do not *per se* at all import that the house must be occupied permanently, or even temporarily, by the undivided family."

Although under the Hindu Succession Act a married daughter has no right of residence in the ancestral dwelling-house, she may come to possess that right under certain circumstances, for example, where she has been deserted or separated from her husband, or where she becomes a widow. Therefore, there is no absolute bar against the residence of a married daughter in the ancestral dwelling-house.(5a)

By virtue of S. 13 of the General Clauses Act, 1897, which provides that unless a contrary intention is implied, singular words occurring in all Central Acts and Regulations should be taken to include the plural, the expression "dwelling-house" would include "dwelling-houses" where there are more dwelling-houses than one belonging to an undivided family. Where a family is large enough to need several dwelling-houses and the share of one of the members in all such houses is transferred to a stranger, it has been held that the other members can avail themselves of the protection afforded by S. 4 of the Partition Act, 1893.(6) The same principle will apply to cases to which this section is applicable.

10. "Undivided family." — The expression "undivided family" occurs also in S. 4 of the Partition Act (IV of 1893) and it has been held that the expression should be taken to have the same meaning in both the Acts,(1) as that section is just compli-

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2b. '51 93 Cal L Jour 362 (366).

3. 1935 All 894 (894, 895) [AIR V 22].

4. 1964 Cal 52 (56) [AIR V 51C 13] (DB). (Case under S. 4, Partition Act, 1893 — Major portion of house let out to tenant — Some of daughters married and living with their husbands away from father's house —Sale of her share in house by one of married daughters — House held was 'dwelling house belonging to undivided family' —A I R 1910 Rang 53; AIR 1936 Bom 197 and AIR 1953 Pat 344, Not Foll.)
1934 Cal 202 (203, 204) [AIR V 21] (DB).
1929 Cal 231 (233) [AIR V 16].
1928 Cal 539 (542) [AIR V 15].
('10) 7 Ind Cas 436 (440, 441) (DB) (Cal). (Nor is it necessary that the members of the family should be joint in mess.)
('06) 9 Oudh Cas 156 (158, 159).

4a. 1953 Cal 259 (260) [AIR V 40 C 94] : ILR (1951) 1 Cal 384 (DB).

5. 1935 Mad 628 (634) [AIR V 22].

5a. 1964 Cal 52 (56) [AIR V 49 C 13] (DB).

6. 1935 Mad 628 (634) [AIR V 22].
1932 All 678 (680) [A I R V 19] : 54 All 840 (DB).

Section 44 — Note 10

1. ('08) 30 All 324 (327) (FB).
1950 Cal 111 (113) [AIR V 37 C 33] : ILR (1951) 1 Cal 103 (DB).
1940 Rang 53 (54) [AIR V 27]. (The expression 'undivided family' in S. 4 of Partition Act is borrowed from S. 44 of the Transfer of Property Act.)
1930 Mad 561 (562) [A I R V 17] : 53 Mad 417. (Phrase 'undivided family' in Partition Act appears to have been borrowed from S. 44 of the Transfer of Property Act.)
1929 Cal 231 (233) [AIR V 16].
1929 All 414 (415) [AIR V 16].

mentary to the second part of this section.(1aa)

A "family" is not restricted to a body of persons who can trace their descent from a common ancestor, but includes a group of persons who live in one house under one head or management.(1a) The expression "undivided family" must be taken to mean undivided *qua* the dwelling-house in question and to be a family which owns the house but has not divided it.(2) A family which has divided other property belonging to it, but which keeps the dwelling-house undivided, will thus be an "undivided family" for the purposes of this section.(3) It is not necessary, in order to constitute an "undivided family" that the members should always reside in the dwelling-house nor that they should be joint in mess.(4) It is the ownership of the house and not the actual occupation thereof that brings the proviso into play.

An "undivided family" does not mean a joint *Hindu* family. It includes all families who have not divided their dwelling-house, whether, Hindus, Muhammadans or Christians.(5)

So long as the dwelling house has not been completely alienated to strangers, it continues to be a dwelling-house belonging to an undivided family.(5a)

A dwelling-house belonged to four brothers *A*, *B*, *C* and *D*, members of a Hindu family. In 1874 the shares of *A* and *B* were sold in execution of decrees against them. In 1877 the remaining shares were also sold and the house became the property of the plaintiff and one *K*. The plaintiff sued *K* for partition and obtained a decree. Pending execution, *K* conveyed his share back to *A* and *B*. The brothers had continued to occupy the house notwithstanding the changes in the ownership. A applied under S. 4 of the Partition Act, 1893, to be allowed to buy the plaintiff's share. It was held that after 1877 the house no longer belonged to the undivided family. The subsequent purchase of *K's* interest by *A* and *B* did not entitle them to the benefit of Section 4 of that Act.(6)

1aa. 1967 Mad 156 (158) [AIR V 54 C 45].

1a. 1934 Cal 202 (203, 204) [AIR V 21] (DB). (Sometimes a son-in-law who actually resides in the family of his father-in-law for a number of years and has practically taken up his home with his father-in-law is regarded as a member of the father-in-law's family.)
1928 Cal 539 (541, 542) [AIR V 15].
('10) 7 Ind Cas 436 (439) (DB) (Cal). (Sons-in-law included.)

2. ✠('08) 30 All 324 (328) (FB). (9 Oudh Cas 156, Approved.)
1967 Orissa 139 (141) [AIR V 54 C 61].
('62) ILR (1962) Mys 315 (318).
1950 Cal 111 (113) [AIR V 37 C 33] : ILR (1951) 1 Cal 103 (DB).
1941 Pat 4 (5) [A I R V 28]. (AIR. 1938 Pat 13, Relied on.)
1928 Cal 539 (542) [AIR V 15].
('26) 97 Ind Cas 416 (416) (All).
1915 Sind 17 (17) [AIR V 2] : 9 Sind L R 84.
†('10) 7 Ind Cas 436 (440) (DB) (Cal).
('06) 9 Oudh Cas 156 (158).

3. 1950 Cal 111 (114) [A I R V 37 C 33] : ILR (1951) 1 Cal 103 (DB).
1930 Mad 561 (562) [A I R V 17] : 53 Mad 417. (30 All 324 (FB), followed.)
[*See also* 1967 Mad 156 (158) [A I R V 54 C 45]. (Hindu family though divided in status not dividing dwelling house by metes and bounds —Family is undivided qua dwelling house.)
1939 Orissa 139 (141) [AIR V 54 C 61]. (Division in status but no partition by metes and bounds.)]

4. See the cases cited in Note 9.
1950 Cal 111 (114) [AIR V 37 C 33] : ILR (1951) 1 Cal 103 (DB).

5. † ('08) 30 All 324 (327, 328) (FB). (29 All 308, Overruled.)
('62) ILR (1962) Mys 315 (317). (Muhammedans.)
1940 Rang 53 (54) [AIR V 27]. (The expression 'undivided family' includes also a Buddhist undivided family.)
1936 Lah 291 (292) [AIR V 23].
†1934 Cal 202 (204) [AIR V 21] (DB).
1929 All 414 (415) [AIR V 16].
('06) 9 Oudh Cas 156 (158).
('26) 97 Ind Cas 416 (416) (All).

5a. 1950 Cal 111 (114) [A I R V 37 C 33] : ILR (1951) 1 Cal 103.

6. ('98) 23 Bom 73 (76) (DB).

45. Where immoveable property is transferred for consideration to two or more persons, and such consideration is paid out of a fund belonging to them in common, they are, in the absence of a contract to the contrary, respectively entitled to interests in such property identical, as nearly as may be, with the interests to which they were respectively entitled in the fund; and, where such consideration is paid out of separate funds belonging to them respectively they are, in the absence of a contract to the contrary, respectively entitled to interests in such property in proportion to the shares of the consideration which they respectively advanced.

Joint transfer for consideration.

In the absence of evidence as to the interests in the fund to which they were respectively entitled, or as to the shares which they respectively advanced, such persons shall be presumed to be equally interested in the propcrty.

Synopsis

1. Scope of the section.
2. Consideration paid out of common fund.
3. Consideration paid out of separate funds.
4. "In the absence of a contract to the contrary."
5. Mortgages in favour of two or more persons.
6. Gift to two or more persons.
7. Last paragraph—Presumption of equality of interests.
8. Section, if applies to involuntary transfers.

1. Scope of the section. — This section deals with the question as to what 'quantum' of interest each one of several 'transferees' under a transfer gets 'in the property transferred.' The next section deals with the question as to what interest each one of several transferors under a transfer gets in the 'consideration' for the transfer. Both the sections are applications of the rule of equity enunciated by the maxim 'aequitas est quasi equalitas'— equity is, as it were, equality. The principle of equality applicable to a case where a transfer for consideration is made to several persons would be that the transferees should be entitled to the property transferred in proportion to their interests or shares in the consideration.(1) The section accordingly provides that the amount of, or the interest in the consideration advanced by each transferee shall be the measure of his interest in the property.(2) It lays down that—

(1) where the consideration comes from a 'common fund,' the transferees take interests in the property identical with their interests in the fund;

(2) where the consideration comes from their 'separate funds,' the transferees take interests in the property in proportion to the shares of the consideration which they respectively advanced;

(3) in the absence of evidence as to their respective interests in the common fund, or as to the shares which they respectively advanced, the transferees will be 'presumed' to be 'equally interested' in the property.

The principle of equity underlying the section would clearly not apply if the parties have themselves 'specified' what interest or share each of the transferees should have in the property transferred. The section accordingly declares that the rules enunciated are to apply only where there is no 'contract to the contrary.'

Section 45 — Note 1

1. See Snell, Principles of Equity, 11th Edn. Pages 125, 126.

2. *See* ('11) 34 Mad 80 (81) (DB).

The section applies only to transfers for 'consideration' and not to 'gifts' or 'bequests'.(3) In the latter class of transfers the interests of the transferees cannot possibly be determined by reference to any 'consideration' for the transfers, inasmuch as they are not transfers for value at all. They must be determined by reference to general principles of law and not by reference to this section. (See also Note 6.)

2. Consideration paid out of common fund. — The first part of the first paragraph of the section provides that where the consideration for a transfer in favour of several transferees is paid out of a 'common fund' belonging to them, their interests in the property transferred are 'identical', as nearly as may be, with their interests in the fund.

Illustrations.

(1) *A*, *B* and *C* are jointly entitled to a fund with rights of survivorship (e. g., the members of a Hindu coparcenary.) They purchase a property paying the consideration therefor out of the said fund. They will be jointly entitled to the property purchased with rights of survivorship. Where however a single coparcener purchases property, making use of both ancestral and self-acquired property funds, there can be no question of apportioning the property between two persons according to their respective funds. Under the personal law, as the coparcener took the aid of the ancestral property in acquiring the new property it is not open to him to treat a portion of the property as his self-acquired property.(1a)

(2) *A* has a 'life interest' and *B* has the 'remainder' in a fund. They together purchase a property with the fund. *A* will have a life-interest in the property purchased and *B* will be entitled to the remainder.

(3) *A*, *B* and *C* are entitled to common fund each being entitled to one-third share therein as tenants-in-common. They purchase a property out of the common fund. They will each be entitled to one-third share of the property as tenants-in-common. (Note.—In this respect the English law is different. See Note 3.)

The mere fact that two Hindu brothers lived together and acquired a property under a joint sale deed does not show that they have acquired the property as 'joint tenants' in the absence of proof that the consideration was advanced out of a fund to which they were jointly entitled with rights of survivorship.(1)

3. Consideration paid out of separate funds. — The second part of the first paragraph of the section provides that where the consideration is paid out of separate funds belonging to the transferees, they are in the absence of a contract to the contrary, respectively entitled to interest in such property in proportion to the shares of the consideration which they respectively advanced. Thus, if *A*, *B* and *C* advance Rs. 100, Rs. 200 and Rs. 300 from their separate funds for the purchase of a property, *A* will be entitled to one sixth, *B* to one-third and *C* to a half of the property purchased. It is thus clear that the section makes *A*, *B* and *C* 'tenants-in-common' of the property purchased and not 'joint tenants' for, if they were joint tenants they would each be entitled to the 'whole property as well as to a part' and not merely to a 'separate' part thereof.(1)

In this respect the section differs from the English law as it was before the Law of Property Act, 1925 (15 Geo. V, Ch. 20). Under that law —

(1) Where two or more persons 'purchase' property contributing the purchase-money in 'equal' shares whether from a common fund or from

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3. ('11) 34 Mad 80 (81) (DB).

Section 45 — Note 2

1a. 1958 All 42 (47, 48) [AIR V 45 C 18].

1. *See* 1934 All 701 (701) [AIR V 21].

Section 45 — Note 3

1. Joint tenants are said to be seised per my et per tout (by the half and the whole.) [*See also* 1957 Andh Pra 619 (621) [AIR V 44 C 205] (DB). (Lease for life-time of Hindu

their separate funds, they are, in the absence of specific words to the contrary in the deed of purchase, 'joint tenants.'(2) Where, however, they advance the consideration in 'unequal' shares, they are regarded in equity as tenants-in-common.(3) So also where there is any other indication, even though slight, showing that a tenancy in common was intended by the parties.(4)

(2) Where two or more persons purchase as 'partners' or for purposes of trade or speculation, they will be regarded as tenants-in-common.(5)

(3) Where two or more persons advance money by way of 'mortgage' whether in equal or unequal shares, they will be regarded only as tenants-in-common.(6)

After the Law of Property Act, 1925 (15 Geo. V, Ch. 20), a 'tenancy-in-common' cannot be created as a 'legal estate', but can be created as an 'equitable estate, i.e., by a conveyance to trustees on trust for sale and to give effect to the interests of the beneficiaries in the proceeds of the sale. Equitable interests similar to joint tenancy and tenancy-in-common still continue subject to similar rules as before.(7)

Joint tenancy as that expression is understood in English law is unknown in this country(7a) except in the case of coparcenary between the members of an undivided Hindu family. (See Note 6.)

A and *B* jointly purchased a property from *C*. *A* paid the whole consideration to *C*, but debited in his account books half the amount against *B*. *B* did not pay this amount to *A* but claimed half the property. It was held that *A* must be taken to have advanced half the consideration for himself and half on behalf of *B*, that therefore *B* was entitled to half the property, but that the Court should pass a decree therefor only on condition of *B*'s paying up the amount.(8)

4. "In the absence of a contract to the contrary." — Where there is a contract between the parties as to the 'quantum' or as to the nature of the interest that the transferees should take in the property transferred, that contract will prevail over the rule laid down in the section. Whether there is a "contract to the contrary" is, of course, to be gathered from the words used by the parties, their conduct and the

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father and son, divided from each other.)

2. (1860) 1 John & H 287 (292) : 70 E R 756, Harrison v. Barton.
(1815) 19 Ves 441 (446) : 34 E R 580, Aveling v. Knipe.

3. (1858) 4 K & J 505 (510) : 70 E R 211, Robinson v. Preston.
(1751) 28 E R 163 (167) : 2 Ves Sen 252, Rigden v. Vallier.

4. (1858) 4 K & J 505 (515) : 70 E R 211, Robinson v. Preston.
(1855) 5 Ir Ch Rep 129, Fleming v. Fleming.

5. (1857) 24 Beav 283 (288) : 53 E R 367, Bone v. Pollard.
(1851) 55 E R 498 (505) : 6 Ex 164 (180, 181), Buckley v. Barber.
(1732) 24 E R 1011 (1013) : 3 P Wms 158, Lake v. Craddock.
(1729) 1 Eq Cas Ab 291 (291) : 21 E R 1052, Lake v. Gibson.
[*See also* 1929 P C 72 (73) [A I R V 16] : 56 Ind App 112. (Law of Straits Settlements same as in England.)]

6. Snell, Principles of Equity, 11th Edn. Pages 39, 40.
(1860) 1 John & H 287 (292) : 70 E R 756, Harrison v. Barton.
(1798) 30 E R 1192 (1193) : 4 R R 106, Morley v. Bird.
(1751) 2 Ves Sen 252 (258) : 28 E R 163, Rigden v. Vallier

7. Law of Property Act, 1925, (15 Geo. V, Ch. 20). Ss. 34, 36.
Topham, New Law of Property, 4th Edn., 1932, Pages 71 and 72.

7a. 1946 Lah 399 (404) [AIR V 33 C 73] (FB).
[*See also* 1948 Bom 53 (54) [AIR V 35 C 11]. (The presumption in India should always be in favour of a tenancy-in-common rather than joint tenancy.)]

8. ('12) 15 Ind Cas 173 (173) (All).

surrounding circumstances. Evidence of such conduct or circumstances is admissible to prove such contract.(1) The presumption in India must always be in favour of a tenancy-in-common rather than a joint tenancy. But there is nothing to prevent the court from coming to a different conclusion if that presumption is displaced by clear and cogent language to the contrary.(2)

5. **Mortgages in favour of two or more persons.** — A mortgage is a "transfer of property" and is governed by the rule laid down in the section. Under the English law, as has been seen already in Note 3, two or more persons taking a mortgage are regarded in equity only as tenants-in-common and not as joint tenants. Under the present section, the nature of the interest taken by them will, it is conceived, depend (apart from any contract to the contrary), upon the nature of the fund out of which the consideration was advanced and the interest of the mortgagees therein. If the moneys had been advanced from a common fund to which they were entitled as joint tenants, then they would take under the mortgage also as joint tenants. Where there is nothing to show that they were interested in the fund as joint tenants, they cannot, as regards the mortgage, be regarded as joint tenants.(1)

In the undermentioned case(2) of the Oudh Court *X* mortgaged his property to *A* and *B* each of whom advanced half the mortgage amount. *A* subsequently sued *X* and *B* for the recovery of half the mortgage-money from out of the whole of the mortgaged property. It was held that the object of this section was to define the 'quantum' of interest acquired by the transferees 'inter se' and not to decide any matter between the 'transferor and the transferees,' and that the defendants could not rely on this section and claim that *A* should proceed only against 'half' the mortgaged property.

A contrary view has been expressed by the High Court of Allahabad in '*Partab* v. *Nehal Singh*.'(3) In that case a mortgage was executed in favour of four persons *A*, *B*, *C* and *D*, for Rs. 3,000 the deed specifying that three-fourths of the amount was advanced by *A*, *B* and *C* and the remaining one-fourth by *D*. Subsequently, three-fourths of the mortgage amount was paid up to *A*, *B* and *C*. *D* then sued for the recovery of his one-fourth of the mortgage-money by sale of the 'whole' property. It was held that he was not entitled to do so, but could proceed only against one-fourth of the property. After referring to this section, the Court observed :

> "Ordinarily a mortgage is treated as indivisible as between a mortgagor and a mortgagee or the persons who represent their rights, but as between the co-mortgagees themselves or their successors-in-interest their rights are determined by and correspond to such specification of interest as may be contained in the mortgage deed. Here the interests of Chandi (D) were specified in the mortgage deed; and, as between him and his co-mortgagees his interest in the property mortgaged must follow the specification and be identical with the interest possessed by him in the consideration money."

See also the undermentioned case.(4)

Section 45 — Note 4

1. 1942 Oudh 327 (329) [A I R V 29] : 18 Luck 92 (DB). (Rights determined by contract of partnership and agreement as to payments to be made — Purchase of certain property — Section does not apply.)

('67) 7 Suth W R 353 (354) (DB).

(1860) 1 John & H 287 (294) : 70 E R 756, Harrison v. Barton.

2. 1948 Bom 53 (54) [AIR V 35 C 11].

Section 45 — Note 5

1. *See* ('08) 1908 Pun Re No. 100, p. 465 (468, 469). (Mortgage in favour of several persons — Shares specified — Alienees are tenants-in-common. Note. Overruled on a different point in 1930 Lah 515 [AIR V 17] (FB).)

2. (1900) 3 Oudh Cas 8 (12) (DB).

3. 1926 All 676 (677) [AIR V 13] (DB).

4. 1954 Mys 16 (16) [A I R V 41 C 6] : I L R (1953) Mys 354. (Hindu father hypothecating

6. Gift to two or more persons. — As has been seen in Note 1, the section has no application to 'gifts or bequests' of property to two or more persons. It is relevant, however, to consider what interest the donees take in the property gifted. Where the deed of gift or will 'specifies' the interest of the donees, there is, of course, no difficulty. They will take only the interest so specified. But where there is no such indication of the intention of the donor, the matter must rest on presumptions of law. In the case of Parsees(1) and Native Christians,(2) it has been held that the general rule of English law(2a) that a conveyance to two or more persons without words specifying their shares constitutes them 'joint tenants', applies. In the case of Hindus also, it was held in the undermentioned cases(3) that the same rule applied. In *Joge-shwar Narain Deo* v. *Ramchander Dutt*,'(4) however, it was held by their Lordships of the Privy Council, that the view, so far as Hindu gifts and bequests were concerned, was erroneous. They observed as follows :

> "The learned Judges of the High Court of Madras were not justified in importing into the construction of a Hindu will an extremely technical rule of English conveyancing. 'The principle of joint tenancy appears to be unknown to the Hindu law, except in the case of coparcenary between the members of an undivided family'."

All the High Courts in India except the High Court of Madras have interpreted this decision to mean that a gift to two or more persons governed by the Hindu law will '*prima facie*' make them only tenants-in-common as regards such property,(5) even though they may be members of a Hindu coparcenary.(6)

According to the High Court of Madras, if the gift is made to persons who are Hindus but who are incapable of forming a joint Hindu family, they will be presumed to take only as tenants-in-common.(7) If on the contrary, the gift is to persons who constitute such a family the position is somewhat different. If the donees would, but for the gift or will, have succeeded to the donor according to the law of intestate succession, for example, gifts by a father to his sons, then the presumption is that they

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joint property of himself and his four sons — Suit by hypothecatee against sons after death of father—Suit withdrawn against three sons and decreed ex parte against one — Purchase of his interest by decree holder in execution — Decree holder gets 1/5th share of judgment-debtor and 1/4th of the 1/5th share of the father i.e. in all 1/4th share and not only 2/5th share of the joint property.)

Section 45 — Note 6

1. ('99) 23 Bom 80 (93) (DB).

2. ('11) 34 Mad 80 (81) (DB).

2a. (1803) 9 Ves 197 (203) : 32 E R 577, Crooke v. De Vandes.

3. ('05) 28 All 38 (39).
('04) 27 All 310 (312) (DB).
('88) 11 Mad 258 (260) (DB). (Overruled by 23 Cal 670 (PC).)

4. ('96) 23 Cal 670 (679) : 23 Ind App 37 (PC).

5. 1953 Trav-Co 89 (90) [AIR V 40 C 29]. (Gift by father and his brother — Travancore Nayar Regulation (1 of 1088) not applicable — Donees take as tenants-in-common under general law.)
1927 Lah 126 (127) [AIR V 14] : 8 Lah 219 (DB). (Will by Hindu mother in favour of her daughter and son-in-law.)
1921 All 50 (51) [A I R V 8] : 43 All 600 (DB). (Gift to two daughters' sons. 28 All 38, Dissented from.)
1920 Pat 275 (276) [A I R V 7]. (Gift to co-widows.)]
('09) 1909 Pun Re No. 39, p. 126 (132) (DB). (Gift to daughters.)
('11) 33 All 41 (44). (Gift to two daughters.)
[*See* ('97) 24 Cal 646 (653) (DB). (Gift to two widows.)]

6. 1942 Sind 145 (153) [AIR V 29] : ILR (1942) Kar 392.
1926 Lah 677 (678) [A I R V 13]. (Gift to two brothers.)
† ('01) 26 Bom 445 (448) (DB). (Gift to two undivided brothers.)
('11) 33 All 665 (676). (Do.)

7. 1939 Mad 479 (480) [A I R V 26]. (Gift to three sisters.)
1917 Mad 336 (339) [A I R V 4] (DB). (When a Hindu female and a male jointly acquire a property under a deed of relinquishment, they take it as tenants-in-common and not as joint tenants.)
('05) 28 Mad 363 (373) (DB).
('02) 27 Mad 498 (503) (DB). (Gift in favour of husband and wife.)

take as joint tenants.(8) But not in other cases.(9)

Grants by Government to persons who constitute a joint Hindu family will stand on the same footing and would be governed by the same principles as gifts to such persons by individuals. In *Mt. Bahu Rani* v. *Rajendra Bakhsh Singh*,(10) a case which went up from Oudh to the Privy Council, their Lordships reiterated the view expressed in *Jogeshwar Narain Deo's case*,(11) and held that a grant by the Government to 'two brothers' who constituted a joint Hindu family '*prima facie*' constituted them only tenants-in-common, in the absence of any intention to the contrary expressed in the deed of grant.

See also the undermentioned cases.(12)

A gift to two or more persons governed by the Muhammadan law, '*prima facie*' makes them only tenants-in-common and not joint tenants as regards the property gifted.(13)

7. Last paragraph — Presumption of equality of interests. — The second paragraph lays down a rule of evidence. Where there is no evidence as to what interests the transferees had in the common fund out of which the consideration for the transfer was advanced, or as to what shares they respectively advanced towards the consideration, they will be presumed to be 'equally' interested in the property transferred.(1)

Where *A* and *B* purchased a property and *X* sued *A* for pre-emption of 'half' the property and relied merely upon the presumption referred to in the last paragraph of the section in proof of the fact that *A* was entitled to half the property, it was held by the Chief Court of Oudh that the last paragraph of the section did not apply until there was 'an absence of evidence' as to the interest of *A* and *B* in the fund advanced for the transfer, that *X* could have adduced evidence as to that matter but did not, and that therefore the presumption could not be drawn in his favour.(2) In another case of the same Court *A* and *B* (a stranger) together purchased a property. *X* sued them both for pre-emption of the whole property. A claimed that he was a cosharer and had a preferential right over *X* in respect of half the property and in support of his right to the said half he relied upon the presumption in the last paragraph of the section. it was held that since he should and could have produced evidence as to his right, and did not, no such presumption could be raised in his favour and that *X* was therefore entitled to pre-empt the whole property.(3)

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8. 1926 Mad 273(278) [AIR V 13]: 49 Mad 98(DB). 1925 Mad 645 (653) [AIR V 12]. (Gift to sons.) ('05) 28 Mad 363 (373, 374) (DB). (Do.)

9. 1934 Mad 16 (21) [A I R V 21] (DB). (Donees under gift deed, members of joint family but not heirs to donor — Individual position of donees emphasized and each and his heirs to enjoy property with absolute rights — Donees take as tenants-in-common and not as joint tenants.)

1926 Mad 273 (278) [A I R V 13] : 49 Mad 98 (DB). (Bequest by a Hindu to his divided brother and his sons who formed a joint family — Brother not heir — No indication in the will that they should take as joint tenants — Held, they took as tenants-in-common.)

10. 1933 P C 72 (75) [A I R V 10] : 60 Ind App 95 : 8 Luck 121.

11. ('96) 23 Cal 670 (679) ::23 Ind App 37 (PC).

12. ('84) 11 Cal 1 (5) (PC). (Intention of grant found to be to make the donees joint tenants — Held that they took as joint tenants.)

('91) 1891 Pun Re No. 27, p. 152 (159). (Grant to members of a family jointly without limitation of interest to parties severally—The grant took effect as one to the parties jointly with a right of survivorship.)

13. 1938 Mad 677 (681) [AIR V 25] (DB).

Section 45 — Note 7

1. 1929 All 817 (818) [AIR V 16] (DB).
('28) 107 Ind Cas 149 (149, (DB) (Pat).
(1900) 4 Cal W N 465 (467) (DB).
[*See also* 1926 Rang 172 (174) [AIR V 13] : 4 Rang 110.]

2. 1925 Oudh 369 (370) [AIR V 12].

3. 1928 Oudh 384 (385) [AIR V 15] : 3 Luck 674 (DB).

See also the undermentioned cases.(4)

8. Section, if applies to involuntary transfers. — Section 2, cl. (d) makes it clear that this chapter, and therefore this section, does not apply to involuntary transfers. But the principle underlying the section is one of justice and will apply to such transfers.(1a) It has been observed, however, in the undermentioned case(1) that the section is applicable to involuntary transfers. Section 2, cl. (d), was not referred to.

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46. Where immoveable property is transferred for consideration by persons having distinct interests therein, the transferors are, in the absence of a contract to the contrary, entitled to share in the consideration equally, where their interest in the property were of equal value, and, where such interests were of unequal value, proportionately to the value of their respective interests.

Transfer for consideration by persons having distinct interests.

Illustration.

(a) *A*, owning a moiety, and *B* and *C*, each a quarter share, of mauza Sultanpur exchanged an eighth share of that mauza for a quarter share of mauza Lalpura. There being no agreement to the contrary, *A* is entitled to an eighth share in Lalpura, and *B* and *C* each to a sixteenth share in that mauza.

(b) *A*, being entitled to a life-interest in mauza Atrali and *B* and *C* to the reversion sell the mauza for Rs. 1,000. *A*'s life-interest is ascertained to be worth Rs. 600, the reversion Rs. 400. *A* is entitled to receive Rs. 600 out of the purchase-money. *B* and *C* to receive Rs. 400.

Synopsis

1. Scope.
2. "Distinct interests."
3. Apportionment of consideration.

1. Scope. — Section 45 deals with the question as to what interest each of several joint 'transferees' gets in the property transferred. This section deals with the question as to what interest each of several joint 'transferors' gets in the consideration for the transfer. Both these sections are, as has already been seen in the Notes on S. 45, applications of the maxim of equity, 'acquitas est quasi equalitas,' equity is, as if it were, equality. In the case of joint 'transferees' they become entitled to interests in the property proportionate to their interests in the fund out of which the consideration was paid, and in the case of joint 'transferors,' they will be entitled to share in the consideration amount proportionately to their interests in the property transferred. Both these provisions are, however, applicable only in the absence of a 'contract to the contrary'.

2. "Distinct interests." — The section is applicable only where the joint transferors have 'distinct interests' in the property transferred. Illustrations (a) and

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4. 1930 All 98 (98) [AIR V 17] (DB). (Mortgage in favour of two persons—Presumption is that they advanced in equal shares.)
('81) 1881 All W N 88 (88) (DB). (Mortgage of a house by one of the two co-sharers—Mortgagee claiming a moiety in the house as against the mortgagor — Claim could not be decreed in the absence of any specific share of the mortgagor in the property.)
('67) 7 Suth W R 366 (367) (DB). (Settlement of a talook with thirteen persons jointly — This could not raise the presumption of equal rights particularly when the question of the extent of the shares was in dispute.)

Section 45 — Note 8

1a. 1956 Cal 58 (59) [AIR V 43 C 17] (DB). (Principle applied to revenue sale.)
1. 1941 Cal 416 (416) [AIR V 28].

(b) to the section show what is meant by the expression "distinct interests." As further illustrations of "distinct interests" the following may be mentioned—

(1) the interests of the mortgagor and the mortgagee in mortgaged property;
(2) the interests of the lessor and the lessee in property leased;(1)
(3) the interests of a tenant for life and the remainderman.

A 'joint tenant' of property in the sense in which that expression is used in English law, has no interest in property 'distinct' from that of the other joint tenants in such property. All the joint tenants have the 'same' interest in the property.

Two or more sons, grandsons, and great-grandsons, succeeding to their paternal ancestor, or two or more daughters' sons succeeding to their maternal grandfather, or two or more widows succeeding to their husband, or two or more daughters succeeding to their father, take as 'joint' tenants under the Hindu law, and have no 'distinct interests' in the property so inherited by them.

In the undermentioned case(2) *A* and *B*, owners in equal shares of certain property; mortgaged it to *C* for a certain sum which was to be retained by *C* for the purpose of paying certain mortgages *x* and *y* which had already been executed by them to third persons. *C* failed to pay the prior mortgages as undertaken by him and the mortgagees under *x* and *y* sued for and recovered from *A* the amount due to them. *A* then sued *B* for contribution claiming half the amount so recovered from him. *B* objected to it on the ground that most of the consideration received under the mortgages *x* and *y* had been received by *A* himself, and that therefore he could not recover half the amount recovered from by the mortgagees. It was held that this contention was not correct. *A* and *B* being equal sharers in the property mortgaged to *C*, each was entitled to half the consideration for that mortgage. The result of allowing *B's* contention would be to make the consideration received by *A* and *B* for *C's* mortgage 'unequal' and would be against the provisions of this section.

3. **Apportionment of consideration.**—In order to apportion the consideration among the transferors, it is first necessary to ascertain what their respective interests are and then the respective 'values' thereof 'on the date of the transfer.' The ascertainment of the respective interests of the transferors may be made at the time of the apportionment, if they had not been expressed in the transfer itself. In ascertaining the 'values' of the respective interests, difficulty may arise where such interests are not of the same kind. Thus, where the mortgagor and the mortgagee of certain property together transfer the same to a third person, and the value of the property is more than the amount due to the mortgagee under the mortgage, the value of the mortgagee's interest would be the amount due to him on the date of the transfer, and the mortgagor's interest, the value of the equity of redemption. If, on the other hand, the amount due to the mortgagee on the date of the transfer is more than the value of the property itself, the mortgagor's interest is of no value at all and the whole of the consideration would belong to the mortgagee. The value of any particular interest is a question of fact to be decided on evidence.

It is necessary that 'each' of the interests must be valued separately, and the consideration apportioned in the proportion of such values. Thus, where interests of

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Section 46 — Note 2

1. (1876) 2 Ch D 540 (546) : 24 W R (Eng) 636 (636), Morris v. Debenham. (It was held in this case that the lessor and the lessee could both join in selling property to a third person and apportion the purchase-money between themselves.)

2. 1937 Oudh 138 (140) [AIR V 24] (DB).

A and *B* are together sold for a sum of money, say Rs. 500, the interests of *A* as well as *B* must be valued and then the amount of the consideration apportioned. It may not be correct to value the interest of *A* at a particular sum and assume that the value of the other interest is the balance of the consideration after deducting the value of the interest of *A* from Rs. 500. The reason is that though the interests of *A* and *B* were sold for Rs. 500, it cannot be said that, that amount represents the true value of their properties. For the value of interest of *A* may be Rs. 300 and that of the interest of *B* Rs. 350 and both might been sold for Rs. 500 for various reasons. If the consideration were to be apportioned according to the values of the interests of *A* and *B*, then it will have to be divided in the proportion of 3:3½ whereas if the former method were adopted it will have to be divided in the proportion of 3: 2.(1)

The proper apportionment of the consideration is not a matter merely between the transferors 'inter se.' The 'transferee' is also entitled to see in order to safeguard his interests that the apportionment is properly made. Thus, where a tenant for life and the trustees under a settlement of the reversion in fee joined in executing a transfer, it was held that the transferee was entitled to see that a proper apportionment was made, in order to safeguard his interests against claims by the beneficiaries on the ground that the act of the trustee was not beneficial to their interests.(2)

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47. Where several co-owners of immoveable property transfer a share therein without specifying that the transfer is to take effect on any particular share or shares of the transferors, the transfer, as among such transferors, takes effect on such shares equally where the shares were equal, and, where they were unequal, proportionately to the extent of such shares.

Transfer by co-owners of share in common property.

Illustration.

A, the owner of an eight-anna share, and *B* and *C*, each the owner of a four-anna share, in mauza Sultanpur, transfer a two-anna share in the mauza to *D*, without specifying from which of their several shares the transfer is made. To give effect to the transfer one-anna share is taken from the share of *A*, and half-an-anna share from each of the shares of *B* and *C*.

1. Scope of the section.—This section also is an application of the principle of equity that equality is equity. It enacts that where *A*, *B* and *C*, co-owners of immovable property, jointly transfer to *D* a share therein without specifying that the transfer is to take effect on any particular share or shares, *A*, *B* and *C* must, among themselves, bear the burden of the transfer in proportion to the extent of their shares. In other words the shares of *A*, *B* and *C*, after the transfer, in the property, will be reduced in the proportion of the extent of their former shares. In the illustration to the section, the shares of *A*, *B* and *C* remaining after the transfer will be 7 annas, 3½ annas and 3½ annas respectively and *D* will have 2 annas, thus making in all 16 annas.

The same principle is recognised also by S. 43 of the Contract Act, 1872, which deals with joint promise by two or more persons. The burden of the 'obligation' is to be borne equally by the promisors, in the absence of an agreement to the contrary.

Section 46 — Note 3

1. *See* (1865) 55 E R 218 (220) : 32 Beav 555: Rede v. Oakes.

2. (1876) 46 L J Ch 133 (136) : 4 Ch D 802 (817), In re Cooper & Allen's Contract. (1834) 58 E R 762 (766) : 7 Sim 67, Clark v. Seymour.

The fact that the burden of the obligation or of the transfer, as the case may be should be shared by the promisors or the transferors, does not, however, affect the rights of the promisee or the transferee to enforce the obligation or the burden against any one of the promisors or transferors, unless there is, in the case of a joint promise, an agreement to the contrary, and, in the case of a joint transfer, a specification that the transfer is to take effect on any particular share or shares of the transferors: this is made clear in this section by the expression "as among such transferors" and "without specifying . . . . . or shares." In the undermentioned case(1) *A* who had an absolute estate in 8 annas or certain property and *B* who had a life-interest in the other 8 annas thereof transferred an eight-annas share in the common property to *D*. From the circumstances that *A* and *B* had not the same kind of estate in their respective shares in the property, and from a construction of the document of transfer it was held that *A* and *B* each purported to transfer only 4 annas out of his own share to *D* (in other words that there was a specification that the transfer was to take effect on particular shares of the transferors) that therefore *D* could get only a 4 annas share of *A* and a 4 annas share out of the life-interest of *B* which would come to an end at the death of *B*.

The section will obviously have no application where the several co-owners transfer the 'whole' of the immovable property and not merely a 'share' therein.

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48. Where a person purports to create by transfer at different times rights in or over the same immoveable property, and such rights cannot all exist or be exercised to their full extent together, each later created right shall, in the absence of a special contract or reservation binding the earlier transferees, be subject to the rights previously created.

Priority of rights created by transfer.

Synopsis

1. Scope of the section.
2. "A person."
3. "To create by transfer."
4. "At different times."
5. "In or over the same immovable property."
6. "And such rights cannot all exist or be exercised to their full extent together."
7. "In the absence of a special contract or reservation binding the earlier transferees."
8. Priority between registered instruments.
9. Priority between registered and unregistered instruments.
10. Priority between registered instruments of transfer and oral transfers.
11. Salvage liens.
12. Priority of mortgage-rights created by Receivers.
13. Owelty-liens.
14. Government-debts.
15. Charges created by manager appointed under the Bengal Tenancy Act.
16. Priority by estoppel.
17. Priority under section 79. See Notes on Section 79.
18. Law in the Punjab.

1. Scope of the section.—This section is based upon the principle enunciated by the maxim 'qui prior est tempore potier est jure'—he has a better title who was first in point of time.(1)

Section 47 — Note 1

1. 1927 Sind 62 (65, 66) [AIR V 14] (DB).

Section 48 — Note 1

1. 1923 P C 211 (213) [AIR V 10] : 51 Cal 86 : 1 Rang 637 : 50 Ind App 283.

1966 Andh Pra 233 (236) [AIR V 53 C 78] (DB).

†(1853) 61 E R 646 (648) : 100 R R 43, Rice v. Rice. (Equitable interest of the defendant as equitable mortgagee was preferred, upon considering all the circumstances of the case, to the plaintiff's interest in respect of vendor's lien

It lays down the general rule regarding priority of rights created by transfer by a person at different times in or over the same immovable property(2) and provides that as between such rights each later created right is subject to the rights previously created.(3) There are, however, certain exceptions to the general rule enacted in this section which are dealt with in Notes 9 to 17.

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for unpaid purchase-money.)
(1752) 28 E R 302 (311) : 2 Ves Sen 472, Earl of Pomfret v. Lord Windsor.
(1845) 67 E R 808 (811) : 71 R R 10, Wilmot v. Pike.
(1855) 69 E R 704 (710) : 110 R R 112, Ropper v. Harrison.
(1888) 40 Ch D 182 (188) : 58 L J Ch 238 (241), Farrand v. Yorkshire Banking Co. (Expression 'equal equities' does not refer to equality in date.)

2. 1923 P C 211 (213) [AIR V 10] : 51 Cal 86 : 1 Rang 637 : 50 Ind App 283.

3. 1944 P C 22 (24) [AIR V 31] : ILR (1944) Kar (PC) 73.
1933 P C 191 (192) [AIR V 20]. (Priority of mortgages—Earlier mortgage, unless displaced has priority over later mortgages—Onus of displacing is on later mortgagee.)
1923 P C 211 (213) [AIR V 10] : 51 Cal 86 : 1 Rang 637 : 50 Ind App 283.
1966 Andh Pra 233 (236) [AIR V 53 C 78]. (Later or pusne mortgage is subject to prior mortgage.)
1964 Him Pra 19 (24) [AIR V 51 C 9].
1963 Orissa 136 (137) [AIR V 50 C 49] : I L R (1963) Cut 525.
('62) 64 Pun L R 680 (684, 685). (Right of former and subsisting lessee not affected by fresh lease.)
1961 Cal 300 (305) [AIR V 48 C 65] (DB). (Priority between mortgagee and subsequent purchaser—S. 48 applies.)
1937 Pesh 74 (75) [AIR V 24] (DB). (Subsequent mortgagee cannot avoid previous mortgage though mortgagor kept the fact of the previous mortgage from the subsequent mortgagee.)
1934 Oudh 283 (285) [AIR V 21] (DB). (Question of priority between mortgagee and subsequent vendee is governed by S. 48.)
1930 Cal 22 (23) [AIR V 17] : 56 Cal 868. (Prima facie and apart from notice, the priority of mortgages in India depends upon the respective dates of their creation, the earlier in date having the precedence.)
1927 Cal 538 (542) [AIR V 14] (DB). (Mortgagee claiming priority will not lose his right unless estopped by his conduct.)
1924 Pat 359 (361) [AIR V 11] (DB).
1923 Rang 41 (42) [AIR V 10].
1922 Mad 249 (258) [AIR V 9] (DB).
(1912) 14 Ind Cas 585 (587) (Mad).
('07) 6 Cal L J 74 (82) (DB). (Where it cannot be ascertained which security was executed first, the mortgagees would take as joint tenants.)
† ('95) 22 Cal 33 (38) (DB).
('86) 8 All 409 (418) (DB).
('85) 7 All 568 (572, 574) (DB).
('81) 5 Bom 5 (7) (DB). (Where there was a prior registered morgage on the property, held that a subsequent lessee of the same property, although the lease was registered and possession given thereunder, took only what the mortgagor had to give him, viz., a lease subject to the registered mortgage.)
('81) 5 Bom 2 (4) (DB).
('78) 2 Bom 662 (665) (DB). (Mortgagee with right to bring the mortgage property to sale — Purchaser in execution of the decree given to the mortgagee acquires a right free from encumbrance created subsequently to the mortgage.)
('66) 3 Mad H C R 38 (39) (DB). (Two sales at different times—First takes priority.)
[*See also* 1920 P C 81 (83) [AIR V 7] : 47 Cal 662 : 47 Ind App 11, (Two mortgage-deeds.)
1938 Lah 430 (431) [AIR V 25] (DB). (Two mortgages.)
1934 Cal 552 (553) [AIR V 21] : 61 Cal 494 (DB). (Two mortgages.)
1934 Rang 7 (7) [A I R V 21]. (Two mortgage deeds.)
('10) 6 Ind Cas 642 (642, 643) (Lah). (Two sales of equity of redemption—Subsequent purchaser acquires no title by his purchase.)
1929 Oudh 449 (451) [AIR V 16] (DB). (Mortgagee taking fresh deed in safisfaction of previous liabilities cannot claim priority on basis of the earlier mortgages when he allows his right to recover money on basis of earlier mortgages to be lost by lapse of time.)
1921 Lah 311 (311) [AIR V 8] (DB). (Mortgagor purporting to transfer equity of redemption on 5-12-1911—Sale not completed under 28-3-1912—Subsequent mortgage on 22-12-1911—*Held* mortgage of 22-12-1911 was not void ab initio and could be ratified by purchaser.)
('93) 17 Bom 741 (744) (DB). (Two sales.)
('83) 7 Bom 526 (529). (Case before Act — Successive mortgages over same property—First and third mortgages in favour of A and second mortgage in B's favour — A not entitled to priority in respect of the third mortgage.)
(1881) 1881 Bom P J 117 (DB). (Case before Act —Prior and puisne mortgagees—Prior mortgagee with possession but mortgagor continuing in possession under rent note — Prior mortgagee buying property under rent decree—His right under such sale cannot have priority over the puisne mortgage which had been executed prior to the sale.)
('80) 2 All 711 (712) (DB). (Two sales.)
(1864) 1864 Suth W R 345 (346) (DB). (Prior mortgage-deed—Subsequent deed of conditional sale.)]

Suppose, *A* transfers to *B* a 'contingent' interest in a certain property. Then, *A* creates another interest in the same property in favour of *C*. *B*'s interest becomes vested in him subsequently. Is *B* entitled to priority over *C* or *C* over *B*? In other words, where a contingent interest is created, is the date of the interest becoming 'vested' to be taken as the date of the "creation" of the interest for the purpose of this section? On this question there seems to be a difference of judicial opinion. See Note 7.

2. **"A person."** — It has been held that in order that this section may apply, the rights must have been created by the 'same person'.(1) But obviously the legal representative of a person cannot be regarded as a different person for the purposes of this section. Thus, where a person mortgages certain immovable property to another and then dies and thereafter his successor executes anothar mortgage over the same immovable property to a different person, the latter will, by virtue of this section, take his mortgage only subject to the prior mortgage.(2)

3. **"To create by transfer."** — This section applies only where rights are purported to be created 'by transfer' in or over the same immovable property. The creation of a 'charge' is not 'a transfer' of any interest in immovable property and consequently where a person first creates a charge and then executes a mortgage over the same immovable property the charge will not prevail against the mortgage unless the mortgagee has taken his mortgage with notice of the charge.(1) As regards more than one charge on immovable property, where a specific charge is created an equitable charge, or a floating charge, will not have priority regardless of point of times. But where another specific charge is created on the same property, the specific charge which is the first in point of time will have priority over the second.(1a)

A contract to transfer immovable property does not effect any 'transfer' of any interest in such property nor does it create any right in or over such property.' This section has therefore no application to cases where a person in whose favour a contract to transfer immovable property exists, seeks to enforce his rights against a subsequent purchaser or subsequent mortgagee of the property with notice of such contract. Such cases are governed by S. 27. cl. (b) of the Specific Relief Act, 1877. (See now S. 19 of the Specific Act, 1963). See the undermentioned cases.(2)

Section 48 — Note 2

1. 1922 Mad 249 (259) [AIR V 9] (DB).

2. *See* 1919 Oudh 114 (114, 115) [AIR V 6] : 21 Oudh Cas 317.

Section 48 — Note 3

1. 1937 Lah 35 (37) [AIR V 24] : 17 Lah 659 (DB).

[*See also* 1934 Bom 189 (191) [AIR V 21] (DB). (The result that the charge had no priority over a subsequent mortgage was arrived at by reference to S. 48 of the Registration Act.)]

1a. 1966 Andh Pra 233 (236) [AIR V 53 C 78].

2. 1950 Ajmer 59 (61) [AIR V 37 C 73].

1938 Bom 357 (358) [AIR V 25] (DB). (Agreement to mortgage in favour of A — Subsequent mortgage to B — Suit by A against mortgagor for specific performance of agreement—A cannot be given priority over B's mortgage under this section—An agreement to mortgage is not generally capable of specific performance.)

1929 All 817 (818) [AIR V 16] (DB). (Prior agreement to sell has priority in law over later agreement to sell if there is knowledge of it.)

1928 Nag 246 (247) [AIR V 15]. (Law imputes a notice to the subsequent transferee of the prior contract of sale.)

1926 Nag 95 (97) [AIR V 13]. (First contract to sale and then a mortgagee – on purchaser's suit for specific performance held that mortgage was not binding.)

1914 Mad 634 (634) [AIR V 1] (DB).

('12) 15 Ind Cas 457 (457) (DB) (Mad). (Agreement for sale—Subsequent registered mortgage to third party — Execution of sale deed subsequent to mortgage — *Held*, actual conveyance entitled purchaser to priority over mortgagee, unless he was bona fide for value.)

('02) 26 Bom 159 (162) (DB). (Agreement to sell to A—Subsequent sale of same land to B under registered conveyance — B having bought with notice of A's contract, the contract should be given effect to.).

4. "At different times."—The general rule in this section applies only if the rights are created 'at different times' and not if they are created 'at the same time.' When two instruments are executed on the same day that which is executed first takes priority, and evidence may be let in to show which was in fact executed first.(1) If it cannot be ascertained which of them was executed first, then the transferees would take as joint tenants or tenants-in-common.(2)

5. "In or over the same immovable property." — The rights created by the transfer must have been created in or over the 'same' immovable property. If rights by transfer are created in or over 'different' immovable properties the general rule laid down in this section will not apply;(1) such rights can be exercised to their full extent at the same time without encroaching upon one another.

6. "And such rights cannot all exist or be exercised to their full extent together".—The general rule in the section that a later created right shall be subject to the rights previously created applies only 'if the later created right cannot co-exist with or be exercised to its full extent along with the rights previously created'. Where they can all exist or be exercised to their full extent together without conflicting with one another the question of priority becomes immaterial.(1) The rights must, in such cases, be treated as relating to separate entities,(2) or as each successive right operating on what remains after the previously created right.(3) Thus, in the undermentioned case(4) one *S* mortgaged certain specified plots of land to *A* out of one anna three pies share owned by him. Subsequently, *S* mortgaged half of the one anna three pies share to one *B* without specifying any plots of land. It was held that *B* was entitled to have partition of the share mortgaged to him, to have such share assigned to him free of any incumbrance and to have the previously mortgaged plots of land assigned to the other half share.

A simple mortgage and a lease are not necessarily inconsistent and can co-exist unless the lease has the effect of impairing the rights of the mortgagee or hampering his remedy.(5) But rights under two usufructuary mortgages cannot be exercised together and the later mortgage must give way to the incidents of the earlier. The earlier mortgagee is, therefore, entitled to possession.(6)

(1900) 27 Cal 468 (471, 472) (DB).
('95) 18 Mad 43 (45) (DB).
(1865) 3 Suth W R 103 (105) (DB).
(1865) 3 Suth W R 64 (64) (DB).

Section 48 — Note 4

1. ('55) 1955 Ker L T 10 (13, 14) : AIR 1955 NUC (Ker) 5082 (DB).
('07) 6 Cal L Jour 74 (82) (DB).

2. ('55) 1955 Ker L T 10 (13, 14) (DB).
1921 Mad 693 (694) [AIR V 8] (DB). (Both transfers must be treated pari passu as if both were executed simultaneously.)
† ('07) 6 Cal L Jour 74 (82) (DB).
[*See also* (1882) 21 Ch D 762 (767, 768) : 51 L J Ch 828, Gartside v. The Silkstone & Dodswor Collieries Company. (When two deeds are executed on the same day, the Court must inquire which was in fact executed first, but if there is anything in the deeds themselves to show an intention, either that they shall take effect pari passu or even that the later deed shall take effect in priority to the other, Court will presume that they were executed in such an order as to give effect to the manifest intention.)]

Section 48 — Note 5

1. 1938 Mad 547 (550) [AIR V 25]. (As between the two substituted security rights, no question of priority arises.)
1919 Oudh 114 (115) [AIR V 6] : 21 Oudh Cas 317.

Section 48 — Note 6

1. † ('12) 13 Ind Cas 653 (655) (Cal).
('85) 7 All 568 (572, 574) (DB).

2. 1923 Oudh 42 (43) [A I R V 10].
1919 Oudh 114 (115) [AIR V 6]: 21 Oudh Cas 317.

3. 1919 Oudh 241 (244) [A I R V 6] : 61 Oudh Cas 360 (DB).

4. 1923 Oudh 42 (43) [AIR V 10].

5. 1919 Oudh 241 (244) [A I R V 6] : 21 Oudh Cas 360 (DB).

6. †1936 Lah 153 (155) [AIR V 23] (DB).
('12) 14 Ind Cas 735 (736) (Oudh).

7. **"In the absence of a special contract or reservation binding the earlier transferees."**—The general rule laid down in the section applies 'only in the absence of a special contract or reservation binding the earlier transferees.' If there is any special binding contract between the transferor and the earlier transferee that the earlier transfer will not have priority or if the transferor reserves rights in this respect, the earlier transferee may lose his priority. A document of transfer, '*prima facie*,' operates from the date of its execution; but the parties may agree that it should take effect at some other time. In that case it would take effect not from the date of its execution but from the time agreed upon.(1) If the transferor executes another document of transfer in the period intervening between the date of execution of the prior document and the time provided for its taking effect, the first transferee, though his document is executed earlier, will lose his priority.(2) In 'Gartside v. Silkstone'(3) Fry, J., observed as follows :

> "I think the law stands in this way, that when two deeds are executed on the same day, the Court must inquire which was in fact executed first, but that if there is anything in the deeds themselves to show an intention, either that they shall take effect 'pari passu' or even that the later deed shall take effect in priority to the earlier, in that case the Court will presume that the deeds were executed in such order as to give effect to the manifest intention of the parties."

In the undermentioned case(4) *A*, who sold property *X* to *B*, also executed to *B* a mortgage bond of property *Y* by way of indemnity against any loss that may be caused to *B* in respect of property *X*. It was held that the mortgage had priority over subsequent mortgages executed by *A* on property *Y*, even though the consequence attached to the property under the indemnity bond might come into existence after the date of the subsequent mortgages. But, in the case noted below,(5) a contrary conclusion was arrived at on similar facts. The facts were as follows: *A* executed a mortgage deed in favour of *B* in respect of property *X*. The mortgage deed provided that if property *X* should become unavailable to *B* on account of certain contingencies *B* should be entitled to a mortgage on property *Y* for the amount due to him. *A* then granted a mortgage of property *Y* in favour of *C*. The contingency contemplated by the mortgage deed in favour of *B* happened subsequently. It was held that *B* had only a contingent interest in *Y* which became vested in him only after the mortgage in favour of *C*. It was held that therefore *B* was not entitled to priority over *C*. It is

('95) 22 Cal 33 (38) (DB).
('86) 8 All 409 (418) (DB).
[*See also* ('01) 1901 All W N 52 (52).]

Section 48 — Note 7

1. 1922 Pat 299 (301) [AIR V 9] : 1 Pat 281 (DB). (If there is nothing in the mortgage deed to suggest that the mortgage was not to become effective until the consideration money was paid, the mortgage deed becomes operative as from the date of the execution of the mortgage.)
('12) 13 Ind Cas 653 (655, 656) (DB) (Cal). (A mortgage was duly executed on January 19th, but registered on 23rd, the date of the deed having been altered by the mortgagor from 19th to 23rd — Another mortgage of the same property was executed and registered on 22nd—Held, first mortgage should have priority over the second.)
('04) 29 Bom 46 (50, 51) (DB). (Mortgage to A, the deed being written on a plain paper with one anna receipt stamp—Presentation of the original deed by A and due registration — Mortgagor transferring the property to others subsequently —Held, from A's deed it was clear that legally the mortgage therein began to operate from the date of the document.)
[*See* 1934 Pat 68 (69) [AIR V 21]. (Registration alone is insufficient to pass the title without payment when it is intended between the parties that the title should not pass until payment of the consideration money.)
(12) 1912 Pun Re No. 105. (In the absence of contract to the contrary, the failure to pay consideration does not prevent the registration of a deed relating back to the State of the execution of the deed.)]

2. 1922 Pat 299 (301) [AIR V 9]: 1 Pat 281 (DB).
('12) 13 Ind Cas 653 (655, 656) (DB) (Cal).

3. (1882) 21 Ch D 762: (767, 768): 51 L J Ch 828 (830).

4. 1920 Mad 650 (651) [AIR V 7] (DB).

5. 1930 Oudh 129 (131) [AIR V 17] (DB).

submitted that this decision is not correct. The 'vesting' of a contingent interest is not the same as the 'creation' of such interest.

8. Priority between registered instruments.—Under S. 47 of the Registration Act, 1908, a registered document operates, not from the time of its registration, but from the time from which it would have commenced to operate if no registration thereof had been required or made, i. e., it operates from the time of its execution.(1) Consequently, when two documents of transfer are both registered, the priority of the one over the other must be determined with reference to the time of its 'execution,' and not to the date of its registration; a document executed earlier, though registered later than another, has, therefore, priority over that another executed later.(2)

9. Priority between registered and unregistered instruments. — An exception to the general rule laid down in this section is furnished by S. 50, sub-s. (1) of the Registration Act, 1908,(1) which provides as follows :

> "Every document of the kind mentioned in clauses (a), (b), (c) and (d) of S. 17, sub-s. (1) and clauses (a) and (b) of S. 18, shall, if duly registered, take effect as regards the property comprised therein, against every unregistered document relating to the same property, and not being a decree or order, whether such unregistered document be of the same nature as the registered document or not."

Clauses (a), (b), (c) and (d) of S. 17, sub-s. (1) refer to documents of which registration is compulsory; while clauses (a) and (b) of S. 18 refer to documents of which registration is optional. Thus, under S. 50(1) a subsequent registered document of which registration is either compulsory or optional has priority over a prior unregistered document of which registration is optional.(2) But notwithstanding that

Section 48 — Note 8

1. †('82) 6 Bom 168 (180) (FB).
‡1937 Nag 143 (144, 145) [AIR V 24] : ILR (1939) Nag 266. (Sale deed executed before but registered after attachment of property covered by sale deed — Sale deed, though subsequently registered, operates from date of its execution —Its operation is not affected by attachment of property sold between its execution and registration.)
1936 Pesh 103 (105) [A I R V 23] (DB).
1934 Pat 68 (69, 70) [AIR V 21]. (If it was intended that title should not pass until payment of the consideration money registration alone was insufficient to pass the title.)
1917 Mad 364 (363) [AIR V 4] (DB).
1915 Low Bur 112 (112) [AIR V 2.]
[*See* ('02) 24 All 402 (418) (FB).
1926 All 549 (549) [AIR V 13] (DB). (Case under Limitation Act.)
1924 Cal 600 (608) [AIR V 11]. (Do.).
1916 All 199 (200) [AIR V 3] (DB). (Do.)]
Also see Section 59, Note 13.

2. 1960 Mad 396 (397, 398) [A I R V 47 C 140]. (Sale of same property in favour of two different persons at different times — Subsequent sale antidated—Sale executed prior in point of time as a matter of fact, will prevail.)
1958 Pat 193 (196) [AIR V 45 C 72].
1946 Mad 140 (140) [AIR V 33 C 79]
1942 Oudh 172 (173) [A I R V 29] : 17 Luck 362.
1941 Pat 247 (248) [AIR V 28] (DB).
1938 All 431 (432) [AIR V 25].
1934 All 70 (71) [AIR V 21] (DB). (Two sale-deeds.)
1931 Sind 74 (74, 75) [A I R V 18] (DB). (Two sale deeds.)
1926 Mad 39 (41) [AIR V 13]. (Two sale-deeds—The first transferee, however having fraudulently delayed registration was not given priority.)
1919 Lah 196 (197) [AIR V 6]. (Do.)
1918 Cal 960 (960) [AIR V 5] (DB).
1918 Cal 539 (539) [AIR V 5] (DB). (Prior mortgage deed—Subsequent sale-deed.)
1914 All 313 (314) [AIR V 1]. (Two sale deeds.)
('12) 13 Ind Cas 653 (656) (Cal). (Two mortgage deeds.)
('12) 1912 Pun Re No. 105 : 16 Ind Cas 29.
('04) 29 Bom 46 (51) (DB). (Two mortgage deeds.)
('04) 29 Bom 42 (44) (DB). (Two mulgeni leases.)
(1900) 1 Low Bur Rul 293 (295) (DB).
('97) 1897 Bom P J 407 (DB).
('90) 3 C P L R 151 (152).
('84) 8 Bom 182 (184, 185) (DB).
[See however ('78) 2 Bom 299 (343) (DB). (In a conflict between two registered sale deeds executed on one and the same day, the vendee who has perfected his title by taking possession of the property must be preferred; rights of parties determined by Hindu law.)]

Section 48 — Note 9

1. *See* ('83) 1883 Pun Re No. 102 page 315.

2. ('82) 8 Cal 597 (610) (FB). (Section 54, T. P. Act, virtually abolishes optional registration — Per Garth, C. J.—7 Cal 753, Overruled.)
('80) 2 All 851 (853) (FB).

section, it has been held generally that if the transferee under the registered instrument has 'notice' of the prior unregistered transfer, he will not have priority over the latter.(3) The principle on which these decisions rest was stated by Lord Cairns in

1939 Lah 26 (31) [AIR V 26] : ILR (1939) Lah 261.
1937 Lah 57 (58) [AIR V 24].
1925 All 325 (326) [AIR V 12] : 47 All 338 (DB).
1925 Oudh 506 (508) [AIR V 12].
1919 Lah 296 (296) [AIR V 6] : 1918 Pun Re No. 111.
1917 Nag 209 (210) [AIR V 4]. (Benefit of S. 50 cannot be taken by a person who takes with a notice of prior title under an unregistered document.)
1915 Oudh 124 (124) [AIR V 2].
('13) 18 Ind Cas 724 (724) (DB) (All).
✠('12) 34 All 631 (635) (DB).
('12) 16 Ind Cas 625 (625) (All).
('11) 10 Ind Cas 233 (235) (All).
('09) 2 Ind Cas 495 (495) (All).
('09) 5 Nag L R 82 (83). (Subsequent registered sale without notice of previous unregistered one, is entitled to priority.)
('06) 4 Cal L Jour 490 (491, 492) (DB).
('05) 1 Nag L R 125 (127). (A registered sale deed executed by the purchaser at a sale held in execution of a decree is entitled to priority under S. 50 of the Registration Act, 1877, over an optionally registrable and unregistered mortgage deed.)
('04) 9 Cal W N 14 (17) (DB).
('03) 16 C P L R 95 (96).
('01) 25 Mad 1 (2) (DB).
(1900) 2 Bom L R 223 (224) (DB).
(1900) 2 Bom L R 110 (110) (DB). (Unregistered agreement of sale but accompanied with possession is entitled to priority.)
(1900) 3 Bom L R 97 (99) (DB).
(1900) 28 Cal 139 (141, 142) (DB).
('98) 1898 Pun Re No. 32. p. 110 (112).
('97) 22 Bom 945 (948) (DB).
✠('96) 20 Bom 158 (164, 165) (DB).
('96) 22 Bom 213 (215) (DB).
('94) 18 Bom 684 (687) (DB).
('94) 1894 Bom P J 133 (Reprint) 81 (81, 82) (DB).
('93) 1893 Bom P J 107 (DB).
('89) 1889 Pun Re No. 195, p. 689 (691).
('88) 12 Bom 569 (571) (DB).
('86) 1886 All W N 133 (133) (DB). (The priority of a registered bond conferred by the Registration Act is not taken away by a mortgagee of an unregistered mortgage bond obtaining a decree under it.)
('85) 7 All 378 (381) (DB).
('85) 7 All 577 (579, 581) (DB).
('84) 10 Cal 82 (85) (DB).
('83) 6 Mad 88 (89, 90) (DB).
('81) 3 Mad 46 (47) (DB).
('81) 7 Cal 570 (573) (DB).
('79) 2 All 198 (199, 200) (DB).
('79) 2 All 431 (433) (DB).
('72-92) 1872-1892 Low Bur Rul 151 (151). (A registered document has priority over an unregistered even when the latter is accompanied with possession.)
[But see ('85) 8 Mad 167 (168) (DB). (But if possession is given under prior deed it will be valid.)
('79) 4 Cal 536 (538) (DB). (Case under S. 50 of the Registration Act of 1871 which was different from the present section.)]

3. (1900) 1900 Pun Re No. 56 p. 199 (204) (FB). (Overruling 1890 Pun Re No. 115 (FB).)
✠('93) 16 Mad 148 (164) (FB). (Overruling 5 Mad 73 and 5 Mad 139.)
1939 Lah 29 (30) [AIR V 26] : ILR (1939) Lah 261. (Delivery of possession may amount to notice of previous title, but that would depend upon the nature and circumstances of possession.)
1933 Lah 836 (838) [AIR V 20] (DB).
1933 Lah 609 (610) [AIR V 20].
1930 Rang 188 (190) [AIR V 17].
1917 Nag 209 (210) [AIR V 4].
1917 Oudh 161 (162) [AIR V 4].
1915 Upp Bur 16 (17) [AIR V 2].
1914 Cal 331 (332) [AIR V 1] (DB). (If a person is in possession, it is sufficient to put a purchaser on inquiry as to the nature and extent of his interest.)
('13) 18 Ind Cas 46 (47) (DB) (Cal).
('11) 10 Ind Cas 233 (235) (All).
† ('08) 30 All 130 (131, 132) (DB).
('08) 30 All 238 (240).
('07) 17 Mad L Jour 319 (320) (DB).
('06) 28 All 315 (325) (DB). (Registration statute should not be made an engine to work injustice.)
('06) 29 Mad 362 (364).
†('05) 9 Cal W N 14 (17) (DB).
('03) 25 All 366 (370) (DB).
('03) 27 Bom 408 (412, 414) (DB). (Possession may have in certain cases for the purposes of notice, the same effect as registration.)
('03) 16 C P L R 95 (96).
† ('02) 27 Bom 452 (471, 473) (DB). (Possession is at least very cogent evidence of notice.)
('01) 25 Mad 1 (2) (DB).
('98) 20 All 252 (253) (DB). (Confirming on appeal 19 All 145.)
('97) 1897 All W N 90 (90). (1897 All W N 19, Followed.)
('95) 8 C P L R 109 (110).
('90) 1890 Bom P J 101 (DB).
('88) 1888 Bom P J 253 (DB).
('88) 12 Bom 569 (572) (DB).
('86) 13 Cal 70 (72) (DB).
('86) 8 All 540 (542) (DB).
('86) 10 Bom 105 (106, 107) (DB).
('85) 9 Bom 427 (428) (DB).
('85) 11 Cal 667 (670) (DB).
('85) 1885 Pun Re No. 14 p. 28 (29).
('85) 1885 All W N 57 (57) (DB).
('84) 10 Cal 1073 (1075) (DB). (Possession, though not conclusive, is very cogent evidence of notice.)

Agra Bank v. *Barry*(4) as follows:

"... by decisions ... it has been settled that, notwithstanding the apparent stringency of the words contained in this Act of Parliament [Irish Registration Act, 6 Anne, Cap. II], still if a person in Ireland registers a deed, and if at the time he registers the deed either he himself, or an agent, whose knowledge is the knowledge of his principal, has notice of an earlier deed, which, though executed, is not registered, the registration which he actually effects will not give him priority over that earlier deed. And, my Lords, I take the explanation of those decisions to be that, which was given by Lord King in the case of *Blades* v. *Blades*,(5) upwards of 150 years ago, the case which was mentioned just now at your Lordships' Bar. I take the explanation to be this, that inasmuch as the object of the statute is to take care that, by the fact of deeds being placed upon a register, those who come to register a subsequent deed shall be informed of the earlier title, the end and object of the statute is accomplished if the person coming to register a deed has, 'aliunde,' and not by means of the register, notice of a deed affecting the property executed before his own. In that case the notoriety, which it was the object of the statute to secure, is effected, effected in a different way, but effected as absolutely in respect of the person who thus comes to register as if he had found upon the register notice of the earlier deed."

The section will not apply where the prior unregistered document is one of which registration is compulsory, because such a document does not affect the property comprised in it and there can be no question of priority in such a case.(6)

Section 50 of the Registration Act applies if the two documents are antagonistic to each other and not if effect can be given to both of them without infringement of either.(7) The operation of the section is, however, practically limited to cases arising in the provinces where this Act is not in force inasmuch as this Act has virtually abolished optional registration. The Act recognises only two modes of transfer, i.e., registered instrument and delivery of the property in the case of sales, mortgages (except mortgage by deposit of the title deeds), leases (except where otherwise directed by Provincial Governments), and gifts so that now there cannot be any such transfer by an unregistered document.(8)

('83) 1883 Pun Re No. 102 Note, p. 315 (318).
('82) 6 Bom 515 (518, 519) (DB).
('80) 5 Cal 336 (349) (DB).
('74) 21 Suth W R 421 (421).
('70) 7 Bom H C R O C J 45 (73).
('69) 12 Suth W R 456 (456) (DB).
[*See also* ('72) 9 Bom H C R 147 (150) (DB). (An unregistered deed of sale accompanied by immediate possession ought to be preferred to a subsequent registered certificate of sale unaccompanied by possession.)
('72) 9 Bom H C R 151*n* (152*n*) (DB). (Do.)]
See also the undermentioned cases:
(1813) 12 R R 94 (98): 2 Ball & B 290, Eyre v. Dolphin.
(1871) 6 Ch 678 (683): 40 L J Ch 701 (702), Rolland v. Hart. (The same property mortgaged to A and B, both having been induced to advance money by their common solicitor—B, the subsequent mortgagee had no information as to existence of the mortgage to A — B registered his deed before A — Held, B must be taken to have had, through the solicitor, notice of the first mortgage, and could not by prior registration obtain priority.)
(1764) 28 E R 884 (885): 2 Eden 224, Sheldon v. Cox. (Notice to an agent is notice to a principal.)
(1815) 34 E R 578 (580): 19 Ves 435, Watt v. Barwell. (Lis pendens is not deemed notice for the purpose of postponing registered conveyance.)

4. (1874-75) L R 7 Eng & Ir App 135 (148).
5. (1727) 1 Eq C Abr 358.
6. ('85) 1885 Pun Re No. 90, page 193 (197) (FB).
((1885) Pun Re No. 2 Dissented from.)
†1928 Mad 546 (549, 552, 554) [AIR V 15] (DB).
('11) 9 Ind Cas 55 (55, 56) (DB) (Mad).
('90) 1890 Pun Re No. 92, page 277 (278).
('85) 1885 Pun Re No, 14 p. 28 (29).
[*See also* (1870) 2 N W P H C R 311 (312) (DB). (Registered mortgage prevails over prior unregistered mortgage to third person.)]
See Section 49 of the Indian Registration Act.
7. †('82) 6 Bom 193 (208) (FB).
1937 Lah 57 (58) [AIR V 24].
1928 Bom 269 (269, 270) [AIR V 15] (DB).
1925 Oudh 458 (458) [AIR V 12]: 29 Oudh Cas 15.
('12) 16 Ind Cas 625 (625) (All).
('86) 9 Mad 495 (498) (DB).
('84) 7 Mad 248 (282) (DB).
('69) 9 Bom H C R 60 (61) (DB). (First unregistered conveyance — Subsequent sale in execution of decree — Section 50 does not apply because what is sold in execution is only the right, title and interest of judgment-debtor so that if the first sale is valid nothing passes to the auction-purchaser.)

8. ('82) 8 Cal 597 (612) (FB).
('83) 1883 Pun Re No. 102, page 315 (317).

10. Priority between registered instruments of transfer and oral transfers.—Another exception to the general rule stated in this section is provided by S. 48 of the Indian Registration Act, 1908,(1) which runs as follows :

"All non-testamentary documents duly registered under this Act, and relating to any property, whether moveable or immovable, shall take effect against any oral agreement or declaration relating to such prcperty, unless where the agreement or declaration has been accompanied or followed by delivery of possession and the same constitutes a valid transfer under any law for the time being in force.(1a) :

Provided that a mortgage by deposit of title deeds as defined in S. 58 of the Transfer of Property Act, 1882, shall take effect against any mortgage-deed subsequently executed and registered which relates to the same property."

There are certain transfers of immovable property under this Act which may be made orally and without delivery of possession of the property transferred, e.g., a lease of immovable property falling within the proviso to S. 107 of this Act. Such oral transfers, though prior in point of time will not, by virtue of S. 48 of the Registration Act, have priority as against a registered transfer though subsequent. In provinces where the Transfer of Property Act does not apply, oral transfers of immovable property are not invalid, and in such cases also, a registered document will have under the said provision of the Registration Act, priority over the oral transfer(2) unless the transferee under the registered instrument had 'notice' of the oral transfer in which case he would have no such priority.(2a) In the undermentioned case(3) a charge was assumed to be an oral transfer of property and was held postponed to a subsequent registered document, by virtue of the provisions of S. 48 of the Registration Act.

A 'mortgage by deposit of title deeds' may be made orally even under this Act,(4) but S. 48 of the Registration Act specifically excepts such mortgages from its operation and consequently such a mortgage, if made prior in point of time to a registered mortgage, will be entitled to priority under this section.(5)

In England a subsequent purchaser for valuable consideration without notice when clothed with the legal title has priority over a prior transferee who has in himself

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Section 48 — Note 10

1. 1934 Bom 189 (191) [AIR V 21] (DB). (This section must be read subject to S. 48 of the Registration Act.)

1a. *See* 1923 Lah 560 (564) [A I R V 10]. (Oral agreement to sell to a mortgagee in possession can be enforced against a subsequent registered purchaser because the previous possession of the mortgagee together with the agreement to sell, is equivalent to transfer of possession under the agreement of sale.)

('10) 5 Ind Cas 57 (58) (DB) (Mad). (A sale of immovable property less than Rs. 100 in value by unregistered deed and delivery of possession passes a good title and has priority over a registered sale of a later date of the same property.)

2. 1916 Lah 291 (291) [AIR V 3] : 1916 Pun Re No. 30 (DB). (Oral gift is an 'oral agreement or declaration' within the meaning of S. 48 of the Registration Act.)

('13) 6 Low Bur Rul 144 (145).

2a. ('10) 5 Low Bur Rul 184 (FB).

† 1929 Lah 500 (501) [AIR V 16].

1919 Lah 404 (406) [A I R V 6] : 1919 Pun Re No. 132.

1915 Lah 232 (234) [AIR V 2] (DB).

('07) 4 Low Bur Rul 26 (27).

3. 1934 Bom 189 (191) [AIR V 21] (DB).

4. See Section 59 of the Transfer of Property Act.

NOTE.—Even before the proviso was added to S. 48 of the Registration Act in 1929, it had been held that a mortgage by deposit of the deeds was not an "oral agreement" within that section. See cases cited in foot-note (5).

5. 1930 Lah 920 (927) [AIR V 17] : 11 Lah 564 (DB).

† ('07) 33 Cal 410 (422) (DB).

('85) 11 Cal 158 (160). (Deposit of title deeds of certain property, under a verbal arrangement to secure a payment of a debt, is not an "oral agreement or declaration relating to such property" within the meaning of S. 48 of the Registration Act.)

[*See* 1916 Lah 39 (43) [AIR V 3] : 1916 Pun Re No. 31 (DB). (Case not decided under T. P. Act.)]

[*See also* ('70) 7 Bom H C R O C 45 (62). (Case decided prior to T. P. Act.)]

only an equitable title.(6) A mortgage by deposit of title deeds is, in England, known as an equitable mortgage, and has no priority against a subsequent legal mortgagee without notice.(7) This rule has no application to transfers in India as the law in India does not recognise the distinction between legal and equitable estates.(8) Thus, it was observed by Maclean, C. J., in '*Gokul Das* v. *Eastern Mortgage and Agency Company*'(9)

> "As stated by the Judicial Committee in the case of '*Webb* v. *Macpherson*,'(10) 'the law of India, speaking broadly, knows nothing of the distinction between legal and equitable property in the sense in which that was understood when equity was administered by the Court of Chancery in England.' The case of the Company, as presented to us, is that they are 'legal' mortgagees and that they are in the same position as a legal mortgagee in England, who has obtained the legal estate without notice of the prior equitable encumbrance. But the reasoning is fallacious, because in India there is no such distinction between legal and equitable estates as is known to the English law."

In the undermentioned cases(11) decided before the Transfer of Property Act, the English rule was applied and the subsequent mortgagee without notice was held to have priority over the prior mortgagee by deposit of title deeds. These cases are no longer good law.

In the Punjab and other places also, where the Transfer of Property Act does not apply, a mortgage by deposit of title deeds operates as a valid legal mortgage and has the same effect as any other mortgage.(12)

11. Salvage liens. — Another exception to the rule enunciated by this section is that a transfer for the purpose of saving the property from loss or destruction has priority over another transfer though prior in point of date. The reason is that payments made in order to save the property from loss or destruction are in the nature of 'salvage' payments on behalf of all persons interested, and are to be paid back in precedence to all other claims.(1) 'In re Tharp'(2) the reason for giving priority to salvage liens was stated by Lord St. Leonards as follows:

> "In Ireland, it is a very common equity to have, as a prior charge to all other encumbrances, what is called salvage money, where a leasehold estate, or an estate held for lives to

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6. ('06) 33 Cal 657 (663).
('06) 33 Cal 410 (421, 422) (DB).
('86) 8 All 86 (91) (DB).
(1752) 28 E R 302 (311) : 2 Ves 485, Pomfret v. Windsor.
(1851) 68 E R 586 (590) : 9 Hare 458, Hewitt v. Loosemore.
(1768) 27 E R 440 (441) : Amb 678, Morecock v. Dickson.
(1791) 29 E R 526 (527) : 3 Ch Cas 263, Williams v. Lambe.
(1748) 26 E R 1172 (1176) : 1 Amb 436, Le Neve v. Le Neve.
(1880) 14 Ch D 563 (574) : 50 L J Ch 118 (120, 121), Greaves v. Tofield.
(1891) 60 L J Ch 1 (5) : (1891) 1 Ch 8, Taylor v. Russell.

7. 1923 P C 211 (213) [AIR V 10] : 51 Cal 86 : 1 Rang 637 : 50 Ind App 283.
1930 Lah 920 (924) [A I R V 17] : 11 Lah 564 (DB).
1916 Lah 39 (42) [AIR V 3] : 1916 Pun Re No. 31 (DB).

8. 1923 P C 211 (215) [A I R V 10] : 50 Ind App 283 : 51 Cal 86 : 1 Rang 637.
1916 Lah 39 (42, 43) [A I R V 3] : 1916 Pun Re No. 31 (DB).
('06) 33 Cal 410 (421, 422) (DB).
('90) 13 All 28 (40) (DB).
('86) 8 All 86 (91) (DB).
Also see S. 58, Note 39.

9. ('06) 33 Cal 410 (421, 422) (DB).

10. ('03) 31 Cal 57 (72) : 30 Ind App 238 (PC).
Also see S. 5, Note 6; S. 54, Note 23 and S. 58, Note 39.

11. ('76) 1 Bom 237 (247, 248). (A having notice of the prior equitable mortgage, purchased from one, who, also with such notice, had purchased from a bona fide purchaser for value without notice — Held, a held the property free from the equitable mortgage.)
('69) 1 N W P H C R 166 (168) (DB). (Following 9 Moo Ind App 303 (PC).)

12. 1930 Lah 920 (927) [A I R V 17] : 11 Lah 564 (DB).
1916 Lah 39 (42, 43) [A I R V 3] : 1916 Pun Re No. 31 (DB).

Section 48 — Note 11

1. 1931 P C 226 (228) [A I R V 18] : 58 Ind App 341 : 59 Cal 463. (AIR 1930 Cal 151, Reversed.)
2. (1852) 2 Sm & G 578*n*. (Cited in 2 Cal 58 (79).)

> which half a dozen people are entitled in successfon, many of them being mortgagees, according to certain priorities, the last man of all who is entitled after everybody, being in possession, redeems, I may say, the estate by paying the landlord, 'who otherwise would have recovered the estate, and taken it from everybody.' His payment is what is called salvage money. That is established equity, and a very proper equity. He that pays the salvage has a prior incumbrance to every other charge and interest, 'because, so far as any interest is left to anybody beyond the charge, it is acquired by that payment, in the shape of redemption money'."

Where 'two' mortgages are executed 'both' for saving the property from destruction the later mortgage in date will have priority over the earlier. Thus, in '*Girdhari Lal* v. *Dhirendra Kristo Mukerjee*'(3) a mortgage was first executed by the mortgagor for the purpose of saving the property from a 'putni sale'. Subsequently, a partition suit was filed in respect of the property and therein a Receiver was appointed who, under the Court's orders, executed a mortgage of the property to another persons. This mortgage also was made for the purpose of preserving the property. Harrington, J., observed :

> "If it be taken therefore that both the plaintiff's advance, and the advance made by defendant No. 8 to the Receiver on the authority of the Court, are both advances made to preserve the property, they would take precedence according to the inverse order of their respective dates, i.e., the later in date would obtain priority."

In order to claim a salvage lien, it is however necessary that the person making the payment should have some interest in the property, or some right or duty towards the owner of the property, impelling him to make the expenditure. A mere volunteer cannot generally claim such a lien.(4)

12. Priority of mortgage-rights created by Receivers. — Upon the appointment of a Receiver by the Court the assets which are brought into his possession are in the custody of the Court to be dealt with by it under such orders as it may deem proper from time to time. The Receiver's possession is no doubt generally subject to all valid and existing liens upon the property at the time of his appointment. But the Court can authorize the Receiver to create liens on the property in his possession and in giving him this power "it can declare by its order that the lien created by him will have priority over the liens already existing on the property." This it generally does to save the property from loss or destruction,(1) or in an administration suit or partition suit, for working out the rights, liabilities and obligations of the cosharers of the joint properties in the course of partition.(2) Where,

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3. ('07) 34 Cal 427 (441) (SB).

4. ('13) 18 Ind Cas 247 (248) (DB) (Mad). (Failure of prior mortgagee to discharge mortgagor's debt, which was part consideration for mortgage and in consequence sale of property in execution — Second mortgagee setting the sale aside by payment of the consideration for his mortgage for the sale amount — Held that the second mortgagee had no salvage lien on the property as he had no interest to preserve.)
('04) 31 Cal 667 (679, 680) (DB).
('78) 1 Cal L R 152 (154) (DB). (A person who advances money to another for the purpose of saving a mehal from sale for arrears of rent has no lien on the property for the money advanced.)
†('77) 2 Cal 58 (80) (DB).

Section 48 — Note 12

1. ('07) 34 Cal 427 (434, 435, 442) (SB).

✠1941 Cal 163 (166) [AIR V 28] : I L R (1941) 1 Cal 155 (DB). (By the appointment of the Receiver the Court takes upon itself the duty of protecting and preserving the subject-matter of the suit, which it discharges through its officer, namely the Receiver. It must therefore have all powers which are incidental and necessary for the discharge of that duty. It will have therefore the power to sanction a loan to be raised by the Receiver and if necessary to direct the mortgage to be executed by him for securing it to have precedence over earlier mortgages executed by the parties. It may be unaware of such prior mortgages or even if aware, may not give notice to those mortgagees.)

2. ✠1941 Cal 163 (166) [AIR V 28] : I L R (1941) 1 Cal 155 (DB).

therefore, the Court, with the object of preserving the property, orders the Receiver to raise a loan on the security of the property and expressly directs that the intending mortgagee from the Receiver should have a first charge, the mortgagee is entitled to priority over all other mortgages though of earlier dates.(3) Where, however, the purpose of the loan ordered to be raised on a first charge, is not any of those set out above, and this appears on the face of the order, the mortgagee advancing money on the faith of the order, cannot claim precedence over the earlier mortgages on the same property. The reason is that the Court in sanctioning such a loan arrogates to itself a power, which it does not possess.(4)

13. Owelty-liens. — A mortgagee of an undivided share in property takes it subject to the liability of the property being subsequently partitioned. If the Court in a suit for partition allots certain property to the mortgagor subject to certain amounts to be paid by him as owelty to other cosharers (i.e., the amounts payable by one sharer to another for equalising the partition), the mortgage operates on the property, allotted to the mortgagor *subject to the owelty-liens* of other cosharers.(1)

14. Government debts. — In the case of *unsecured debts* the Government as a creditor takes precedence over all other creditors.(1) But in the case of *secured debts* the Government has no preference and takes subject to prior encumbrances, except where otherwise provided by law.(2) In the Full Bench case of '*Dost Muhamad* v. *Mani Ram*(3)' Aikman J., observed :

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3. ('07) 34 Cal 427 (434, 442) (SB).
✠ 1941 Cal 163 (166) [AIR V 28] : ILR (1941) 1 Cal 155 (DB).
1926 Pat 94 (97) [AIR V 13] (DB).
('06) 33 Cal 1175 (1176, 1177) (Joint property attached in execution of a money-decree — Receiver appointed in the partition suit of the property — Court ordering Receiver to mortgage property and directing mortgagee to have a first charge on the property—Mortgagee gets priority over the attaching creditors.)
(1906) 1 Ch 365 (377) : 75 L J Ch 109 (113), In re Glasdir Copper Mines Ltd.
(1895) 2 Ch 1 (6) ; 64 L J Ch 658 (659, 660), Strapp v. Bull.
(1894) 2 Ch 205 (207) : 63 L J Ch 670 (671), Greenwood v. Algesiras Railway Co.

4. ✠1941 Cal 163 (167) [AIR V 28] : ILR (1941) 1 Cal 155 (DB). (In such a case the principle of breach of faith cannot be the decisive factor. It is a question of power or jurisdiction of the Court. If the Court arrogates to itself a power which it does not possess and does an act affecting persons not parties to the suit, its acts cannot prejudice the rights of such persons.)

Section 48 — Note 13

1. 1957 S C 577 (582) (Pr 19) (Pt a) [AIR V 44 C 84] : 1957 S C R 775. (Lien or charge may be express or implied.)
('08) 35 Cal 388 (391, 392) (SB).
[*See also* 1926 Mad 186 (187) [AIR V 13]. (The principle that in a partition suit all equities between the members of the coparcenary should be worked out allotting to each member the share to which he is equitably entitled is not restricted to Hindus.)]

Section 48 — Note 14

1. ('07) 29 All 537 (542, 543) (FB). (For instance when a plaintiff wins a suit brought in forma pauperis, Government's claim for court-fees.)
('06) 33 Cal 1040 (1046) (DB). (Do.)
1926 Oudh 44 (45) [A I R V 13]. (In competing claims against moveables, the Crown has a priority.)
1918 Mad 1111 (1115) [A I R V 5] : 40 Mad 767 (DB). (Warrant of distress issued by a criminal Court takes precedence over a civil writ.)
(1892) 1892 A C 437 (441) : 61 L J P C 75 (76). Maritime Bank of Canada v. New Brunswick Receiver General.
('76) 1 Bom 7 (9, 10) (DB).
[*See also* 1954 Mad 197 (199) [AIR V 41 C 82].]

2. ✠('07) 29 All 537 (543) (FB). (2 All 196, Overruled.)
1934 Rang 321 (323) [A I R V 21] : 12 Rang 437 (DB). (Sums realized by Receiver, appointed during pendency of suit, from mortgaged property form part of mortgage security and Crown is not entitled to claim the sum to be paid in priority to the mortgagee decree-holder.)
†1919 Cal 908 (911, 912) [AIR V 6] : 45 Cal 653. (Shares merely deposited and not actually transferred do not create right in favour of the depositee superior to the right of the Crown.)
[*See also* 1954 Mad 197 (199) [AIR V 41 C 82.]
('05) 28 Mad 420 (422) (DB). (A sale for arrears of Abkari revenue of immovable properties belonging to the defaulter under S. 28 of Act I of 1886 has not the effect of discharging encumbrances created prior to the sale.)]

3. ('07) 29 All 537 (542, 543) (DB).

"No doubt the Crown as creditor takes precedence of all other creditors. But in my opinion the learned Judges who decided the case in '*Nikha Mal* v. *Sulaiman Sheikh Gardner*,(4)' erred in saying that this principle is not liable to an exception in the case of lien-holders. Save when otherwise provided by law, the Crown can only sell such rights as the person indebted to it possesses. In certain cases Government is declared to have a first charge on property. For instance when a plaintiff has brought a suit 'in forma pauperis' and wins that suit the Government claim for the amount of the court-fees which would have been payable on the suit is declared by law (S. 411, Code of Civil Procedure, 1882) to be a first charge on what the plaintiff has won by the suit . . . . Again the Land Revenue Act (vide' S. 141 of Act No. III of 1901) declares that in the case of every mahal the revenue assessed thereon shall be the first charge on the entire mahal, and following upon this S. 161 of the same Act provides that when a mahal is sold for arrears of revenue which have accrued due upon it, it shall be sold free of all encumbrances. But when any property of the defaulter, other than the mahal upon which the revenue is due, is sold to recover that revenue, the proviso to S. 162 lays down that provisions of S. 161, namely, as to the sale free of all encumbrances shall not apply to such sale. When the Government executed the decree against Ruhumatullah, it could only sell such rights in the house as he had at the time of sale, and the purchase by the appellant was, as was indeed expressly declared at time of sale, subject to the previous encumbrances."

15. Charges created by manager appointed under the Bengal Tenancy Act. — Sub-section (3) of S. 98 of the Bengal Tenancy Act (VIII of 1885) (Since repealed in W. Bengal by Act 10 of 1956) provides that the manager appointed under S. 95 of the Act by the District Judge "shall subject to the control of the District Judge, have, for the purposes of management, the same powers *as the co-owners jointly might but for his appointment have exercised*, and the co-owners shall not exercise any such power." Thus, after the appointment of the manager a co-owner has no power *to deal with the whole of the estate.* But this does not take away the power of the co-owner *to deal with his own share in the estate.* However, the person taking from the co-owner *takes subject to any charge, on the estate, that might be properly incurred by the manager during period of his management.(1)*

16. Priority by estoppel.—A subsequent transferee may get a right of priority by the application of the doctrine of estoppel. Thus, if a prior transferee has by misrepresentation induced another person to advance money or to purchase the property under the belief that there is no prior incumbrance, he will be estopped as against such other person from setting up his prior rights.(1) Section 78 of this Act is based upon this principle and applies where a prior 'mortgagee' has induced another person to advance money on a subsequent 'mortgage.'(2)

17. Priority under section 79.—See Notes on Section 79.

18. Law in the Punjab.—The Transfer of Property Act is not in force in the State of the Punjab. But the principle of this section which is of general applicability that a later created right shall be subject to the rights previously created will apply to cases arising in that State.(1)

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4. ('79) 2 All 196 (197).

Section 48 — Note 15

1. ('03) 31 Cal 305 (312) : 31 Ind App 24 (PC). (Debt was incurred in this case, to pay off the arrears of the Government revenue.)

Section 48 — Note 16

1. 1926 Mad 39 (40) [AIR V 13].
1918 Cal 411 (411) [AIR V 5] (DB).
[*See also* 1934 Rang 372 (373) [AIR V 21] (DB).]
2. 1918 Cal 411 (411) [AIR V 5] (DB).

Section 48 — Note 18

1. 1938 Lah 430 (431) [AIR V 25] (DB).
1930 Lah 920 (926, 927) [A I R V 17] : 11 Lah 564 (DB).
('83) 1883 Pun Re No. 93, p. 285 287).

49. Where immoveable property is transferred for consideration, and such property or any part thereof is at the date of the transfer insured against loss or damage by fire, the transferee, in case of such loss or damage, may, in the absence of a contract to the contrary, require any money which the transferor actually receives under the policy, or so much thereof as may be necessary, to be applied in reinstating the property.

Transferee's right under policy.

Synopsis

1. English law.
2. Scope of the section.
3. "For consideration."
4. "May require any money which the transferor actually receives."
5. "In the absence of a contract to the contrary."
6. "In reinstating the property."

1. English law.—Under the English law a contract of fire insurance is in the nature of an indemnity and the assured cannot claim the insurance amount where he does not suffer any loss or damage.(1) Where property which has been insured against loss by fire is transferred by *A*, the owner, to *B*, *A* himself retaining no 'interest' in the property, and subsequently the property is lost or damaged by fire, *A* cannot recover from the insurer any amount inasmuch as he cannot be said to have suffered any loss.(2) Further the transferee *B* cannot, also, in the absence of an assignment of the policy in his favour, or of a special statutory provision, claim the insurance amount from the insurer.(3)

Where the transferor *A* 'retains' some interest in the property transferred, he can, if the property is destroyed or damaged by fire recover the insurance amount from the insurer. In such a case it was held in '*Garden* v. *Ingram*(4) that *B* was entitled to the benefit of such amount. The Lord Chancellor observed as follows:

> "When a man insures property under an absolute covenant to insure, and then assigns or charges the lease to secure a sum of money he still retains his interest in the property, subject to the charge. Then the property is burnt and the insurance money is payable. Can the mortgagor claim this money against his own mortgagee when the object of effecting the policy was for the purpose of reinstating the premises? I am of opinion that the benefit of the policy passed by the mortgage."

This view of the Lord Chancellor has, however, not been followed in England the general trend of opinion being that the transferee is not entitled to the benefit of the insurance amount.(5)

Section 49 — Note 1

1. †(1883) 11 Q B D 380 (386): 52 L J Q B 366 Castellain v. Preston.
(1852) 23 L J Ch 478 (479): 98 R R 452 Garden v. Ingram.
(1880) 50 L J Q B 33 (35): 5 Q B D 560, Darrell v. Tibbitts.
(1877) 46 L J Ch 537 (539): 5 Ch D 569, North British & Mercantile Insurance Co. v. London, Liverpool & Globe Insurance Co.
(1881) 18 Ch D 1 (7): 50 L J Ch 472 (476), Rayner v. Preston.
(1843) 152 E R 695 (696): 11 M & W 10, Pawles v. Innes. (A person who assigns his interest in a ship after insurance but before loss, can only sue in respect of loss as a trustee of assignee if he holds the policy.)

2. (1843) 152 E R 695 (696): 11 M & W 10, Pawles v. Innes. (A, B and C had effected an insurance on a ship — During currency of insurance A transferred by sale his share in the ship to B — *Held*, that at the time of the loss by fire A having sold his share, had no interest and therefore could not claim insurance amount.)
(1881) 50 L J Ch 472 (480): 18 Ch D 1, Rayner v. Preston. (Per James L. J.)

3. †(1881) 50 L J Ch 472 (480): 18 Ch D 1, Rayner v. Preston. (Per James L. J.)

4. (1852) 23 L J Ch 478 (479): 98 R R 452.

5. (1881) 50 L J Ch 472 (477): 18 Ch D 1, Rayner v. Preston.
(1912) 2 Ch 414 (419): 28 T L R 594, Sinnott v. Bowden.

In the case of *contracts* for the *sale* of property which has been insured against loss by fire, where the damage by fire occurs before the contract is completed, the vendor retains his interest in the property until the contract is completed, and is therefore entitled to recover from the insurer, the insurance amount. On the question whether the purchaser is entitled to the benefit of this amount to any extent, it was held by the majority of the Judges of the Court of Appeal in '*Rayner* v. *Preston*'(6) that he was not entitled to such benefit, in the absence of a contract or a statutory provision to the contrary. James, L. J., however, disagreed with this view and observed as follows :

"I am of opinion that the relation between the parties was truly and strictly that of trustee and 'cestui que trust'. I agree that it is not accurate to call the relation between the vendor and purchaser of an estate under a contract while the contract is *in fieri*, the relation of trustee and *cestui que trust*. But that is because it is uncertain whether the contract will not be performed, and the character in which the parties stand to one another remains in suspense as long as the contract is *in fieri*. But when the contract is performed by actual conveyance or performed in everything but the mere formal act of sealing the engrossed deeds, then that completion relates back to the contract, and it is a thing ascertained that the relation was throughout that of trustee and *cestui que trust*. That is to say, it is ascertained that while the legal estate was in the vendor, the beneficial or equitable interest was wholly in the purchaser. And that, in my opinion, is the correct definition of a trust estate. Wherever that state of things occurs, whether by act of the parties or by act or operation of law, whether it is ascertained from the first or after a period of suspense and uncertainty, then there is complete and perfect trust, the legal owner is and has been a trustee, and the beneficial owner is and has been a *cestui que trust*.

"This being the relation between the parties, I hold it to be a universal rule of equity that any right which is vested in a trustee—any benefit which accrues to a trustee, from whatever source or under whatever circumstances, by reason of his legal ownership of the property—that right and that benefit he takes as trustee for the beneficial owner."

The view of James, L. J., in the above case has now been adopted by Legislature in S. 47 of the Law of Property Act, 1925 (15 Geo. V, Ch. 20). That section runs as follows :

"47. (1) Where after the date of any contract for sale or exchange of property, money becomes payable under any policy of insurance maintained by the vendor in respect of any damage to or destruction of property included in the contract, the money shall, on completion of the contract, be held or receivable by the vendor on behalf of the purchaser and paid by the vendor to the purchaser on completion of the sale or exchange, or so soon thereafter as the same shall be received by the vendor.

(2) This section applies only to contracts made after the commencement of this Act, and has effect subject to—

(a) any stipulation to the contrary contained in the contract,

(b) any requisite consents of the insurers,

(c) the payment by the purchaser of the proportionate part of the premium from the date of the contract.

(3) This section applies to a sale or exchange by an order of the Court, as if—

(a) for references to the "vendor" there were substituted references to the "person bound by the order" ;

(b) for the reference to the completion of the contract there were substituted a reference to the payment of the purchase or equality money (if any) into Court ;

(c) for the reference to the date of the contract there were substituted a reference to the time when the contract becomes binding."

2. Scope of the section.—This section appears to have been based upon the English decision of '*Garden* v. *Ingram*,'(1) referred to in Note 1, to the effect that the

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6. ✠(1881) 18 Ch D 1 (12) : 44 LT 787. (Relying upon Poole v. Adams, (1864) 12 WR (Eng) 683.)

Section 49 — Note 2

1. (1852) 23 L J Ch 478 (479) : 98 R R 452.

benefit of the policy of insurance passes to the transferee. It does not seem to have been based, as has been sometimes stated,(2) upon the dissenting judgment of James L. J., in '*Rayner* v. *Preston*,'(3) for, that view proceeded on the basis that in a *contract to sell*, the vendor would be in the position of a trustee for the vendee in respect of any moneys received by him from the insurer, and it was expressly observed by his Lordship that the position would be different where the loss by fire occurred after the *completion of the contract by the execution of the conveyance.* This section deals with *completed* transfers, as is shown by the words "is transferred," and not with *contracts* to sell, and therefore cannot be said to have been based upon the view of James, L. J., in the above case.

The section assumes that the transferor is in a position to receive the insurance amount from the insurer. Where the transfer is by way of a *mortgage or lease* it is clear that the mortgagor or lessor retains an interest in the property, and in case of damage thereto or loss thereof, he can recover the insurance amount from the insurer on the basis that he has suffered loss. In the case of an out and out *sale* where the vendor has entered into a contract to *repurchase* the property from the vendee, it has been held that the vendor has an "insurable interest" and can therefore recover the insurance amount.(4)

In both the above cases the transferee may, under this section, require the money obtained by the transferor to be applied in reinstating the property. But where the case is one of outright sale, and the vendor retains no sort of interest in the property, he cannot recover from the insurer, any money inasmuch as a contract of fire insurance is only a contract of 'indemnity'(5) and the vendor cannot be said to have suffered any loss. Under S. 55, sub-s. (5), cl. (c), the vendee in such cases is to bear the loss, etc., of the property occurring after the date of purchase. This section seems to assume that even in such cases, the vendor can get the money from the insurer, inasmuch as it is made applicable to *all* transfers. It is submitted, however, that the section must be taken to apply only to transfers of property wherein the transferor has an insurable interest and can recover the insurance amount from the insurer.

The section applies only where *at the date of the transfer* the property has been insured. It does not apply where the insurance is effected 'after' the date of the transfer.(6)

3. **"For consideration."**—The section applies only where the transfer has been made *for consideration.* Thus, it would apply to transfers by way of mortgage, lease, exchange, etc., but not to transfers by way of 'gift.'

4. **"May require any money which the transferor actually receives."**—The transferee cannot in the absence of an assignment of the policy in his favour, claim from the 'insurer' direct, that the insurance amount should be paid to him.(1) He can only require the *transferor* to apply any monies *actually received* by him,

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2. *See* 1923 Rang 6 (8) [AIR V 10] : 11 Low Bur Rul 294 (DB).

3. (1881) 50 L J Ch 472 (480) : 18 Ch D 1.

4. 1931 Rang 210 (211, 212) :[AIR V 18] : 9 Rang 451 (DB). (*Held*, insurable interest is not the same as legal interest as defined in S. 54, T. P. Act.)

5. 1923 Rang 6 (9) [AIR V 10] : 11 Low Bur Rul 294 (DB).

6. 1923 Rang 6 (8) [AIR V 10] : 11 Low Bur Rul 294 (DB).
[*See also* (1866) 35 L J Ch 412 (416) : L R 2 Eq 143, Lees v. Whiteley.]

Section 49 — Note 4

1. †1923 Rang 6 (7) [AIR V 10] : 11 Low Bur Rul 294 (DB).
(1864) 12 W R (Eng) 683 (683) : 143 R R 425 Poole v. Adams.

in reinstating the property. If the transferor does not receive any money at all, the transferee has no remedy. He cannot compel the transferor to receive the money from the insurer except perhaps in certain cases indirectly. Thus, the mortgagee may, under S. 68, cl. (b) ask the mortgagor to give further security, and if he fails to do so, sue for the recovery of the mortgage-money, personally from him. If the transfer is by way of a lease, the lessee may put an end to the lease, if the property is not reinstated. (See S. 108, clause (e).)

5. "In the absence of a contract to the contrary."—The section has no application where there is a contract to the contrary, i. e., a contract by which the transferee is precluded from claiming any such benefit as is provided for by this section.

6. "In reinstating the property."—The transferee can require the transferor only to *reinstate the property*. He cannot ask that the insurance money received by the transferor should be paid to him. It follows that the transferor is entitled to retain for himself any money over and above what is necessary to reinstate the property.(1)

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50. No person shall be chargeable with any rents or profits of any immovable property, which he has in good faith paid or delivered to any person of whom he in good faith held such property, notwithstanding it may afterwards appear that the person to whom such payment or delivery was made had no right to receive such rents or profits.

Rent *bona fide* paid to holder under defective title.

Illustration.

A lets a field to *B* at a rent of Rs. 50, and then transfers the field to *C*. *B*, having no notice of the transfer, in good faith pays the rent to *A*, *B* is not chargeable with the rent so paid.

Synopsis

1. Scope of the section.
2. Person claiming protection must have held in good faith and also paid in good faith.
3. Payment in advance by tenant.

1. Scope of the section.—This section, the second paragraph of S. 109 and S. 130 are all applications of the general principle of law referred to by Willes, J., in *De Nicholls* v. *Saunders*(1) that if a party fulfils an obligation without notice of the rights of a third party, his obligation is discharged. This section is a *general* provision applying to *all* cases where property is held by one person under another, while the second paragraph of S. 109, applies only to *leases for non-agricultural purposes*.

The section covers two classes of cases :

(1) Where *A who has a right* to a land or other property lets it to *B* and then transfers the property to *C* and thereafter *B*, without notice of the transfer, in good faith, pays the rent to *A*. This is the case referred to in the illustration to the section.

Section 49 — Note 6

1. Ccmpare the provisions of the Fire Prevention Act, 1774 (14 Geo. III, c. 78.)

Section 50 — Note 1

1. (1870) 22 L T 661 (662) : 18 W R (Eng) 1106.

(2) Where *A who has no title* to a property lets it to *B* who takes it in good faith and pays the rent to *A* in good faith. In this case there is no 'transfer' by *A* to any person during the tenancy of *B*; but he has no title to let it to *B*. Even in such a case, *B* cannot be charged by the real owner with the rents and profits of the property.(2) The remedy of the latter is only to proceed against *A*.

The section contemplates payment of rent in good faith for *the same tenancy* to a wrong person. Where a sub-tenant pays rent to the tenant who is his immediate landlord in respect of the contractual sub-tenancy without the knowledge that he had become a statutory tenant directly under the landlord such payment cannot be relied upon by him as a payment to the landlord in respect of the statutory tenancy.(3)

It has been held that this section is subject to the doctrine of *lis pendens* contained in S. 52. If, therefore, the tenant takes the lease and makes any payment to the mortgagor during the pendency of the suit to enforce the mortgage by the mortgagee he does so at his own risk and he cannot claim protection under this section.(4)

The section applies to a case where rent is paid *bona fide* to the holder under a defective title. Where the defence was that during the time when the previous landlord was the owner, the tenant spent some amount on repairs and that he was entitled to deduct the same from the rents, no question of any payment to any person whose title was defective arises.(5)

2. Person claiming protection must have held in good faith and also paid in good faith.—In order that *A* who has paid or delivered the rents and profits of immovable property to *B* may be protected under this section from the demands of *C*, the person who is really entitled to such rents and profits, it is necessary for *A* to show that—

(1) he *held* the property in *good faith* from *B* and

(2) he *paid* the rents or delivered the profits to *B* in *good faith*.(1)

If he did not *hold* the property in good faith from *B*, a payment of rents and profits to the latter cannot obviously be in good faith. *A* is, therefore, not protected under this section. The mere fact, however, that he holds the property in good faith from *B*, does not necessarily mean that *payment* or *delivery* of the rents and profits to *B* is in good faith. He may hold the property from *B* in good faith, but at the time of payment he might have become aware of the fact that *C* and not *B* was entitled to such rents and profits. If, notwithstanding such knowledge, he paid or delivered the rents or profits to *B*, he will not be protected under this section.

The expression "good faith" has been defined in S. 3, sub-s. (22) of the General Clauses Act, 1897, thus: "A thing shall be deemed to be done in good faith, where it is in fact done 'honestly', whether it is done negligently or not." Though, as will be seen in Note 8 on S. 51, this definition does not, in terms, apply to this Act, the expression "good faith" has been held to have the same meaning as it has in the said definition unless there is anything repugnant in the subject or context. Section 3 of this Act, however, provides that a person is said to have 'notice' of a fact when he actually knows the fact or when, but for wilful abstention from an enquiry or search

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2. ('09) 33 Bom 96 (104) (DB).

3. 1951 Cal 394 (395) [AIR V 38 C 98] [DB].

4. 1954 Sau 82 (84) [AIR V 41 C 35].
1931 Bom 539 (541) [AIR V 18].

5. ('66) 1966-1 Andh L T 11 (12).

Section 50 — Note 2

1. ('38) 42 Cal W N 378 (380) (DB).

which he ought to have made, or 'gross negligence,' he would have known it. In the light of this provision, the expression "good faith" will exclude cases where a person has acted in a 'grossly negligent' manner, sufficient to charge him with notice of the real owner's right.(1a)

Illustrations.

(1) *A* leased his property to *B* and thereafter mortgaged it to *C*, who was entitled under the terms of the mortgage to realise the rents. *C* gave notice to *B* who thereafter paid the rent to *C*. Subsequently, the property was sold to *D* in execution of a decree against the mortgagor *A*, and *D* gave notice to *B* that *C's* mortgage had been satisfied, and that rent should be paid to him. *B*, without making any inquiry, whether the mortgage was, in fact, satisfied paid the rent to *D*. *C's* mortgage was in fact not satisfied. It was held that *B* could not be said to have made the payment to *D* in good faith.(2)

(2) *B* held land from *A*. After *A's* death *B*, without taking any care to assure himself that *A's* widow had any authority, paid rent to her. It was held that, as against the claim of the executors of *A* who were really entitled to such rent, *B* could not claim any protection under this section.(3) But where the widow had got her name entered in the Revenue Registers as the owner, and *B* paid her the rent honestly, it was held that he was protected.(4)

(3) *B* held land from *A*. After *A's* death, there was a dispute between *C* and *D* as to who was entitled to succeed to *A* and *B* was aware of the existence of such dispute. He however, paid rent to *D*. *C* was the person who was really entitled to the rent. It was held that *B* was not protected from the claim of *C* under this section.(5)

(4) *B*, not being aware of the fact that *A* had already transferred his property to another, and that there was a dispute between them as to the validity of the transfer, obtained a lease of the land from *A*. Subsequently he became aware of the dispute as to title between *A* and his purchaser, but nevertheless paid the rent to *A*. It was held that inasmuch as *B* would be estopped under S. 116 of the Evidence Act from disputing the title of *A*, in a suit which *A* might have brought against him, his payment of rent to *A* could not be said not to be in good faith and that therefore he was protected under this section from the claim of the purchaser for rent or profits.(6)

(5) *A* lets his land to *B* and then transfers the land to *C*. *B* having notice of the transfer pays the rent to *A*, *B* is not protected.(7)

See also the undermentioned cases.(8)

1a. 1939 Pat 540 (547) [AIR V 26] (DB). (Mortgagee entitled in rents — Tenants without inquiring whether mortgage is satisfied, paying rent to purchaser cannot claim benefit of this section.)

2. 1939 Pat 540 (547) [AIR V 26] (DB).

3. ('03) 1903 Pun Re No. 72 p. 304 (307).

4. ('09) 33 Bom 96 (103, 104) (DB).

5. 1927 Nag 237 (238) [AIR V 14].

6 ('38) 42 Cal W N 378 (380) (DB).

7. ('12) 14 Ind Cas 801 (802) (Bur). (Decree for possession not executed but separate suits for mesne profits brought against person in possession and his tenant—*Held*, that as tenant had notice of plaintiff's claim, he was also liable for mesne profits.)
(1864) 1864 Suth W R Act X, Rul 6 (7) (DB).

8. 1967 Cal 390 (402) [AIR V 54 C 86]. (A leasing property to B and then transferring it to C — B knowing about transfer after some months—B not paying rent either to A or to C B is not protected by S. 50.)
('55) ILR (1955) 2 Cal 279 (282) : AIR 1955 NUC (Cal) 931.
1943 Oudh 105 (106) [AIR V 30]. (Lease of land taken by partners in business — Payment of rent by one partner to lessor even after knowledge of the other partner of the defective title of lessor — Payment is in bad faith as such knowledge must be common to both partners.)
1932 Mad 95 (96) [AIR V 19] : 55 Mad 316 (DB). (Receiver in insolvency leasing property—Lessee paying rent to receiver is protected.)
1929 Oudh 378 (380) [AIR V 16]. (The test of the bona fides of a tenant when he pays rent to a particular person is whether he has paid rent to him before or not. If he has paid rent to a particular person to whom he has been paying rent hitherto, his good faith will be considered to have been established.)
1927 Lah 880 (880) [AIR V 14]. (Lessor telling lessee to attorn to third person — Lessee not liable to pay rent to lessor.)
1925 Cal 251 (253) [AIR V 12]. (Payments made by tenant to mortgagor after mortgage are valid against mortgagee only if at time of payment there was no notice of the mortgage.)
1918 Oudh 166 (167) [AIR V 5]. (Payment to intervener is not good if landlord is proved to be in receipt and enjoyment of rent prior to

3. Payment in advance by tenant. — A payment by the lessee in *advance* to the lessor is a mere loan to the lessor and is not *payment of rent.*(1) This section will not apply to such cases. But such an advance will '*pro tanto*' operate as payment of rent *as and when the rent falls due.*(2) To the extent, therefore, of the rent that has fallen due before the lessee gets notice of the transfer, the advance will operate as a discharge of the lessee under this section.

The question, however, arises whether apart from the section, a payment made by the lessee in advance to the lessor is binding on a transferee from the lessor. The question may be considered from two standpoints :

(1) Whether the advance is made *before* the transfer by the lessor.

(2) Whether the advance is made *after* the transfer by the lessor.

Advance made before transfer.

It was held in '*Cook* v. *Guerra*'(3) decided in the year 1872 that even in the case of an advance made before the date of the transfer, the lessee could not escape liability in respect of rents that might fall due after the date of notice by the transferee of his rights. In '*Green* v. *Rheinberg*'(4) it was, however, held that if before the transfer the lessee had paid an advance under an arrangement that it should be in satisfaction of rent that might accrue for a particular period in future, the transferee will be charged with constructive notice of the terms under which the lessee held the land. Unless he was a transferee for value without notice of the arrangement, he would be bound by the arrangement, and the lessee cannot be asked to pay rent once again. In this country it has been held in the undermentioned cases(5) that a payment in advance *before* the date of the transfer is not binding on the transferee to the extent of the rent accruing due after notice to the lessee of the transferee's rights. The

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the period in suit for rent.)

1916 Mad 208 (208, 209) [AIR V 3] (DB). (Payment of entire rent to one co-sharer if bona fide is valid, if otherwise, other co-sharer can sue for his share.)

('11) 33 All 308 (311) (DB). (Where a tenant pays the entire rent to one of the two co-sharers after the receipt of notice by one of them not to do so, and the payment is made in collusion with the other, a suit by the other co-sharer for his share of the rent is maintainable.)

('88) 1888 All W N 45 (45). (Suit by cosharer for arrears of rent—Rent paid by tenant to lambardar but not in his capacity as such—Held, payment was bona fide.)

('78) 4 Cal 350 (354) (DB). (Plaintiff's suit against tenant for rent - Tenant accustomed to pay rent to the co-sharers of plaintiff — *Held*, plaintiff's suit for his share of rent did not lie against tenants.)

('74) 23 Suth W R 53 (54). (Where a tenant; knowing that a co-proprietor has been in possession of a share for a very long time and after distinct notice, paid rent which belonged to the said sharer to another person who had no title at all, payment is not bona fide.)

('71) 18 Suth W R 508 (510) (DB). (Lessee paying rent to lessor without notice of transfer protected.)

(1862-64) 1862-64 Suth W R F B 30 (31). (Do.)

Section 50 — Note 3

1. 1960 Raj 19 (20) [AIR V 47 C 7] : ILR (1959) 9 Raj 190

†1934 Pat 653 (657, 658) [AIR V 21] : 13 Pat 396 (DB).

1931 Rang 292 (293) [AIR V 18] : 9 Rang 470.

1928 Sind 95 (96) [AIR V 15].

1926 Cal 204 (209) [AIR V 13] (DB).

1922 Pat 339 (340) [AIR V 9] (DB).

('08) 30 All 82 (84) (DB).

('01) 14 C P L R 65 (66).

(1872) 41 L J C P 89 (90) : L R 7 C P 132, Cook v. Guerra.

(1870) 39 L J C P 297 (298, 299) : L R 5 C P 589, Denicholls v. Saunders. (Money would become rent on the day it became due.)

2. 1934 Pat 653 (658) [AIR V 21] (DB).

(1872) 41 L J C P 89 (90) : L R 7 C P 132, Cook v. Guerra.

(1915) 84 L J Ch 193 (203) : (1915) 1 Ch 274, Ashburton v. Nocton.

3. (1872) 41 L J C P 89 (90) : L R 7 C P 132.

4. (1911) 104 L T 149 (150, 151).

5 1960 Raj 19 (20) [AIR V 47 C 7] : ILR (1959) 9 Raj 190. (AIR 1934 Pat 653 and A I R 1931 Rang 292 Rel. on.)

1934 Pat 653 (658) [A I R V 21] : 13 Pat 396 (DB).

1931 Rang 292 (293, 294) [A I R V 18] : 9 Rang 470.

principle enunciated by '*Green* v. *Rheinberg*'(6) was not adverted to. On the other hand in the cases noted below(7) it has been held that a payment in advance before the date of the transfer is binding on the transferee unless he is able to show that he is a transferee for value without notice. In *Tiloke Chand* v. *Beattie & Co* ,'(8) an advance had been made by the lessee to the lessor before the date of the transfer by the lessor, under an arrangement that it should operate as a satisfaction of the rent that may accrue due for a particular future period. Rankin, J., observed as follows :

> "Now, it seems to me that the cases of '*Green* v. *Rheinberg*'(9) and '*Ashbucton* v. *Nocton*'(10) show that such an arrangement will in equity bind a person taking a transfer of the reversion, unless he can show that he purchased for value without notice. This no doubt is an advance upon the common law standpoint of '*Cook* v. *Guerra*'.(11) In this case there was a tenant upon the property and his open possession is notice not only of the immediate terms of his tenancy but of collateral agreements as well, in the absence of all enquiry by the transferees."

Advance made after transfer.

The principle of '*Green* v. *Rheinberg*'(11a) will not apply to advance made by a lessee to the lessor 'after' the date of the transfer. In '*Ashburton* v. *Nocton*'(12) Swinfen Eady, L. J., distinguished the case of '*Green* v. *Rheinberg*' (13) and observed as follows :

> " '*Green* v. *Rheinberg*'(14) was a clear case, as there the landlord had, prior to the mortgage, released the rent to the lessee and tenant in possession; and under the doctrine of '*Daniels* v. *Devison*'(15) the subsequent mortgagee was affected with notice of the interest which the tenant had in the land. If the arrangement between the mortgagor and tenant for pre-payment of rent, or for setting off future rent against money due to the tenant from the mortgagor, be made subsequent to the date of the mortgage, such arrangement will be treated as a collateral bargain between those parties, and not binding upon the mortgagee."

The view expressed in '*Ashburton* v. *Nocton*'(16) has been followed in the undermentioned case of the Calcutta High Court.(17) The cases cited below(18) also are all consistent with this view.

But though *as an advance* the payment may not be binding on the transferee, it may, as has been seen already, if the lessee had paid it '*bona fide*', operate as a payment of rent in respect of all rents that actually accrue due before notice of the transfer.

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6. (1911) 104 L T 149 (150, 151).

7. †1926 Cal 204 (206, 207) [AIR V 13] (DB).
('08) 30 All 82 (84) (DB).
('75) 24 Suth W R 68 (68) (DB).
('72) 18 Suth W R 328 (329) (DB).
[*See also* 1914 Low Bur 276 (277) [AIR V 1] : 7 Law Bur Rul 268. (Where payment of rent in advance is part of contract of lease, this section protects the lessee from having to pay over again to a person subsequently entitled to rent.)]

8. 1926 Cal 204 (210) [A I R V 13] (DB). (On appeal from AIR 1927 Cal 270.)

9. (1911) 104 LT 149 (151).

10. (1915) 84 LJ Ch 193 (203): (1915) 1 Ch 274.

11. (1872) 41 L J C P 89 (91) : L R 7 C P 132 (138).

11a. (1911) 104 L T 149 (150, 151).

12. (1915) 84 L J Ch 193 (203) : (1915) 1 Ch 274.

13. (1911) 104 L T 149.

14. (1911) 104 L T 149.

15. (1809) 16 Ves 249 : 10 R R 171.

16. (1915) 84 L J Ch 193 (203) : (1915) 1 Ch 274.

17. 1926 Cal 204 (207) [AIR V 13] (DB).

18. 1926 Bom 567 (570) [AIR V 13] .
1922 Pat 339 (340) [AIR V 9] (DB).

51. When the transferee of immoveable property makes any improvement on the property, believing in good faith that he is absolutely entitled thereto, and he is subsequently evicted therefrom by any person having a better title, the transferee has a right to require the person causing the eviction either to have the value of the improvement estimated and paid or secured to the transferee, or to sell his interest in the property to the transferee at the then market-value thereof, irrespective of the value of such improvement.

Improvements made by bona fide holders under defective titles.

The amount to be paid or secured in respect of such improvement shall be the estimated value thereof at the time of the eviction.

When, under the circumstances aforesaid, the transferee has planted or sown on the property crops which are growing when he is evicted therefrom, he is entitled to such crops and to free ingress and egress to gather and carry them.

Synopsis

1. Scope of the section.
2. Hindu law.
3. Muhammadan law.
4. Person claiming benefit under section must be a transferee.
5. Improvements by co-sharers.
6. Improvements by a purchaser at a courtsale.
7. "Improvements".
8. "Good faith".
9. 'Absolutely entitled' to the property.
10. Improvements by a trespasser.
11. Improvements by transferee from a limited owner.
12. Improvements by transferee of land subject to a right of pre-emption.
13. Improvements by mortgagee. See S. 63A and Notes thereon.
14. Improvements during the pendency of litigation relating to the property. See Note 3 on Section 52.
15. "Evicted therefrom by any person having a better title".
16. Transferor may be evictor.
17. Representatives-in-interest of the transferee, if can claim benefit of section.
18. Modes of compensating the evicted transferee.
19. Value of improvements—How estimated.
20. Profit due to improvement is not included in mesne profits.
21. Right to crops.
22. Doctrine of acquiescence.
23. This section and the doctrine of acquiescence are based on different principles.
24. No acquiescence after an act is done.
25. Owner if can be made to pay compensation in the absence of acquiescence.

1. **Scope of the section.** — It is a general rule of great antiquity, recognised by the Roman Civil Law and by the Common Law of England, that whatever is affixed to the soil becomes, in contemplation of law, a part of it and is subject to the same rights of property as the soil itself — *quicquid plantatur solo solo cedit.* In this country no such absolute rule of law was ever recognised.(1) Under the Hindu law as stated by 'Narada' (VI-20, 21):

"If a man has built a house on the ground of a stranger and lives in it, paying rent for it, he may take with him, when he leaves the house, the thatch, the timber, the bricks and the

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Section 51 — Note 1

1. † 1927 P C 135 (137) [AIR V 14]: 54 Ind App 218 : 54 Cal 669.
1967 Ker 22 (24) [AIR V 54 C 5] : I L R (1966) 2 Ker 211.
1965 Mad 185 (186) [AIR V 52 C 64] : ILR (1965) 1 Mad 624.
1961 Ker 147 (148) [AIR V 48 C 52] : ILR (1960) Ker 115.
1953 Trav-Co 349 (350) [A I R V 40 C 129] (DB).
1949 All 757 (759) [AIR V 36 C 282]: ILR (1950) All 606.
('66) 6 Suth W R 228 (228, 229) : Beng L R Sup Vol 595 (FB).
1936 Lah 511 (512) [AIR V 23] (DB).
('80) 5 Cal 688 (692).

other building material; but if he has been residing on the ground of a stranger, without paying rent and against that man's wish, he shall, by no means, take with him, on leaving it, the thatch and the timber".(2)

Under the Muhammadan law also, according to the 'Hedaya':

"A person usurping land and planting trees in it, or erecting building upon it, must be directed to remove the trees and clear the land and restore the same to the proprietor. If the removal is injurious to the land, the proprietor of the land has the option of paying to the proprietor of the trees or of the buildings, a compensation equal to the value and thus possessing himself of them."(3)

Even in England, there were certain exceptions recognised from very early times to the Common law rule referred to above, for example, in the cases of what are known as fixtures attached to the free-hold.

The first statutory exception to the general rule enacted in this country was S. 2 of the Mesne Profits and Improvements Act, 1855 (Act XI of 1855) which ran as follows :

"If any person shall erect any building or make an improvement upon any lands held by him '*bona fide*' in the belief that he had an estate in fee-simple, or other absolute estate, and such person, his heirs and assigns, or his or their under-tenants, be evicted from such lands by any person having a better title, the person who erected the building or made the improvement, his heirs or assigns, shall be entitled either to have the value of the building or improvement so erected or made during such holding and in such belief, estimated and paid or secured to him or them, or, at the option of the person causing the eviction, to purchase the interest of such person in the lands at the value thereof, irrespective of the value of such building or improvement :

Provided that the amount to be paid or secured in respect of such building or improvement shall be the estimated value of the same at the time of such eviction."

That Act, however, applied only to cases to which the 'English law was applicable'.(3a) In cases to which the English law was not applicable, the rule to be applied was stated by Sir Barnes Peacock in '*Thakoor Chunder Poramanick* v. *Ramdhone Bhuttacharjee*'(4) in the following words:

"We think it should be laid down as a general rule that, if he who makes the improvement is not a mere trespasser, but is in possession under any '*bona fide*' title or claim of title, he is entitled either to remove the materials, restoring the land to the state in which it was before the improvement was made, or to obtain compensation for the value of the building if it is allowed to remain for the benefit of the owner of the soil—the option of taking the building, or allowing the removal of the material, remaining with the owner of the land in those cases in which the building is not taken down by the builder during the continuance of any estate he may possess."(5)

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2. Sacred Books of the East, 1889 Edn., Vol. XXXIII, Pages 144. 145. Ganganath Jha, Hindu law in its Sources, 1930 Edn,. Vol. 1, Page 302, where the texts of Narada, VI-20, 21, are cited. Also see S. 108 (h), Note 2.

1949 All 757 (759) [AIR V 36 C 282] : ILR (1950) All 606.

3. Hedaya : Hamilton's Translations, Vol 3.

1949 All 757 (759, 760) [AIR V 36 C 282] : I L R (1950) All 606.

[*See also* ('02) 26 Bom 1 (15, 16) : 28 Ind App 121 (PC). (Case from Zanzibar where Muhammadan Law applied — The above passage was held to contain the rule applicable.)]

3a. See the Preamble to the Mesne Profits and Improvements Act (XI of 1855).

4. ('66) Beng L R Supp Vol. 595 (598) (FB).

5 *See also* 1929 P C 163 (165) [A I R V 16] : 53 Bom 589 : 56 Ind App 259.

1961 Ker 147 (149) [AIR V 48 C 52] : ILR (1960) Ker 115. (Husband building house on wife's land with consent of wife — Divorce — Wife unwilling to pay compensation — Husband is entitled to remove materials.)

('03) 27 Mad 211 (214, 217) (DB).

('82) 8 Cal 582 (592) (DB).

('72) 17 Suth W R 97 (97) (DB). (Lessee of land under an ijara erecting an indigo factory thereon, with the knowledge of, and without any objection by the lessor—Lease determined and possession of rest of land delivered — Factory held on rent—Held, lessee was entitled to remove the materials.)

('72) 8 Beng L R 237 (242) (DB).

This section merely gives a statutory recognition to the rule so laid down, in the case of *transferees* of immovable property effecting improvements,(6) and is worded similar to S. 2 of the Mesne Profits and Improvements Act, 1855. It is thus an exception to the rule enunciated by the maxim *quicquid plhntatur solo solo cedit*,(7) and is based upon the equitable principle, referred to by Mr. Justice Story in '*Bright*' v. '*Boyd*',(8) that no man should enrich himself at the expense of another and that consequently where the defendant has made the improvements in good faith as a '*bona fide*' occupant of land and in the belief that the land is his own, the plaintiff who obtains the benefit of the expenditure which has increased the value of the property ought to reimburse the defendant for the expenditure so made.

It has been held in some cases(9) that the section is based upon the maxim that *he who seeks equity*, must do equity. This, however, does not seem to be correct. A man seeking to enforce his legal right to property against a person with the defective title *does not seek any equity*, though the *defendant* is given relief on equitable grounds.

In order that this section may apply, it is essential that—

(1) the person claiming relief under this section is a *transferee* of immovable property,

(2) he has made improvements believing in good faith that he was absolutely entitled to the property, and

(3) he is evicted therefrom by a person with a better title.(10)

But even in cases where the section does not, in terms, apply, the principle underlying it, being an equitable one, will apply.(11) The principle will also apply to cases arising in States to which this Act has not been extended.(12) Reference may also be made to the provisions of S. 41 of the Specific Relief Act, 1877, which provides that on adjudging the cancellation of an instrument, the Court may require the party to whom such relief is granted to make any compensation to the other which justice may require. It has been held that where a transfer by a guardian of a Muhammadan minor is void 'ab initio' and the minor subsequently sues for cancellation of the transfer, the Court can, under S. 41 of the said Act award the transferee compensation for any improvements he might have made.(13) (See now S. 33 (1) of the Specific Relief Act, 1963.)

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6. 1931 All 277 (283) [AI R V 18] : 53 All 334 (FB).
1940 Cal 356 (358) [AIR V 27] : I L R (1940) 1 Cal 161 (DB). (Husband knowingly building on wife's land — Wife is the owner of the building—Section does not apply.)

7. 1928 Rang 141 (142) [AIR V 15] (DB).

8. (1841-43) 1 Story 478. (Cited in (1910) 6 Ind Cas 141 (145).
[*See also* 1956 S C 727 (729) [AIR V 43 C 114] : ILR (1956) Mys 184.
1953 Pepsu 45 (47) [AIR V 40 C 24].]

9. 1963 Andh Pra 177 (184) [A I R V 50 C 60] : ILR (1963) Andh Pra 991.
1952 Mys 117 (118) [A I R V 39] : I L R (1952) Mys 384.
1940 Sind 77 (80) [AIR V 27] : I L R (1940) Kar 241 (DB).
1937 Oudh 75 (77) [AIR V 24] : 12 Luck 133. (Reversed in AIR 1937 Oudh 446 (DB).)
1929 All 12 (14) [A I R V 16] : 51 All 454 (DB).
1917 Oudh 257 (259) [AIR V 4].

10. 1952 Mys 117 (118) [A I R V 39] : I L R (1952) Mys 384.
1951 Ajmer 18 (19) [AIR V 38 C 12].
1938 Bom 71 (74, 75) [AIR V 25] (DB).
1929 Bom 246 (248) [AIR V 16] (DB .
1927 Nag 370 (373) [AIR V 14].
1926 Bom 599 (600) [AIR V 13] (DB.)

11. ('57) ILR (1957) 7 Raj 473 (475). (1938 All 342 [AIR V 25], Rel. on.)
1953 Pepsu 45 (47) [AIR V 40 C 24].
1938 All 342 (345) [AIR V 25].

12. 1933 Lah 540 (541) [AIR V 20] (DB). (The Punjab.)
1916 Lah 379 (380) [AIR V 3]. (Do.)
('22) 70 Ind Cas 1 (3) (Pesh). (Peshawar.)

13. 1926 Lah 170 (171) [A I R V 13] : 7 Lah 35 (DB). (Mortgage.)

It has been held that the provisions of Kerala Compensation for Tenants Improvements Act (29 of 1958) do not supersede the provisions of this section.(14)

2. **Hindu law.**—Before this Act was amended by Act XX of 1929, the sections in Chapter II of the Act did not affect any rule of Hindu law. But as has been seen in Note 1 there was no rule of Hindu law which ran counter to the equitable principle laid down in this section and therefore this section was applicable to cases arising between Hindus. After the amendment of S. 2, by the deletion of the word 'Hindu' therefrom, this section directly governs such case.(1)

3. **Muhammadan law.**—Section 2 lays down that nothing containing in the second chapter of the Act shall be deemed to affect any rule of Muhammadan law. There is, however, no rule of Muhammadan law which would preclude a Muhammadan party from claiming the benefit of the equitable principle embodied in the present section and hence the section has heen directly applied to the cases of Muhammadan transferees.(1)

4. **Person claiming benefit under section must be a transferee.**—It is only a *transferee* of property that can claim the benefit of this section.(1) The word "transferee" is not defined in this Act, but its meaning must be ascertained by reference to the definition of the word "transfer" in S. 5.(2) A "transfer of property" is defined by that section as meaning an act by which a *living person conveye* property to one or more 'living persons'. It follows that a *legatee* under a will is not a *transferee* within the meaning of this section.(3) The word *transferee* will, of course, include a person in whose favour an instrument of transfer has been executed with all the formalities (such as registration) necessary for its validity, though the title conveyed by the instrument is defective.(4) Thus, a person in whose favour an instrument of transfer has been executed by a *de facto* guardian of a minor,(5) or by the father or manager of a joint Hindu family for no necessity,(6) is a *transferee* within the meaning of this section.

There is, however, a difference of opinion as to whether a person in whose favour an instrument is executed but which is invalid for want of registration is a

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('30) 128 Ind Cas 308 (309) (DB) (Lah). (Sale —Distinguishing 18 Ind Cas 485.)

14. ('63) 1963 Ker L T 219 (221).

Section 51 — Note 2

1. 1954 Cal 345 (346) [AIR V 41 C 115] : I L R (1956) 1 Cal 456.

Section 51 — Note 3

1. ('07) 30 Mad 197 (198) (DB).

Section 51 — Note 4

1. 1964 Mys 24 (25) [A I R V 51 C 7] : I L R (1963) Mys 301. (Assignment of separate plots by Government to plaintiff and defendant — Defendant erroneously occupying plot assigned to plaintiff and effecting improvements — Defendant is not 'transferee' of plot within S. 51 and hence, not entitled to compensation for improvements under that section.)

1952 Mys 117 (118) [A I R V 39] : I L R (1952) Mys 384.

1915 Mad 263 (265) [A I R V 2] (DB). (Improvements by the transferor — Transferee cannot claim compensation—Quaere — Whether transferee's heir entitled to compensation for improvements.)

2. 1940 Sind 77 (80) [A I R V 27] : I L R (1940) Kar 241 (DB).

3. 1940 Sind 77 (78) [AIR V 27] : I L R (1940) Kar 241 (DB). (Obiter.)

1932 Bom 190 (191) [AIR V 19].

4. 1940 Sind 77 (80) [A I R V 27] : I L R (1940) Kar 241 (DB).

1928 All 41 (44) [AIR V 15] (DB).

5 1927 Bom 611 (612) [A I R V 14] : 51 Bom 1040 (DB). (Vendee from a de facto guardian of a Hindu minor.)

('07) 30 Mad 197 (200) (DB). (Transferee from mother acting as de facto guardian of a Muhammadan minor.)

[*See also* 1938 Mad 677 (680) [A I R V 25] (DB). (Transfer by de jure guardian of a Muhammadan minor set aside as unwarranted — Alienee held entitled to compensation under S. 51.)]

6. 1929 All 854 (855) [AIR V 16] (DB). (Gift.)

1928 All 41 (43) [AIR V 15]:(DB). (Sale.)

transferee. According to the High Court of Madras(7) and the Judicial Commissioner's Court of Sind(8) he is a transferee. According to the High Courts of Allahabad(9) and Rangoon he is not.(9a)

A person in whose favour an instrument has been executed, but the transaction is merely a 'colourable' one and no title of any kind is intended to pass, cannot, it is conceived, be said to be a *transferee* and cannot claim any compensation for improvements that may be made by him.(10)

Where a person who was managing the estate of a Hindu widow made some improvements on the estate, and the widow subsequently transferred the property to *X*, it was held that *X* could not, when he was evicted by the reversioner, claim the amount spent by the manager on the estate.(11)

5. Improvements by co-sharers.—This section cannot apply to a co-sharer or a tenant-in-common as he is not a transferee within the meaning of the section. He cannot ordinarily effect improvements on the joint property without the concurrence of other co-sharers. Still a co-sharer '*bona fide*' improving the common property may, under certain circumstances, be granted compensation for the same at the time of partition on equitable grounds. As regards the considerations which govern such question, see the undermentioned cases.(1)

6. Improvement by a purchaser at a court sale. — By virtue of S. 2, cl. (d), this section has no application to transfers in execution of a decree or order of a Court. A court auction-purchaser cannot, on the sale in his favour being set aside, claim the benefit of *this section* and obtain compensation for the improvements effected by him.(1) He may, however, be allowed compensation for such improvements as are made in good faith, *on equitable grounds*.(1a) In *Mathunsa Rowthan* v. *Apsa Bin*'(2) it was held by the High Court of Madras that if a man enters upon land as a stranger-purchaser at an execution sale and effects improvements thereon, he is entitled to compensation therefor, upon the reversal of the judgment and sale, irrespective of any question of good faith on the part of the purchaser. And that even assuming good faith was essential, the good faith required should not, at any rate, go

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7. 1919 Mad 1083 (1090) [A I R V 6] : 40 Mad 1134 (FB).

8. 1940 Sind 77 (79) [A I R V 27] : ILR (1940) Kar. 241 (DB).

9. 1964 All 300 (302) [AIR V 51 C 85].

9a. 1940 Rang 172 (174) [AIR V 27]. (A transferee under an oral agreement is not a transferee within this section.)

10. (1854) 6 Moo Ind App 27 (51, 52) (PC).

11. 1941 Mad 345 (350) [AIR V 28](DB).

Section 51 — Note 5

1. 1962 Orissa 71 (73) [AIR V 49 C 28]. (Partition suit—Construction by co-sharer on joint property in excess of his share—Such co-sharer is not entitled to claim compensation for construction which has fallen to share of another co-sharer.)

1962 Pat 300 (301) [AIR V 49 C 79]. (Improvement on joint land—Partition — Expenses for improvements— Improver to be given allotment, as far as possible, that may enable him to keep the advantage of his improvements.)

1925 All 770 (771, 772) [A I R V 12] : 48 All 34 (DB). (Making repairs to property which was in ruins and thus making it fit for occupation —Compenation allowed.)

1925 Oudh 45 (45) [A I R V 12]. (Improvements by one of several cosharers without protest from other cosharers—Compensation allowed.)

1923 Mad 358 (359) [A I R V 10] : 46 Mad 104 (DB). (No compensation was granted as the improvements were made without the consent of other sharers and were made not on the property which was to be delivered.)

('10) 6 Ind Cas 346 (351, 352) (DB) (Cal).

Section 51 — Note 6

1. 1953 All 448 (451, 452) [A I R V 40 C 208].
1931 All 277 (283) [AIR V 18] : 53 All 384 (FB).
†('13) 36 Mad 194 (197) (DB).
Also see S. 2 Note 6.

1a. 1954 Cal 345 (346) [AIR V 41 C 115]: I L R (1956) 1 Cal 466. (Principle underlying S. 51 will govern the case of mortgagee auction purchaser.).

2. ('13) 36 Mad 194 (202) (DB).

beyond an honest belief in the purchaser in the validity of his title. See also the undermentioned cases(3) to the same effect. A contrary view, however, has been taken in the undermentioned Allahabad case(4) which holds that considerations of equity do not arise in the case of auction sale.

7. **"Improvement."** — An "improvement" is anything done to the property which results in *increasing its value.*(1) It connotes an idea of permanence namely some permanent benefit which would accrue to the reversioner or remainderman.(1a) Thus, the repair of a house which is in a dilapidated condition is an improvement.(2) Similarly, the removing of stones from a waste land or levelling it so as to make it fit for cultivation is an improvement.(3) For other illustrations of such improvements, S. 3, cl. (3) and S. 4 of the Malabar Compensation for Tenants' Improvements Act, 1900, may be usefully referred to.(4)

See also the Acts mentioned below.(5)

Moneys spent over necessary repairs and upkeep of the property(6) or over the annual husbandmanlike operations such as manuring or levelling the land for the purpose of cultivation(7) cannot be recovered as "improvements."

So also the making of constructions over sir land cannot be said to be an improvement of the land as the constructions would be of no use to the proprietor of the land who would presumably use it for the purpose of cultivation.(8)

Construction of a new house on 'khandar' land cannot be deemed to be an improvement to the 'khandar', as it is not necessary for the preservation of the 'khandar'.(9)

8. **"Good faith."**— As has been seen in Note 1, it is one of the essential conditions for the applicability of the section that the person claiming compensation for

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3. 1926 Nag 160 (161) [AIR V 13].
('75) 23 Suth W R 393 (394) (DB).

4. 1953 All 449 (451, 452) [AIR V 40 C 208].

Section 51 — Note 7

1. Webster, Dictionary.
[*See also* ('13) 36 Mad 194 (201) (DB).]

1a. 1954 Cal 345 (347) [AIR V 41 C 115]: I L R (1956) 1 Cal 456. (Repaires effected some years back - No improvement.)

2. 1929 Lah 825 (825) [AIR V 16] (DB).

3. 1925 Mad 1226 (1228) [AIR V 12]. (Mere fact that some more money has to be spent for bringing it into actual cultivation will not make it any the less an improvement.)

4. The Malabar Compensation for Tenants' Improvements Act (1 of 1900), S. 3, clause (3) and S. 4 run as follows:

"3. (3) "Improvement" means any work or product of a work which adds to the value of the holding is suitable to it and consistent with the purpose for which the holding was let, mortgaged or occupied."

4. "Until the contrary is shown the following works or the products of such works shall be presumed to be improvements for the purposes of this Act:—

(a) the erection of dwelling-houses, buildings appurtenant thereto, and farm buildings,

(b) the construction of tanks, wells, channels, dams and other works for the storage or supply of water for agricultural or domestic purposes:

(c) the preparation of land for irrigation;

(d) the conversion of one-crop into two-crop land;

(e) the drainage, reclamation from rivers or other waters, or protection from floods, or from erosion or other damage by water, of land used for agricultural purposes or of waste land which is culturable;

(f) the reclamation, clearance, enclosure or permanent improvement of land for agricultural purposes;

(g) the renewal or re-construction of any of the foregoing works or alterations therein or additions thereto;

(h) the planting or protection and maintenance of fruit -trees, timber trees and other useful trees and plants."

5. U. P. Tenancy Act (XVII of 1939), S. 3 (8); Bengal Tenancy Act (VIII of 1885), S. 76; Agra Tenancy Act (III of 1926), S. 3 (11); C. P. Tenancy Act (I of 1920), S. 2 (5); Punjab Tenancy Act (XVI of 1887), S. 4 (19).

6. 1929 Bom 230 (230) [A I R V 16] (DB). (Putting up a stair case in an old house.)
1915 Mad 263 (265) [AIR V 2] (DB).

7. 1914 Mad 138 (138) [AIR V 1] (DB).

8. 1953 All 406 (409) [A I R V 40 C 40 C 188]: ILR (954) 2 All 675 (DB).

9. 1956 Bhopal 13 (14) [AIR V 43 C 10].

improvements must have believed in "good faith" that he was absolutely entitled to the property.(1) The expression "good faith" has not been defined in this Act but has been defined in S. 3, cl. (22) of the General Clauses Act, 1897, thus: "A thing shall be deemed to be done in good faith where it is in fact done honestly, whether it is done negligently or not." But this definition applies only to all acts made after the commencement of that Act and, consequently is not applicable, in terms, to this Act.(2) The question has, therefore, arisen as to what meaning the expression has in this section. There is a conflict of opinion on this question. On the one hand, it has been held that the expression has, in this section, the same meaning as it has under the General Clauses Act, 1897, namely, that good faith does not go beyond an honest belief(2a) and it is not incompatible with a mistake of law(3) or with a certain degree of negligence.(4) such as for instance, negligence in investigating the title.(5) On the other hand, the view has been taken that good faith implies due care and attention and if a person has taken property without investigating into the question of title he cannot be said to have believed in good faith that he was absolutely entitled to the property.(6) A third view was expressed by Mukerji, J., in '*Lachmi Prasad* v. *Lachmi Narain*'(7) that "good faith" has a meaning in this section somewhat between the meaning it has under the General Clauses Act and the meaning it has under the Penal Code, and that a person who has been "quite negligent" in investigating the title cannot be said to have believed in good faith that he is absolutely entitled to the property. It is submitted that the first of the views stated above is correct. Sections 38 and 41 use the words "after using reasonable care . . . . . has acted in good faith" which show that good faith by itself does not imply the exercise of "due care."(7a)

The question whether a person believed in good faith that he was absolutely entitled to the property is one of fact to be decided on the facts and circumstances of

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Section 51 — Note 8

1. 1964 Mys 24 (25) [AIR V 51 C 7]: ILR (1963) Mys 301.
1963 Andh Pra 177 (184, 185) [AIR V 50 C 60]: ILR (1963) Andh Pra 991.
1961 Mys 62 (63) [AIR V 48 C 14]. (Person alleging to be bona fide purchaser without notice of prior sale—Improvements by — Rights of parties—Onus is on him to prove that he is bona fide purchaser without notice.)
1952 Nag 40 (42) [AIR V 39]: ILR (1949) Nag 465 (DB).
1945 All 227 (229) [AIR V 32]: ILR (1945) All 148. (The benefit of S. 51 cannot be extended to a transferee when there is a distinct finding that his conduct was not bona fide.)
('36) 40 Cal W N 52 (57).
1932 All 210 (215) [AIR V 19] (DB).
1929 All 12 (14) [AIR V 16]: 51 All 454 (DB). (Under S. 51 the onus is on the subsequent transferee who has put up improvements to prove his good faith.)

2. See Section 3, General Clauses Act, 1897. The Act came into force on 11th March 1897. The prior Act of 1868 did not contain this definition.)
1952 Orissa 239 (243) [AIR V 39].

2a. 1952 Orissa 239 (243) [AIR V 39].
('13) 36 Mad 194 (202).

3. 1952 Orissa 239 (243) [AIR V 39].
1926 Mad 609 (613) [AIR V 13] (DB).
1920 Sind 31 (32, 33) [AIR V 7]: 14 Sind L R 12 (DB).

4. 1952 Mys 117 (118) [AIR V 39]: ILR (1952) Mys 384.
1952 Orissa 239 (243) [AIR V 39].
1926 Mad 921 (924) [AIR V 13] (DB).
1926 Mad 609 (613) [AIR V 13] (DB). (Improvements after thirty years of undisturbed possession raises the presumption of bona fide belief of good title in favour of the person in possession.)
1920 Sind 31(32) [AIR V 7]:14 Sind LR 12 (DB).
1918 Oudh 1 (3) [AIR V 5].
1914 Mad 380 (380) [AIR V 1] (DB).
1914 Mad 107 (107) [AIR V 1] (DB). (Purchaser from guardian of Hindu minor not making sufficient inquiry—Purchaser making improvements on property can be said to have believed in good faith that he was the full owner.)
('06) 2 Nag L R 34 (41).

5. 1935 Cal 625 (630) [AIR V 22] (DB).
('09) 32 Mad 530 (531) (DB).

6. 1954 Cal 345 (347) [AIR V 41 C 115]: I L R (1956) 1 Cal 456.
1940 Sind 77 (80) [AIR V 27]: ILR (1940) Kar 241 (DB).
1940 Oudh 266 (269) [A I R V 27] (DB). (Failure on the part of the vendee to enquire about the right of pre-emption of cosharers.)
1914 Cal 137 (141) [AIR V 1]: 41 Cal 852 (DB).
('09) 3 Ind Cas 415 (417) (Cal).
('92) 1892 Bom P J 135 (DB).

7. † 1928 All 41 (44, 44) [AIR V 15] (DB).

7a. 1952 Orissa 239 (243) [AIR V 39].

each case.(8) The mere fact that a person has spent money on improvements does not by itself give rise to an inference of good faith.(8a) Where a person 'knows' that he has no title to the property, it cannot possibly be said that he believed honestly that he was absolutely entitled to the property;(9) so also, where a person takes with 'notice' of the defective title of the transferor.(10) Where a person purchased property with notice of a prior contract to sell and 'omitted to make any enquiry as to it, it was held in the undermentioned case(11) that he could not be considered to have had an honest belief that he was absolutely entitled to the property. Where a transferee purchases property from a limited owner without making any enquiry, the negligence may be of such a gross type as to lead to an inference of want of good faith. But where some enquiry has been made and the transferee has been misled by a wrong view of law, it cannot be held that he was grossly negligent.(11a)

The omission to make an enquiry, which a prudent person would have made may, however, be a piece of 'evidence' showing bad faith.(12)

As to instances of cases where a transferee was held to have believed in good faith that he was absolutely entitled to the property, see the undermentioned cases.(13)

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8 1963 Andh-Pra 177 (185) [AIR V 50 C 60] : ILR (1963) Andh Pra 991.
955 Hyd 101 (104) [AIR V 42 C 25]: ILR (1954) Hyd 822.
940 Oudh 266 (269) [AIR V 27] (DB). (Vendee failing to assure himself that co-sharers would not pre-empt, cannot be said to have acted in goid faith.)
1940 Sind 77 (79) [AIR V 27] : ILR (1940) Kar 241 (DB).
('38) 1938 Oudh W N 281 (283). (Vendee taking a sale-deed of property from majority of co-sharers—Sale pre-empted by a cosharer who was at the time of sale living abroad — Vendee was held to believe in good faith that he was absolutely entitled.)
1928 Mad 349 (354) [AIR V 15] (DB).
1928 All 41 (44) [AIR V 15] (DB).
1926 Mad 609 (613) [AIR V 13] (DB). (Undisturbed possession for many years may give rise to an inference of good faith.)
1920 Sind 31 (32) [AIR V 7] : 14 Sind L R 12 (DB).
1918 Oudh 1 (2) [AIR V 5]. (Vendee purchasing property knowing that vendor had only limited interest—Vendee cannot be said to have believed in good faith that he was absolutely entitled to it.)
('07) 30 Mad 197 (199) (DB).

8a. 1928 All 381 (385) [AIR V 15] (DB). (Improvements by mortgagee by conditional sale.)
[*See also* 1928 Mad 349 (355) [AIR V 15] (DB). (Claim as to improvements was rejected as the circumstances under which they were effected, were not pleaded or proved.)]

9. 1965 S C 1812 (1816) [AIR V 52 C 309] : (1965) 3 S C R 283.
1953 All 406 (409) [AIR V 40 C 188] : ILR (1954) 2 All 675 (DB). (Licensee making construction on sir land.)
† 1926 Mad 921 (924) [AIR V 13] (DB). (Trespasser.)
1924 Nag 142 (145) [AIR V 11].
1917 Oudh 257 (259) [AIR V 4].

10. 1961 Bom 169 (183) [AIR V 48 C 44]. (Alienation of house by Hindu widow—Expenditure incurred on reconstruction of house by alience after notice by next neversioner claiming to be entitled to the house as reversioner — This would disprove the ingredient of good faith necessary under S. 51.)
('71) 16 Suth W R 169 (171) (DB). (Purchaser knowing that he is purchasing right and title of some one else than his vendor.).
('10) 6 Ind Cas 141 (146) (DB) (Cal).
('72) 1872 Pun Re No. 7, p. 11 (12).

11. 1914 Cal 137 (139) [AIR V 1] : 41 Cal 852 (DB).

11a. 1952 Orissa 239 (244) [AIR V 39]. (Transferee acting with ordinary prudence in accordance with his conception of law — Action held to be in good faith.)

12. (1874) L R 7 H L 135 (157), Agra Bank v. Barry.

13. 1955 All 339 (349) [AIR V 42 C 97] (DB).
1955 Hyd 101 (104) [AIR V 42 C 25]: ILR (1954) Hyd 822.
1953 Pepsu 45 (47) [AIR V 40 C 24].
('38) 1938 Oudh W N 281 (283). (Vendee taking a sale-deed from majority of co-sharers—Sale pre-empted by a cosharer who was at the time of sale living abroad — Vendee was held to believe in good faith that he was absolutely entitled.)
1933 Lah 540 (541) [AIR V 20] (DB). (Exchange of lands by two persons—One of them believing in good faith to be owner and effecting improvements—Subsequent sale in favour of such person—Collateral of vendor suing to pre-empt the land sold—Vendee was held entitled to cost of improvements also.)
1929 All 12 (14) [AIR V 16] : 51 All 454 (DB). (Bona fide purchaser without notice of a prior simple mortgage — Improvements in honest though erroneous belief that he is absolute owner—Suit by mortgagee to enforce the debt —*Held*, purchaser was entitled to benefit of this section or the principle underlying it.)
1929 Bom 246 (249) [AIR V 16] (DB). (Purchaser from Hindu widow — Purchaser's son making improvements — *Held*, on facts, that the im-

As to instances where it was held that there was no good faith, see the cases cited below.(14)

See also Section 50, Note 2.

9. **"Absolutely entitled" to the property.** — The expression "absolutely entitled" means "full proprietorship" with heritable and absolutely transferable rights, as opposed, for example, to a life estate or a rent-free grant liable to resumption.(1) So long as a transfer is subject to payment of rent or to any other condition, the transferee cannot be said to believe that he is "absolutely entitled" to the property.(2) This section cannot, therefore, apply to cases of improvements by lessees, even if they are permanent tenure-holders,(3) or by mortgagees

provements were made with bona fide belief of absolute title and hence he was entitled to compensation.)

1927 Bom 611 (612) [AIR V 14] : 51 Bom 1040 (DB). (Transferee from de facto guardian of Hindu minor improving in good faith and with belief of absolute title is entitled to compensation.)

1926 Mad 314 (316) [AIR V 13]. (Transferee bona fide taking possession of more land than that purchased by him and effecting improvements —*Held*, entitled to compensation.)

1925 Mad 963 (964) [AIR V 12]. (Grant of land on darkhast—Improvements by grantee—Subsequent cancellation of grant—Damages can be recovered.)

1917 Lah 13 (14) [AIR V 4] (DB). (Bona fide belief that litigation has ended and he is entitled to property—Improvements—Party is entitled to compensation.)

(1864) 2 Bom H C R 214 (218) (DB). (Mortgage with a condition that on failure to pay the money on the fixed date mortgagee was to become absolute owner — Money not paid — Mortgagee with bona fide belief of absolute ownership effected improvement — Suit for redemption — Mortgagee held entitled to compensation.)

14. 1930 P C 297 (300) [AIR V 17] : 53 Mad 692 : 57 Ind App 305. (Part of claim of compensation disallowed as no belief in absolute title at the time of making improvements.)

('62) 75 Mad L W 62 (63). (Improvements by non-agriculturist tenant after notice to quit — No right to compensation.)

1953 All 406 (409) [AIR V 40 C 188] : ILR (1954) 2 All 675 (DB). (Licensees making constructions over sir land — *Held* it was impossible to say that they believed in good faith that they were absolutely entitled to the property.)

1947 Bom 241 (247) [AIR V 34 C 69]: ILR (1947) Bom 94 (DB). (Grant of land by Municipality for residential purposes on condition that it was to be vacated whenever needed by municipality without notice — Erection of house by grantee—*Held* that it was not possible to hold that the grantee had in good faith believed that he was absolutely entitled to the land and therefore S. 51 had no application.)

1940 Oudh 266 (269) [AIR V 27]. (Vendee failing to assure himself that co-sharers would not pre-empt—No good faith.)

1937 Oudh 446 (447, 448) [AIR V 24] : 13 Luck 450 (DB). (Permanent lease by undue influence from mother, guardian of a minor — Lessee cannot claim benefit of S. 51.)

1931 All 201 (202) [AIR V 18] : 52 All 831 (DB). (Mortgagee.)

1931 Nag 69 (71) [AIR V 18].

1928 Bom 150 (152) [AIR V 15] : 52 Bom 307 (DB). (Improvements with notice of imperfect title.)

1915 Mad 894 (895) [AIR V 2] (DB). (Improvement before the grant of land.)

('11) 33 All 752 (757) (DB). (Improvements with notice that the property was wakf property.)

('03) 5 Bom L R 643 (646) (DB). (From terms of the conveyance the transferee could not have believed that he was absolutely entitled to property — Hence claim for improvement disallowed.)

Section 51 — Note 9

1. 1931 All 277 (287) [AIR V 18] : 53 All 334 (FB).

1960 Pat 289 (292) [AIR V 47 C 99].

2. 1947 Bom 241 (247) [AIR V 34 C 69] : I L R (1947) Bom 94 (DB). (Grant of land by municipality for residential purposes on condition that it was to be vacated whenever needed by Municipality without notice — Grantee held could not have believed in good faith that he was absolutely entitled to land.)

†1937 Oudh 446 (447) [A I R V 24] : 13 Luck 450 (DB).

3. 1960 Pat 344 (352) [AIR V 47 C 122] : 39 Pat 140 (FB). (Lessee under invalid lease paying rent — Creation of relationship of landlord and tenant — Improvements made by lessee—Right to—Lessee can remove structure.)

1964 Pat 363 (367) [AIR V 51 C 100] : 44 Pat 651.

1960 Pat 289 (292) [AIR V 47 C 99].

1952 Nag 398 (401) [A I R V 39] : ILR (1951) Nag 865 (DB).

1947 Cal 353 (364) [A I R V 34 C 105] (DB). (Obiter).

1942 Oudh 231 (237) [A I R V 29] (DB). (Lessee entering into possession and constructing tin-

in possession.(4) As was remarfied by Mr. Justice Wadsworth in the undermentioned case,(5)

> "to hold that a person is entitled to compensation on the ground that he believed that he is absolutely entitled to the property, when in fact he knows that he is only a lessee, comes very near to holding that the section means something otherwise than what it states."

There are, howrver, some cases which hold that a person believing himself to be a 'permanent' tenure-holder is entitled to compensation for improvements effected by him on eviction by the landlord.(6) This is based on the view that such a person may be said to have believed that he was absolutely entitled to the property subject only to the payment of rent. But where the claim of the person in possession of an immovable property is neither in the nature of a permanent lease nor based on an absolute title, he would not be entitled to the benefit of the provisions of this section.(7) There are also some cases holding that the section will apply to a person who though in fact a mortgagee, believed in good faith in the circumstances of a given case to be absolutely entitled to the property.(7a)

According to the law in the State of Travancore-Cochin a tenant who effects improvements in the property, though there is no provision in that behalf contained in the lease deed but the making of such improvements is not prohibited, is entitled to claim value therefor and retain possession of the property until such value is paid to him.(8)

10. Improvements by a trespasser. — A trespasser cannot be held to have 'believed in good faith' that he was absolutely entitled to the property. Nor is a trespasser a "transferee". This section, therefore, will not enable him to claim any compensation for the improvements that might have been effected by him.(1)

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shed and chabutra—Section 51, T. P. Act, held not expressly applicable.)
1940 Rang 172 (174) [AIR V 27].
1939 Mad 247 (249) [AIR V 26].
1937 Oudh 446 (447) [AIR V 24] : 13 Luck 450. (DB). (Reversing AIR 1937 Oudh 75.)
[See however 1935 Cal 625 (630) [AIR V 22] (DB). (Principle of section applied—Decision on facts.)
1927 Mad 1023 (1024) [A I R V 14]. (Lease of minor's property granted by his mother for particular purpose—Lessee spending money for that purpose—Minor suing through next friend for avoiding the lease — Lessee must be reimbursed.)
1925 All 261 (262) [A I R V 12] : 47 All 430. (Reversing on Letters Patent appeal the decision in AIR 1925 All 190.)
1919 Mad 130 (131) [AIR V 6].
1919 Nag 144 (147) [AIR V 6].
1918 Nag 210 (213) [AIR V 5].
1918 Mad 932 (942) [AIR V 5] (DB).
1916 Mad 502 (502) [AIR V 3] (DB).
† ('10) 37 Mad 1 (12).
(1900) 27 Cal 570 (576) (DB).
('02) 29 Cal 871 (884) (DB). (Compensation granted on principle of equitable estoppel by acquiescence.)
('98) 22 Bom 1 (16).]

4. 1937 Nag 54 (56) [AIR V 24] : ILR (1938) Nag 160.
1928 All 381 (383) [AIR V 15] (DB).

5. 1939 Mad 247 (949) [AIR V 26].

6 1960 Punj 172 (175) [AIR V 47 C 60].
1930 Mad 298 (301) [A I R V 17] (DB). (Doubted in AIR 1939 Mad 247.)
('05) 8 Oudh Cas 13 (19, 20). (Though the section is directly applied.)

7. 1957 Pat 331 (333) [A I R V 44 C 105] (DB). (His rights are governed by S. 108 (h) and not by S. 51.)
1947 Mad 282 (285) [A I R V 34 C 140] : I L R (1947) Mad 671 (DB).

7a. ('63) 1963 Ker L T 219 (221).
1918 Mad 572 (574) [AIR V 5] (DB). (Form of document and conduct of mortgagor and mortgagee showing that mortgagee believed honestly to be absolute owner—Compensation allowed.)
✠ 1920 Upp Bur 56 (61) [A I R V 7] : 3 Upp Bur Rul 141. (Although there is no recognition of the right to crops recognized in Ss. 51 and 108 (i), in the T. P. Act so far as the redemption of mortgages is concerned, principles underlying those sections applied on equitable grounds to usufructuary mortgage which is of uncertain duration.)

8. 1954 Trav-Co 471 (472) [A I R V 41 C 168] : ILR (1954) Trav-Co 841 (FB).

Section 51 — Note 10

1. 1965 S C 1812 (1816) [A I R V 52 C 309] : (1965) 3 S C R 283.
1965 S C 1049 (1052) [A I R V 52 C 168] : I L R

A transferee from a trespasser(2) or from a person who has not title to the property(3) is in no better position than a trespasser and cannot claim any compensation for improvements effected by him.

A trespasser is liable to be evicted from the land even if he has erected substantial buildings upon it. The reason is that no one can, by merely trespassing on the land of another and constructing costly buildings upon it, claim a right to retain possession of the land. A trespasser, or even the Court, cannot compel the real owner to accept compensation for his land instead of the land itself.(4) The real owner is entitled to stand upon his strict rights and to claim possession of the land.(5) It, is, however, usual in India to allow the trespasser to remove his material from the land,(6) and to reserve in the decree leave to the trespasser to remove his material

(1965) 1 All 827 : (1965) 1 S C R 230. (M with notice of the claim of the true owner S effecting constructions on suit property—Acts of M as those of a trespasser—Suit by S for partition of her share — Plea of M having bona fide put common property to use and effected improvements on it—M could claim no special equity.)
1966 Ker 72 (75) [AIR V 53 C 19] : ILR (1965) 2 Ker 173. (Planting of trees on State land without permission or title — Being a trespasser, plaintiff not entitled to any compensation on eviction.)
1959 Cal 69 (71) [AIR V 46 C 16].
1955 Ajmer 23 (24) [AIR V 42 C 24].
1952 Mys 117 (118) [AIR V 39] : ILR (1952) Mys 384.
1952 Trav-Co 195 (199) [AIR V 39] (DB).
1951 Ajmer 18 (19) [AIR V 38 C 12].
1949 All 757 (760) [AIR V 36 C 282] : ILR (1950) All 606.
1944 Pat 77 (86) [AIR V 31] : 22 Pat 513 (DB).
1940 Sind 77 (78) [A I R V 27] : ILR (1940) Kar 241 (DB). (Obiter.)
1937 Cal 129 (140) [A I R V 24] : ILR (1937) 1 Cal 203 (DB).
('37) 1937 Mad W N 533 (535) (DB). (Even if he enters into possession with a bona fide belief of title.)
('37) 18 Lah 350 (367) (DB). (Case from Punjab.)
1924 Lah 370 (373) [A I-R V 11] (DB). (Addition to a building by a trespasser with a knowledge that he has no title—Neither compensation nor removal of material allowed.)
('76) 25 Suth W R 205 (206) (DB). (A person holding land on a false title.)
('78) 3 Cal L R 194 196, 197). (Case before Transfer of Property Act—Principle underlying S. 2, Act XI of 1855, applied.)
[*See also* ('06) 33 Cal 1119 (1130, 1131) (DB). (Son under Dayabhaga law improving ancestral property in the lifetime of his father—Held he is a trespasser and not entitled to compensation.)]

2. ('03) 13 Mad L Jour 214 (216) (DB). (Transferee of growing crops from a trespasser who had cultivated it — Land with crops sold in execution—Transferee has no right to the crop.)
('01) 28 Cal 142 (144) (DB). (Lessee from a person having no title.)

3. 1947 Mad 282 (285) [AIR V 34 C 140] : I L R (1947) Mad 671 (DB). (Suit for ejectment on basis of tenancy — Plaintiff failing to prove tenancy but establishing his title — Defendants found to be in possession under lease granted by a person who had no title to property and who denied plaintiff's title to property — Defendants held not entitled to compensation for improvements.)
1924 Nag 210 (211) [AIR V 11].
(1900) 1900 Pun Re No. 37 p. 135 (139). (Lessee from manager of minor's estate who had no authority to grant lease is not entitled to compensation, but can remove the structure.)
[*See also* 1920 Lah 373 (374) [AIR V 7] : 1 Lah 210. (Donees having precarious tenure of land —Collatarals of the donees are not entitled to claim compensation for the trees planted on the land by the donees and the ordinary principle 'quicquid plantatur solo solo cedit' must prevail.)
('09) 12 Oudh Cas 236 (247) (DB). (Invalid transfer —Persons in possession of trust property under void deed.)]

4. 1950 All 535 (535) [AIR V 37 C 219].
1927 Lah 534 (535) [AIR V 14].
†1914 All 89 (90) [AIR V 1].
('92) 17 Bom 771 (772) (DB).
('28) 108 Ind Cas 618 (618) (Lah).
[*See also* 1957 Pat 308 (312) [(S) AIR V 44 C 97]: 36 Pat 362 (DB). (B building upon A's land — Both parties under mistake as to their rights—Measurement by A revealing encroachment by B — Suit by A for possession — No acquiescence or estoppel on part of A — A is entitled to possession of land by demolition of B's building on it — No compensation can be awarded to A in place of ejectment.)]

5. 1957 Pat 308 (312) [(S) AIR V 44 C 97] : 36 Pat 362 (DB).
('28) 108 Ind Cas 618 (618) (Lah).

6. 1957 Pat 308 (312) [(S) AIR V 44 C 97]: 36 Pat 362 (DB).
1944 Pat 77 (86) [AIR V 31] : 22 Pat 513 (DB). (In this case the building was erected under a bona fide belief of title and with acquiescence on the part of true owner — Trespasser held entitled to remove the materials.)
1927 Nag 400 (401) [AIR V 14].
1927 Nag 348 (349) [AIR V 14].
('29) 114 Ind Cas 696 (696) (DB) (Lah).

within a time to be fixed by the Court, failing which the real owner is to take possession of the land with or without the buildings which he may pull down at his will.(7)

In '*Fakir Chand* v. *Kewal Ram*,'(8) A purchased a house from a person who had no title to it, pulled it down, and built a new house in its place, but utilised some of the old material for the new construction. The real owner sued him for possession. It was held by their Lordships of the Allahabad High Court that since the old materials could not be separated from the new materials without destroying the house itself, the trespasser was not entitled to remove the new materials.

Under S. 9, Travancore Land Conservancy Act (4 of 1091), the Government have the power to eject a trespasser from the Government land and the trespasser so ejected has undoubtedly a right to remove the improvements he had effected unless the right to remove the improvements had been lost by an unequivocal order of forfeiture passed by the State under the section. Where no such order is passed the rights of parties have to be determined without reference to the provisions of the Act.(9)

11. Improvements by transferee from a limited owner. — A limited owner under the Hindu law such as a Hindu widow can, under certain circumstances, transfer the property absolutely to a third person. The question, therefore, whether a particular transfer has conveyed absolute title or not, would depend upon the existence or otherwise of such circumstances. If the transferee honestly believed that such circumstances did exist, he would be a transferee "believing in good faith that he is absolutely entitled to the property." If he did not believe that such circumstances existed he cannot be said to have believed in good faith that he was so entitled to the property. The mere fact, therefore, that a transfer is taken from a limited owner is not, by itself, sufficient to conclude that he could not have believed that he was absolutely entitled to the property and will not render the section inapplicable.(1)

It has, however, been held in the undermentioned cases(2) that this section will not apply at all to the transferees from a limited owner, the reason being that a Hindu widow had only a "life estate" and could not convey a better title to the transferee and that, therefore, a transferee could not believe under any circumstances that he was absolutely entitled to the property. It is submitted that this view is not correct.

The question whether the transferee, in any particular case, did believe that such circumstances existed is a question of fact depending upon the circumstances of

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1926 Lah 694 (695) [AIR V 13] (DB).
[*See also* ('78) 1878 Pun Re No. 53 Page 193 (200). (Relief to which person is entitled depends upon circumstances of each case.)]
1953 Trav-Co 349 (350) [AIR V 40 C 129]. (A I R 1929 P C 163, Rel. on.)]

7. 1914 All 89 (90, 91) [AIR V 1].

8. ('12) 16 Ind Cas 633 (634) (All).

9. 1953 Trav-Co 349 (350) [A I R V 40 C 129] (DB).

Section 51 — Note 11

1. †1919 Mad 685 (686) [AIR V 6] (DB). (Sale by Hindu widow.)
[*See also* 1953 Pepsu 45 (47) [AIR V 40 C 24]. 1917 Bom 155 (158) [A I R V 4] : 42 Bom 136 (DB). (Gift of almost the whole af husband's immovable property by a Hindu widcw for spiritual benefit of her deceased husband — Improvement by the transferee —Gift held invalid — Transferee held entitled to compensation.)]

2. 1926 Nag 384 (384) [AIR V 13].
1925 All 261 (262) [AIR V 12] : 47 All 430 (DB).
1925 Mad 670 (671) [AIR V 12].
1922 All 194 (195) [AIR V 9] : 44 All 665 (DB). (Mortgagee from a Hindu widow.)
1918 Oudh 1 (3) [AIR V 5].
1916 Mad 413 (415) [AIR V 3] (DB).
1914 All 227 (229) [AIR V 1] : 36 All 387 (DB).
[*See also* 1954 Cal 345 (347) [AIR V 41 C 115] : ILR (1956) 1 Cal 456. (Mortgagee auction purchaser from limited estate holder —No enquiry into her title —.Mortgagee cannot believe in good faith to be absolutely entitled.)
1917 All 179 (180) [AIR V 4] : 39 All 463 (DB). (Transferee from a co-widow.)]

that case. Where he 'knew' that he was taking from a limited owner and also 'knew' that the circumstances did not exist or wilfully abstained from ascertaining whether they existed or not, it cannot be said that he believed in good faith that he was absolutely entitled to the property.(3)

It has been held in the undermentioned case(4) that where a Hindu widow transfers property to *X* who makes some improvements during the life of the widow and some improvements after her death, the reversioner who succeeds in evicting *X* is liable to pay only the value of the improvements made, 'after' the death of the widow and not before. The consequence of this view would be that if no improvement at all was made after the widow's death, the transferee would get nothing for the improvements he had effected '*bona fide*' during the life-time of the widow. It is submitted that this view does not seem to be supportable on any principle.

12. Improvements by transferee of land subject to a right of pre-emption. — Where *A* purchases immovable property over which *B* has a right of pre-emption and *B* sues to enforce his right, *A* can claim the benefit of this section provided he is able to prove that he effected the improvements in good faith believing that he was absolutely entitled to the property.(1) But if it appears from the circumstances of the case that he did so in anticipation of the pre-emption suit, he cannot claim relief under this section.(2) It is not a general rule that a vendee of land which is subject to the right of pre-emption is necessarily deprived of his right to compensation under this section by the mere fact that he has effected the improvements with the full knowledge of such rights:(3) though that fact may, along with other circumstances, contribute towards a finding of absence of good faith on the part of the vendee and thus indirectly deprive him of the benefit of the section.

13. Improvments by mortgagee.—See S. 63A and Notes thereon.

14. Improvements during the pendency of ligitation relating to the property.—See Note 3 on Section 52.

15. "Evicted therefrom by any person having a better title."—The right to claim compensation for improvements arises only when the transferee is 'evicted

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3. 1967 Ker 22 (24, 25) [AIR V 54 C 5] : I L R (1966) 2 Ker 211. (Alienation of property by life tenant — Improvements made by alienee with knowledge of alienor's life interest in property at time of alienation — Alienee cannot be considered to be transferee believing in good faith that he is absolutely entitled to property at time of effecting improvements. AIR 1965 S C 1812, Foll.)

1961 Bom 169 (183) [A I R V 48 C 44]. (Alienation of house by Hindu widow — Expenditure incurred on reconstruction of house by alienee after notice by next reversioner claiming to be entitled to the house as reversioner—This would disprove the ingredient of good faith necessary under S. 51)

†('09) 32 Mad 530 (531) (DB).

('09) 3 Ind Cas 415 (417) (Cal).

4. ('10) 6 Ind Cas 141 (146) (DB) (Cal).

Section 51 — Note 12

1. 1933 Lah 540 (541) [AIR V 20] (DB). (Exchange — Mutation refused by Revenue Officer owing to absence of party — Such party believing in good faith to be owner, erecting building on land got by exchange—Subsequent sale in favour of such party by person who had given in exchange — Right to pre-emption in respect of sale can be exercised only on payment of costs for building also.)

('38) 1938 Oudh W N 281 (282). (Vendee taking sale deed from majority of co-sharers—Suit for pre-emption by one residing at a distant place —Improvements by vendee held to be made in good faith and compensation allowed.)

1926 Lah 629 (629) [AIR V 13].

[But see 1928 Rang 26 (27) [AIR V 15]. (S. 51 does not apply to such cases as original purchaser cannot be considered to have acquired a defective title.)]

2. †1940 Oudh 266 (269) [AIR V 27]. (Failure to ascertain that co-sharers would not pre-empt constitutes want of good faith.)

1926 Lah 629 (629) [AIR V 13].

('07) 1907 Pun Re No. 122 page 594 (598).

3. 1940 Oudh 266 (269) [AIR V 27].

('07) 10 Oudh Cas 49 (57) (DB).

from' the property by a person with a better title. The words "evicted therefrom by any person having a better title" must be construed in their natural sense(1) and, so construed, will not cover a case where a purchaser of property who has made improvements is sued by a prior simple mortgagee. The purchaser cannot under this section claim compensation for improvements, firstly" because the prior mortgagee cannot be said to be "a person with a better title" and 'secondly,' because the purchaser cannot be said to be "evicted" by the institution of the suit by the mortgagee.(2) See also the undermentioned case.(3)

The fact that the transferee has made improvements is no answer to a suit for eviction.(4)

16. Transferor may be evictor.—In *Harilal Ranchod* v. *Gordhan Keshav*(1) a transferee from the guardian of a minor of the minor's property effected improvements on the property. On attaining majority the minor sued for setting aside the transfer as being unauthorised and the transferee claimed compensation under this section. It was held by the High Court of Bombay that the section was not inapplicable merely because the evictor was the transferor himself. It must, however, be noted that where the transferor himself is the evictor, other considerations such as the 'doctrine of acquiescence' may come into play and render him liable, though not under this section, to make compensation for the improvements. See Notes 22 and 23.

17. Representatives-in-interest of the transferee, if can claim benefit of section.—In *Bhagwat Dayal* v. *Ram Ratan*(1) *A*, the owner, transferred the property to *B* who effected improvements thereon in good faith; *B* then transferred the property to *C* who was in possession at the time of eviction. Their Lordships of the Privy Council held that *C* was entitled to compensation for the improvements that had been effected by *B*. Again in *Narayanaswami* v. *Rama Iyer*(2) *A*, the owner had transferred property to *B* who again transferred the property to *C*. *C* effected improvements 'bona fide' and after his death, was succeeded by *D*, his heir. *D* was evicted by a superior title-holder and he claimed compensation for the improvements that had been effected by *C*. Their Lordships of the Privy Council held that he was entitled to do so. These two decisions make it clear that the transferee's representatives-in-interest are also entitled to claim the benefit of this section.(3) It has, however, been held by a single Judge of the Calcutta High Court(4) that the section is limited to claims by the first transferee and not by his representatives-in-interest. The reason advanced for

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Section 51 — Note 15

1. 1929 All 12 (14) [AIR V 16]: 51 All 454 (DB).
2. 1931 All 277 (287) [AIR V 18]: 53 All 334 (FB).
1929 All 12 (14) [AIR V 16]: 51 All 454 (DB). (Though the section was held inapplicable in terms, the equitable principle of it was applied.)
3. 1934 Mad 703 (705) [AIR V 21]. (Property sold subject to covenant for reconveyance — Suit for specific performance of the covenant — Claim for improvements by the vendee—*Held*, no case of eviction — Doubted whether S. 51 would apply.)
4. 1917 All 179 (180) [AIR V 4]: 39 All 463 (DB). (Transferee from a co-widow.)

Section 51 — Note 16

1. 1927 Bom 611 (612) [AIR V 14]: 51 Bom 1040 (DB).

Section 51 — Note 17

1. 1922 P C 91 (93) [AIR V 9].
2. 1930 P C 297 (300) [AIR V 17]: 53 Mad 692: 57 Ind App 305. (Confirming AIR 1926 Mad 609.)
3. 1929 Bom 246 (249) [AIR V 16] (DB).
†1929 Lah 825 (825) [AIR V 16] (DB). (Improvement by transferee from transferee.)
('07) 17 Mad L Jour 622 (625) (DB). (Do.)
1916 Mad 1090 (1092) [AIR V 3] (DB). (Improvement by heir.)
[*See* ('05) 2 Nag L R 34 (40).]
4. 1934 Cal 290 (291, 292) [AIR V 21]: 60 Cal 1388.

this view is that the relief given by this section is not property which is heritable or transferable, and that the section was intended to provide for a right of compensation to an 'individual' who fulfils all the conditions laid down in the section, that is to say, an individual who is himself the transferee, has himself executed the improvements in good faith and has himself been evicted. It is submitted that this view is not correct. The principle underlying the section is, as has been seen in Note 1, that a man should not enrich himself at the expense of another, and this principle cannot be rendered inapplicable merely because the transferee is succeeded by another.

18. Modes of compensating the evicted transferee.—A transferee who is evicted has, under this section, a right to require the person evicting him either —

(1) to have the present value of the improvement estimated and paid or secured to him, or

(2) to sell 'his' interest in the property to him (i.e., to the transferee) at the market-value thereof, irrespective of the improvements.(1a)

But the option of choosing between these two alternatives rests with the 'evictor'(1) and not with the transferee or the Court.(2) In the undermentioned case.(3) however, the Allahabad High Court approved of an order of the lower Court directing the evictor to sell his interest to the transferee. It was found as a fact that the evictor was too poor to pay for the improvements and that the second alternative was the only possible one.

As regards the general principles upon which the market-value of immovable property is determined, see the undermentioned cases.(4) See also Note 19.

Section 51 — Note 18

1a. 1961 Mys 62 (63) [AIR V 48 C 14]. (Market value at the time of eviction.)

1. 1956 S C 727 (729) [AIR V 43 C 114] : ILR (1956) Mys 184.
1963 Andh Pra 177 (184) [AIR V 50 C 60] : ILR (1963) Andh Pra 991.
('63) 1963 Ker L T 219 (221).
1961 Mys 62 (63) [AIR V 48 C 14].
('57) ILR (1957) 7 Raj 473 (476).
1932 All 210 (215) [AIR V 19] (DB).
1926 Mad 609 (614) [AIR V 13] (DB).
1926 Bom 599 (600) [AIR V 13] (DB). (Case of a mortgagor redeeming mortgaged property — Option rests with the mortgagor.)
('05) 2 Nag L R 34 (41).
[*See also* 1928 Nag 144 (144) [AIR V 15]. (Decision fixing the price of redemption of property —Review petition for asking addition of the price of improvement made in that property by the applicant is not proper remedy — Proper course is to make a demand on opposite party for one of alternative mentioned in S. 51.)]

2. 1951 Ajmer 18 (19) [AIR V 38 C 12].
1932 All 210 (215) [AIR V 19] (DB).

3. 1928 All 41 (45) [AIR V 15] (DB).

4. ('93) 16 Mad 369 (377, 378) : 20 Ind App 80 (PC).
1953 Trav-Co 299 (300) [AIR V 40 C 110] : ILR (1953) Trav-Co 41 (DB). (Where the lease deed provides as to how value of bearing and non-bearing trees, and of the buildings, is to be ascertained and paid for at the time of redemption the rights of parties in regard to their contractual relationship have to be respected, even though this is at variance with the general rule relating to value of improvements, that is, that the tenant would be entitled to three fourths of the value of trees planted, and to the full value of the buildings. The improvements are to be valued at the time of redemption on the terms previously agreed to, though this redemption is long after the expiry of the period fixed.)
('51) ILR (1951) Trav-Co 282 (285).
('50) 1950 Trav-Co L R 391 (395) (DB). (In assessing compensation for value of improvements in respect of cocoanut trees to a tenant a deduction must in practice be made for droppings for mature cocoanuts found on the trees.)
('07) 34 Cal 599 (603, 604) (DB). (Profit from the advantageous disposition of land, its utility, the recent instances of sales in the same locality and the average rental of lands should be considered in estimating value of land.)
('04) 32 Cal 343 (348) (DB). (Future utility of land must be considered in estimating the value of land.)
('74) 22 Suth W R 234 (235) (DB). (Principles for determining the value of occupied or un-occupied land stated.)
('73) 11 Beng L R 230 (236) (DB). (Case under Land Acquisition Act, X of 1870.)
('72) 10 Bom H C R 34 (36) (DB). (Do).
('91) 15 Bom 279 (282, 283) (DB). (Do.)
(1867) L R 2 Q B 630 (631, 632) : 36 L J Q B

19. Value of improvements — How estimated. — Under the section the amount to be paid or secured to the transferee in respect of the improvement is the estimated value of the improvement at the date of the eviction.(1a) The value of an improvement is the amount by which the market-value of the property is 'increased' by reason of the improvement, and not the amount actually expended over such improvement.(1) "It is always to be borne in mind" said their Lordships of the Privy Council in *Kidar Nath* v. *Mathu Mal*,(2) "that the amount of expenditure made has occasionally very little to do with the real issue, and that that issue is, to what extent has the enhancement of the subject been produced? . . . The real question is, was the property as marketable subject enhanced in value or not?" The burden of establishing the present value of the improvement is on the transferee.(3)

The value of improvements is a question of fact and hence cannot be raised for the first time or considered in second appeal.(4)

If the evidence enables a Court to do so, it should assess the valuation of the improvement as at a date as near as possible to the date of actual eviction rather than the date on which the evictor made his election to pay to the transferee the cost of improvements.(5)

20. Profit due to improvement is not included in mesne profits. — Where a transferee is evicted by a person with a better title and a claim for mesne profits is made against him, the transferee is entitled to claim as a set-off, against the mesne profits, the profit which is due to the improvements effected by him. The reason is that such profit is not included within the meaning of "mesne profits" as defined by S. 2, cl. (12) of the Code of Civil Procedure, 1908. Thus, in *Bhagwat Dayal Singh* v. *Ram Ratan*,(1) *A*, a transferee from a Hindu widow without legal necessity, effected permanent improvements on the property and sold it to *B*. *C*, a reversioner sued *B* for possession and mesne profits. It was found that the rent of the property had increased by the improvements. The question was whether *B*, who had not effected the improvements himself could claim the profits of improvements. Their Lordships of the Privy

322, Queen v. Brown. (Not only the present purpose to which land is applied but also any other more beneficial purpose to which it may be applied, may be taken into consideration.)
(1904) 1 K B 417 (422, 423) : 73 L J K B 228, In re Gough and Aspatria, Silloth and District Joint Water Board. (Special adaptability of land for particular purpose may be taken into consideration.)

Section 51 — Note 19

1a. 1961 Bom 169 (183) [AIR V 48 C 44].

1. 1956 S C 727 (730) [AIR V 43 C 114] : I L R (1956) Mys 184. ((1913) 40 Cal 555, Rel. on.)
1930 P C 297 (300) [AIR V 17] : 57 Ind App 305: 53 Mad 692.
1963 Andh Pra 177 (185) [AIR V 50 C 60] : ILR (1963) Andh Pra 991.
1955 Bom 457 (460) [AIR V 42 C 123] : ILR (1955) Bom 1033.
1953 Pepsu 45 (47) [AIR V 40 C 24]. (However, there being no clear reliable and convincing evidence of present market value, Court had to fall back on the expenditure.)
1952 Mys 117 (119) [AIR V 39] : ILR (1952) Mys 384.
1932 Sind 42 (46) [AIR V 19] : 25 Sind L R 433 (DB).
1929 Bom 246 (249) [AIR V 16] (DB).
1916 Lah 379 (379) [AIR V 3] (DB).
('10) 6 Ind Cas 141 (146) (DB) (Cal). (Transferee from Hindu widow — Improvements by him after widow's death — Difference in market-value at time of widow's death and at date of judgment in reversioner's suit, to be considered.)

2. ('13) 40 Cal 555 (564) : 1913 Pun Re No. 77 (PC).

3. 1955 Bom 457 (459) [AIR V 42 C 123] : I L R (1955) Bom 1033. (Amount spent on improvement being within special knowledge of transferee, he must lead satisfactory evidence.)
1937 Lah 500 (504) [AIR V 24] (DB).
1915 Mad 263 (265) [AIR V 2] (DB). (Evidence must be of a precise and not a general nature.)
1914 Mad 138 (138) [AIR V 1] (DB).

4. 1916 Lah 379 (379) [AIR V 3] (DB).
('11) 34 Mad 535 (542) (DB).

5. 1956 S C 727 (729) [AIR V 43 C 114] : I L R (1956) Mys 184.

Section 51 — Note 20

1. 1922 P C 91 (93) [AIR V 9].

Council held that *B* could do so and allowed the profits due to *A's* improvements to be set off against the claim by *C* for the mesne profits.

21. Right to crops.—Growing crops are "things attached to the earth"(1) and, as such constitute a 'legal incident' of the property to which they are attached. Under S. 8 on a transfer of land, growing crops will pass with it as its legal incident. On the same principle it would follow that if a person is lawfully evicted from land he cannot lay claim to the growing crops on the land at the time of eviction. In England, however, an occupier of land whose occupation has come to an end from a cause beyond his control is entitled to "emblements" i. e., growing crops raised by him on the land. This principle has been given effect to in the third paragraph of this section, in a restricted form. The person evicted is entitled to take the growing crops on the land at the time of the eviction only "under the circumstances aforesaid," i. e., only if he had honestly believed that he was absolutely entitled to the property.(2)

The right to the crops and the ancillary right of ingress and egress for gathering and carrying the crops cannot be pleaded as a bar to the eviction itself.(3)

22. Doctrine of acquiescence. — Where *A*, the owner of a legal right, abstains from interfering while a violation of his right by *B* is in progress, under such circumstances that his assent to such violation may reasonably be inferred, a Court of Equity will consider it dishonest and fraudulent on the part of *A* to set up his rights inconsistent with the acts assented to, and will prevent *A* from setting up his right to the damage of *B*. This is called the doctrine of acquiescence.(1) It is, in fact, another phase of the doctrine of estoppel(2) and is limited to the conduct of a person 'while the violation of his right is in progress'. Acquiescence is thus quiescence under such circumstances as are proper for raising an estoppel against the owner of the right.(3)

It follows that 'mere' inaction by the owner while another person is infringing his rights will not operate as an estoppel against him.(4) A man is not to be deprived

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Section 51 — Note 21

1. †*See* ('90) 13 Mad 15 (16). (Mortgagee is not entitled to emblements and cannot as such rely on section 51.)

✠[See however 1920 Upp Bur 56 (61) [AIR V 7]; 3 Upp Bur Rul 141. (Usufructuary mortgagee whose duration under the mortgage is uncertain or his tenant is entitled to all the crops sown or planted by him on the land which were growing thereon at the time of redemption and to free ingress and egress to gather and carry them, provided that such crops were grown or planted before the person who grew them had notice of the intended redemption—Equitable principle contained in S. 51 and S. 108 (1) applied—13 Mad 15, explained.)]

2. 1920 Sind 31 (33) [AIR V 7] : 14 Sind L R 12 (DB).

3. ('86) 8 All 502 (508, 509) (DB).

Section 51 — Note 22

1. Halsbury, Laws of England, Vol. 13, p. 166.

[*See also* 1944 Pat 77 (86) [AIR V 31] : 22 Pat 513 (DB). (Trespasser building on another's land under bona fide claim of title—True owner standing by and allowing him to do so — Though S. 51, T. P. Act, does not apply, and the trespasser is not entitled to compensation, he is entitled on eviction, to remove materials of building.)

1925 Oudh 258 (260) [AIR V 12] : 28 Oudh Cas 114.

(1878) 47 L J Ch 381 (389) : 8 Ch D 286, De Bussche v. Alt.]

2. Halsbury, Laws of England, Vol. 13, page 166.

✠1936 Cal 711 (713) [AIR V 23].

†1925 Oudh 258 (260) [AIR V 12] : 28 Oudh Cas 114.

(1796) 6 T R 554 (556) : 3 R R 261, R. v. Butterton. (The principle of estoppel by representation, applies both in law and equity though its application to acquiescence is equitable.)

3. Halsbury, Laws of England, Vol. 13, p. 166.

4. 1942 Nag 59 (60) [A I R V 29] : I L R (1942) Nag 232. (Inaction while defendant was extending his house and making other improvements.)

1937 Oudh 226 (227) [AIR V 24].

1936 Cal 711 (713) [AIR V 23].

('06) 1906 All W N 174 (174).

('91) 1891 All W N 186 (186). (Zamindar's omission to sue for removal of trees as per his right under the law—No acquiescence.)

('99) 1899 All W N 191 (193). (It is not enough merely to show that the plaintiff did not interfere with the progress of the building.)

of his legal rights unless he has acted in such a manner as would make it fraudulent for him to set up those rights.(5) Inaction under circumstances which requires a 'duty to speak' is the foundation of the doctrine of acquiescence. It must amount to fraud.(6)

In '*Russell* v. *Watts*'(7) Fry, L. J., observed that in order to constitute fraud of that description the following elements or requisites must be satisfied :

(1) The persen violating the right must have done so under a 'mistaken belief' as to his legal rights.

(2) The owner of the right violated must be aware of his own right.

(3) The owner of the right violated must be aware that the person violating the right was acting on a mistaken belief as to his rights.

(4) The person violating the right must have spent money or done some act on the faith of the mistaken belief.

(5) The owner of the right must have encouraged the other in the expenditure of money or other act either directly or by abstaining from asserting his legal rights.

These elements may be taken up in order :

(1) Person violating the right must have done so under a mistaken belief as to his legal rights.

If he was aware that he was infringing the legal rights of another, he takes the risk of these rights being asserted by the owner.(8) The leading case on the point is

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5. † 1942 Oudh 306 (307) [AIR V 29] : 17 Luck 610 (DB). (Where the defendant has without right made some constructions on the abadi land of the plaintiff, the plaintiff should not be deprived of his right to get such construction demolished merely on the ground that the land on which such construction has been made is of no practical use to the plaintiff.)

1937 Oudh 226 (228) [AIR V 24].
1927 Oudh 135 (136) [AIR V 14].
1927 Oudh 66 (68) [AIR V 14].
('79) 3 Cal L R 1 (6) (DB).
(1883) 32 W R (Eng) 621 (626) : 25 Ch D 559 (586), Russel v. Watts. (Per Fly, L J., following his own decision in Willmott v. Barber, (1880) 49 L J Ch 792.)

6. †1942 Nag 59 (60) [A I R V 29] : ILR (1942) Nag 232.
1936 Cal 711 (713) [AIR V 23].
1927 Nag 180 (183) [AIR V 14].
[*See also* ('07) 9 Bom L R 404 (408). (If a stranger builds upon the land of another, although believing it to be his own, the owner is entitled to recover the land with the buildings on it, unless there are special circumstances amounting to a standing by on the part of the real owner such as to induce the belief that he intended to forgo his right.)]

7. (1883) 32 W R (Eng) 621 (625) : 25 Ch D 559 (586). (Following his own decision in Willmott v. Barber, (1880) 49 L J Ch 792.)
Also see the following cases :
1942 Oudh 306 (307, 308) [A I R V 29] : 17 Luck 610 (DB).
1930 Oudh 235 (243) [AIR V 17] (DB). (Willmot v. Barber, (1880) 49 L J Ch 792, followed.)
1938 Lah 88 (89) [A I R V 25] : ILR (1938) Lah 296. (Do.)
1929 Lah 625 (627) [AIR V 16]. (Do.)
1927 Oudh 66 (68) [AIR V 14]. (Do.)
1926 All 324 (325) [AIR V 13] : 48 All 353 (DB). (Do.)
('98) 22 Bom 1 (13). (Do.)
1921 Oudh 231 (232) [A I R V 8]. (Principles enunciated in 21 All 496 (PC), referred to.)
1929 All 877 (877) [AIR V 16]. (Willmott v. Barber, (1880) 49 L J Ch 792, followed.)
1921 Lah 110 (112) [A I R V 8] : 2 Lah 258 (DB). (Do.)

8. 1965 S C 1812 (1816) [A I R V 52 C 309] : (1965) 3 S C R 283. (Improvements made in property belonging to another—Person making improvements knowing that he has no title in property — He cannot demand payment for improvements—Doctrine of acquiscence not applicable.)
1932 P C 108 (116) [AIR V 19].
1939 Mad 247 (250) [AIR V 26]. (Tenant knowing his rights, building on land—Doctrine of acquiescence cannot be applied.)
1937 Oudh 263 (265) [A I R V 24] : 13 Luck 192 (DB).
1937 Oudh 226 (228) [AIR V 24].
1930 Pat 20 (22) [AIR V 17] (DB).
1929 All 877 (877) [AIR V 16].
1926 All 324 (325) [AIR V 13] : 48 All 353 (DB).
✠ 1924 Cal 438 (440) [AIR V 11] (DB).
1923 All 452 (452, 453) [AIR V 10].
1922 All 210 (210) [AIR V 9]. (Tenant knowing his rights building on land — No equitable estoppel.)
1919 Oudh 199 (200) [AIR V 6]. (21 All 496 (PC), followed.)

Ramsden v. *Dyson*'.(9) In that case a tenant of leasehold property built upon such property. The landlord did not interfere, but subsequently sued for eviction of the tenant. Lord Cranworth, L. C., stated the principles governing the case as follows :

"It may be well to consider shortly what the principles of equity on this subject are. If a stranger begins to build on my land supposing it to be his own, and I, perceiving his mistake, abstain from setting him right, and leave him to preserve in his error, a Court of Equity will not allow me afterwards to assert my title to the land on which he had expended money on the supposition that the land was his own. It considers that when I saw the mistake into which he had fallen, it was my duty to be active, and to state my adverse title, and that it would be dishonest in me to remain wilfully passive on such an occasion in order afterwards to profit by the mistake which I might have prevented. But it will be observed, that to raise such an equity two things are required—first, that the person expending the money supposes himself to be building on his own land ; and, secondly, that the real owner at the time of the expenditure knows that the land belongs to him, and not to the person expending the money in the belief that he is the owner. For if a stranger builds on my land, knowing it to be mine, there is no principle of equity which would prevent my claiming the land with the benefit of all the expenditure made on it. There would be nothing in my conduct, active or passive making it inequitable in me to assert my legal rights. It follows as corollary from these, or perhaps it would be more accurate to say it forms part of them, that if my tenant builds on land which he holds under me, he does not thereby, in the absence of special circumstances, acquire any right to prevent me from taking possession of the lands and buildings when the tenancy has determined. He knew the extent of his interest, and it was his folly to expend money upon a title which he knew would or might soon come to an end."

The rule of '*Ramsden* v. *Dyson*'(10) has been applied to cases arising in this country,(11) but subject to the exception that the party building on the land of another without any acquiescence on the part of that other is allowed to remove the building.(12)

1918 Oudh 1 (3) [AIR V 5].
('11) 35 Bom 182 (188) (DB).
('10) 6 Ind Cas 1006 (1009) (DB) (Lah). (Case of trespass.)
('09) 1 Ind Cas 821 (823) (All). (Tenant building on land — No mistaken belief—Abstinence by owner not acquiescence.)
('02) 1902 All W N 60 (62) (DB).

9. (1865) 149 R R 543 (549) : 1 H L 129.

10. (1865) 149 R R 543 (549) : 1 H L 129.

11. ('99) 21 All 496 (503): 26 Ind App 58 (PC). (Tenant building on land—No acquiescence.)
1942 Nag 59 (60) [A I R V 29] : I L R (1942) Nag 232. (Lessor and lessee — Lessee making improvements — No objection by lessor — Lessee not acting under bona fide belief of his having title—No acquiescence.)
1930 Oudh 235 (244) [A I R V 17] (DB). (Trespasser building on land—No acquiescence.)
1926 Mad 1052 (1055) [AIR V 13] (DB).
1926 All 87 (88) [A I R V 13]. (Raiyat building on waste land without zamindar's permission—No acquiescence.)
1925 Oudh 258 (260) [A I R V 12] : 28 Oudh Cas 114.
1924 Cal 156 (157) [A I R V 11] (DB). (Tenant building on land knowing that he has no permanent right in it—No acquiescence.)
(1900) 27 Cal 570 (584) (DB). (Do.)
1918 Cal 629 (630) [AIR V 5] (DB).
1917 Pat 234 (237) [AIR V 4] : 2 Pat L Jour 600 (DB). (Stranger building on land—No acquiescence by owner — Owner is entitled to eject stranger.)
1916 All 315 (315, 316) [AIR V 3].
('99) 1 Bom L R 191 (197) (DB).
('93) 17 Bom 736 (741) (DB).
† ('87) 9 All 434 (439) (DB).
('81) 5 Bom 450 (462). (Person making repairs and improvements to property knowing that he has no title to it—No acquiescence.)
† ('75) 1 All 82 (85) (DB).
('69) 11 Suth W R 574 (576) : 3 Beng L R (AC) 18 (DB).
('11) 35 Bom 182 (183) (DB). (Building on land of another with knowledge of other's property —No acquiescence.)
1930 Pat 20 (22, 23) [AIR V 17] (DB). (Do.)
1924 Cal 438 (440) [AIR V 11] (DB). (Do.)
('06) 33 Cal 1119 (1128, 1129) (DB).
('04) 1904 All W N 70 (70).

12. 1938 Nag 506 (511) [A I R V 25] : I L R (1940) Nag 269.
1930 Oudh 235 (245) [AIR V 17] (DB).
1926 Lah 694 (695) [AIR V 13].
1926 Nag 416 (423) [AIR V 13].
1926 All 324 (325) [AIR V 13] : 48 All 353 (DB).
1923 All 452 (453) [AIR V 10].
1921 Nag 167 (168) [AIR V 8].
('02) 1902 All W N 60 (62) (DB).
('69) 6 Bom H C R (AC) 80 (85) (DB).
(1865) 3 Suth W R 71 (71) (DB).
('10) 6 Ind Cas 1006 (1009) (DB) (Lah).
('06) 2 Nag L R 4 (5, 7).
('01) 5 Cal W N 846 (858) (DB).

(2) The owner of the right violated must be aware of his own rights.

The doctrine of acquiescence is founded upon conduct with a 'knowledge of one's own legal rights'.(13) If the possessor of the legal right is not aware of it he is in the same position as the person violating it. It cannot be said that the former fraudulently abstained from interfering while his right was being violated and the doctrine of acquiescence will not apply.(13a) As observed by Cotton, L. J., in '*Russell* v. *Watts*':(14)

> "The doctrine as to a person lying by so as to create an equity against him arises..... if 'he knows facts' which are unknown to the other persons acting in violation of the right which those facts give, and does not inform them about it but lies by and lets them run into a trap."

(3) The owner of the right violated must be aware that the person violating the right was acting on a mistaken belief as to his rights.

If the possessor of the legal right does not know that the person violating the right was acting under a mistake there is nothing which calls upon him to assert his own right.(15) It is only if he has such knowledge that it would be inequitable for him to keep silent and allow the wrongdoer to proceed on his mistake. In '*Abdul Kadar* v. *Upendra Lal*'(16) R. C. Mitter, J., observed :

> "If the possessor of the legal right does not know at the time when the trespasser is spending money upon his property that the land is his, and if he does know in addition that the trespasser is acting under a mistaken belief that the property is his, there is nothing wrong if he remains silent. His conscience is not affected. There is nothing fraudulent in his conduct. Even if he knows that the property is his he might not disclose at that time to the trespasser that the property is his unless he also knows that the trespasser is spending money upon a mistaken view of his rights."

(4) The person violating the right must have spent money or done some act on the faith of the mistaken belief.

Otherwise he does not suffer by the owner of the right subsequently asserting his right.

(5) The owner of the legal right must have abstained from interfering while the right was being violated.

The existence of the four elements referred to above, gives rise to a duty, on the part of the owner of the right, to speak. An abstention from interference would be fraudulent under the circumstances.(17) Where owner does assert his title to the

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('96) 20 Bom 298 (300) (DB). (Following 6 Bom H C R A C 80.)
[*See also* ('13) 1913 Pun Re No. 63 : 18 Ind Cas 799 (803) (DB). (The owner has option of making the wrongdoer remove the materials of building or paying compensation for the value of buildings.)
('80) 5 Cal 688 (692). (Case decided on principles of Hindu law.)]
[But see 1917 Pat 234 (235) [A I R V 4] : 2 Pat L Jour 600. (Decree for ejectment was given — It was apparently assumed that the defendant could not remove the building.)]

13. 1957 Pat 308 (312) [A I R V 44 C 97] : 36 Pat 362 (DB). (Both parties labouring under mistake about their rights—*A* on measurement finding that *B* has encroached upon his plot and built on it — No acquiescence or estoppel — *A* is entitled to possession of his land by demolition of building of *B*.)
(1883) 32 W R (Eng) 621 (626) : 25 Ch D 559 (586), Russell v. Watts.

13a. 1919 Mad 1083 (1091) [AIR V 6] : 40 Mad 1134 (FB). (Per Napier J.)
1937 Oudh 226 (228) [AIR V 24].
1936 Cal 711 (713) [AIR V 23].
1935 Bom 219 (221) [AIR V 22] (DB).
1926 Nag 416 (421) [AIR V 13].
1923 Pat 111 (113) [AIR V 10] (DB).
('05) 27 All 338 (347) (DB).
1918 Cal 629 (629) [AIR V 5] (DB).
('79) 3 Cal L R 1 (5) (DB).

14. (1883) 32 W R (Eng) 621 (623) : 25 Ch D 559 (576).

15. 1932 P C 108 (116) [AIR V 19].
1952 Nag 40 (42) [AIR V 39] : I L R (1949) Nag 465 (DB).
(1883) 32 W R (Eng) 621 (626) : 25 Ch D 559 (586), Russell v. Watts.

16. 1936 Cal 711 (713) [AIR V 23].

17. 1950 Mad 53 (55) [AIR V 37 C 32].
(1865) 149 R R 543 (549) : 1 H L 129, Ramsden v. Dyson.

knowledge of the wrongdoer and the latter nevertheless continues to spend money, the doctrine of acquiescence cannot apply.(17a)

Doctrine of expectation.

Closely analogous to the doctrine of acquiescence and also based on the doctrine of estoppel is the principle that where a person knows that a land does not belong to him, but expends money or does some act in the 'expectation' that he would be given certain rights by the owner, and the owner encourages him in that expectation, a Court of Equity will compel the owner to give effect to that expectation. This principle was stated by Lord Kingsdown in '*Ramsden* v. *Dyson*'(18) as follows :

> "If a man under a verbal agreement with a landlord, for a certain interest in land, or, what amounts to the same thing, under an expectation created or encouraged by the landlord that he shall have a certain interest, takes possession of such land with the consent of the landlord, and upon the faith of such promise or expectation lays out money upon the land with the knowledge of the landlord, and without objection by him, a Court of Equity will compel the landlord to give effect to such promise or expectation."

In '*Beni Ram* v. *Kundun Lal*,'(19) their Lordships of the Privy Council followed the decision in '*Ramsden's* case' and observed :

> "In order to raise the equitable estoppel . . . . . it was incumbent upon the respondents (tenants) to shew that the conduct of the owner, whether consisting in abstinence from interfering or in active intervention, was sufficient to justify the legal inference that they had, by plain implication, contracted that the right of tenancy, under which the lessees originally obtained possession of the land, should be changed into a perpetual right of occupation."

Where at the request of the lessee to erect a pucca building on the land the lessor granted the same informing him by a letter that "the lease was a permanent one and gave the lessee the right to erect buildings," and the lessee accordingly built on the leasehold property, it was held by their Lordships of the Privy Council, following the principle laid down by Lord Kingsdown in *Ramsden* v. *Dyson*(20) that the landlord was estopped by the letter from evicting the lessee.(21) Where a canal supplied with water from the Sutlej was constructed at great expense by certain persons for purposes of irrigation with the sanction and encouragement of the Government, partly on Government land and partly on other land, it was held by the Privy Council relying on the said observations of Lord Kingsdown that those persons thereby became proprietors of the canal entitled to have the waters of the Sutlej admitted into it so long as it was used for the purpose for which it was originally designed.(22)

See also the undermentioned cases.(23)

17a. 1927 Cal 54 (55) [AIR V 14] (DB).
1923 All 452 (452) [AIR V 10].

18. (1865) 149 R R 543 (570) : 1 H L 129.

19. ('98) 21 All 496 (502) : 26 Ind App 58 (63) (PC).
[*See also* 1951 Pat 600 (601) [AIR V 38 C 168].
1951 Pat 600 (601) [A I R V 38 C 168] (DB). (21 All 496 (P C) Foll).]

20. 20 (1865) 149 R R 543 (570) : 1 H L 129.

21. 1925 P C 146 (149) [AIR V 12] : 52 Ind App 178 : 4 Pat 707.

22. ('01) 28 Cal 693 (706) : 28 Ind App 211 (218, 219) (PC).

23. 1961 Mad 293 (296) [AIR V 48 C 86]. Improvements by lessee — Doctrine of "equitable estoppel" in Ramsden v. Dyson, (1865-66) 1 H L 129, held applicable — Erection of pucca superstructure on vacant site with consent of landlord — Tenant is entitled to claim compensation for superstructure at the time of eviction.)
1951 Pat 600 (601) [AIR V 38 C 168] (DB).
1935 Bom 219 (221) [AIR V 22] (DB). (Tenant building on land — Landlord not consenting to or encouraging it — No estoppel.)
('07) 29 All 652 (658) (DB). (21 All 496 (PC), Followed.)
('89) 12 Mad 323*n* (324*n*) (DB). (Tenants effecting improvements beyond the scope of the lease —No acquiescence or raising up of expectation on the part of landlord — *Held*, tenant is not entitled to compensation but allowed to remove material only.)
('74) 13 Beng L R 417*n* (418*n*) (DB). (Tenant in possession of land for over thirty years, building without objection — *Held*, by such permissive occupancy he does not acquire right to

The decisions discussed above regarding the doctrines of acquiescence and expectation require, it is submitted, a re-consideration in view of the Privy Council decision in *Iriff* v. *Jadunath Majumdar*(24) (cited and considered in S. 53A, Note 3) holding that equity cannot override the provisions of a statute and confer upon a person a right which the statute enacts shall be conferred only by a registered instrument.(25) As regards the question of compensation to be paid to a person who has been put into possession under an agreement of transfer which is not duly perfected and who is being evicted, if the proposed transfer was to be a permanent lease and the proposed transferee has constructed buildings on the property, he will be only entitled to remove the structures under S. 108(h) and will not be entitled to any 'compensation'.(26)

23. This section and the doctrine of acquiescence are based on different principles.— This section has no reference to the 'conduct of the owner' of the property at all(1) but has reference only to the conduct of the 'transferee' of the pro-

retain possession. 7 Beng L R 152 distinigushed.)

('72) 8 Beng L R App 51 (52, 54) (DB). (A landlord who allows his lessee to invest capital in erecting buildings on lands let for cultivation, and raises no objection for considerable number of years, will not be allowed to disturb the holding. He will be presumed to have granted the lease for building purposes. 7 Beng L R 152 followed.)

('68-69) 4 Mad H C R 312 (315) (DB). (A and B agreed to exchange lands and actually changed possession — No registered document was executed — B built on the land got by him and then A sued to eject him — *Held* that A could not get back the land without making compensation to B.)

('02) 26 Bom 271 (277) (DB).

('91) 15 Bom 71 (73) (DB). (Tenant building on land —No proof that he built in the hope or encouragement by landlord of an extended term or an allowance for expenditure — No estoppel.)

24. 1931 P C 79 (82) [AIR V 18] : 58 Cal 1235 : 58 Ind App 91.

25. *See* 1947 Cal 353 (356) [A I R V 34 C 105] (DB) (Oral agreement between S and B in 1933 for grant of permanent lease of land by S to B at certain monthly rent — In anticipation of execution of lease B let into possession — B erecting substantial structures with knowledge and approval of S—No lease executed — In 1940 S suing for ejectment — *Held* S. 33 A was not applicable — Suit was governed by P C decision in, AIR 1931 P C 79.)

1944 Pat 30 (33) [AIR V 31] : 22 Pat 554 (DB). (Permanent settlement not created by registered instrument is void under S. 107 and tenancy deemed under S. 106 to be one from month to month — Permanent tenancy cannot be created by estoppel without a registered instrument.)

26. 1960 Pat 344 (353) [AIR V 47 C 122] : 39 Pat 140 (FB). (Lessee under invalid lease paying rent —Creation of relationship of landlord and tenant —Improvements made by lessee — Eviction —He is not entitled to compensation — No estoppel held applied—Lessee can remove structure. 19 Pat L T 791 : AIR 1938 Pat 435, Overruled.)

1967 Mad 257 (259) [A I R V 54 C 82] : 79 Mad L W 637 : (1967) 1 Mad L J 93. (Lease of land on yearly rent for erecting temple, developing a garden, planting cocoanut trees and conducting worship in temple— Lessor having right to require lessee to surrender possession with temple etc., on breach of condition — Lease unregistered—Lessee on being evicted by lessor for such breach of condition is not entitled to any compensation.)

('62) ILR (1962) Mys 250 (252).

1951 Pat 600 (602) [AIR V 38 C 168] (DB).

1947 Cal 353 (357, 364) [AIR V 34 C 105] (DB). (Oral agreement between S and B in 1933 for grant of permanent lease of land by S to B at monthly rent — In anticipation of execution of lease, B let into possession — B erecting substantial structures with knowledge and encouragement of S—No permanent lease executed —Suit by S for ejectment in 1940 when B's right to get specific performance was barred by limitation—B held not entitled to compensation for structures erected but was entitled to remove the materials under S. 108 (h), T. P. Act.)

1944 Pat 30 (35) [AIR V 31] : 22 Pat 554 (DB). (Where the Act contains a specific provision, as, for instance, with regard to things attached to the earth, the provisions of the Act must apply and there is no room for the application of equitable principles — Application of S. 51 by analogy in the case of lessor and lessee was not permissible — 27 Cal 570, Rel. on.)

[*See also* 1957 Pat 331 (333) [AIR V 44 C 105] (DB). (Monthly tenant building structure on land under belief that he is permanent tenant— On ejectment, his rights are governed by S. 108 (h) and not by S. 51 — Equitable principles not allowed to defeat statute.)]

Section 51 — Note 23

1. 1920 Sind 31 (32) [AIR V 7] : 14 Sind L R 12 (DB).

[*See also* ('06) 2 Nag L R 34 (10). (Owner need not under this section, be aware of his rights, as is necessary in the case of acquiescence.)]

perty under a defective title. There is no question, under this section, of any *estoppel* against the owner of the property by reason of any conduct of his.(2) As has been seen already, the section rests on the principle that if the conduct of the transferee has been *bona fide*, the owner will not be allowed to enrich himself at the transferee's expense and will consequently have to *compensate* him for the improvements.(3) The owner's right to his property is in no way affected and the claim for compensation for improvements is no answer to the ejectment itself of the transferee.

The doctrine of acquiescence, on the other hand, is a *phase of the doctrine of estoppel* and has reference only to the conduct of the owner under particular circumstances. The effect of acquiescence is to *affect* the right of the owner to his property in whole or in part according to the nature of the right violated by the wrongdoer and acquiesced in by the owner. Thus, these effects may be stated as follows :

(1) If the wrongdoer acted on the belief that he was the *owner* of the property and this was acquiesced in by the true owner, the latter cannot subsequently be allowed to assert, as against the wrongdoer that, he is the true owner. In other words, the true owner would lose his property.(4)

(2) If the wrongdoer acted on the belief that the true *owner* gave him a licence to do the act and intended to allow him to enjoy the fruits of his expenditure in building on the land, and this was acquiesced in by the true owner, the latter cannot subsequently claim any relief inconsistent with the assumption that a licence had been granted.(4a) Inasmuch as a licensee cannot be ejected without payment of compensation, the true owner must, if he wishes to eject the wrongdoer, pay him compensation for the structures erected by him.(5)

(3) If the wrongdoer has acted in the belief that he was entitled under a 'pottah' from the plaintiff to build houses on the land and the landlord has acquiesced in it, he cannot thereafter sue to have the houses removed.(6)

(4) If the wrongdoer, being a tenant, has acted in the belief that he is a *permanent* tenant and this has been acquiesced in by the landlord, the latter cannot sue to evict the tenant on the ground that he is not a permanent tenant.(7)

2.† 1929 All 12(14) [AIR V 16]: 51 All 454(DB).

3. See Note 1.

4. 1929 Oudh 292 (293) [AIR V 16].
1925 Oudh 258 (260) [A I R V 12] : 28 Oudh Cas 114.
1920 Lah 176 (178) [AIR V 7] : 56 Ind Cas 874.
('05) 27 All 338 (341) (DB). (Per Aikman J.)

4a. ('81) 1881 All W N 97 (97) (DB).

5. 1931 Nag 158 (159) [AIR V 18] : 27 Nag L R 183.
1921 Nag 167 (168) [AIR V 8].
[*See also* 1934 Oudh 178 (179) [A I R V 21] : 9 Luck 538. (Wrongdoer constructing road in belief that he had possession from the owners —Acquiescence by owners — Latter cannot sue for possession.)]

6. 1927 All 544 (545) [AIR V 14]. (Prohibition against erecting a new building — Such clause does not preclude the alteration of a kachcha house into a pakka one.)
1916 All 315 (315, 316) [AIR V 3].
✠('05) 29 Bom 580 (607, 611) (DB).
('76) 25 Suth W R 211 (212) (DB).
[*See also* ('04) 1904 All W N 70 (70). (Person building on land after obtaining permission from Municipality to whom, he believed, the land belonged — Acquiescence by owner — Person cannot be compelled to remove the building.)
('28) 112 Ind Cas 609 (610) (All). (Transfer of a house by tenant — Erection of pucca house by transferee — Acquiescence by manager of zamindar amounts to acquiescence by zamindar.)]

7. ✠1925 P C 146 (149) [AIR V 12] : 52 Ind App 178 : 4 Pat 707.
†1929 Cal 101 (104, 107) [AIR V 16]: 55 Cal 1090 (DB).

(5) If the wrongdoer, has acted in the belief that he is a *tenant* and this has been acquiesced in by the owner, the latter cannot evict the wrongdoer as a trespasser.(8) The wrongdoer can be evicted only after the termination of the lease and he can, under S. 108 remove the materials of any construction which he had erected on the land.

In certain cases,(9) where a tenant or other person holding an interest in land made certain improvements on the land believing himself to be entitled to a higher interest, or believing that he would be granted a certain interest in the land by the owner, and the owner acquiesced in it, it has been held that if the owner wished to eject the person from the land, he should *compensate* him for the improvements.

The decisions discussed above require reconsideration in view of the Privy Council decision in *Ariff* v. *Jadunath Majumdar*.(10)

(See Note 22).

24. **No acquiescence after an act is done.**—As has been seen already, the doctrine of acquiescence applies only to the conduct of the owner of a right *while a violation of such right is in progress*. Where without the knowledge of the owner a right has been violated, the right of the owner to sue in respect of such violation is not affected by his *subsequent* conduct.

As Thesiger, L. J., observed in *De Bussche* v. *Alt*(1):

> "When once the act is completed, without any knowledge or assent upon the part of the person whose right is infringed, the matter is to be determined on very different legal considerations. A right of action has then vested in him, which, at all events as a general rule, cannot be divested without accord and satisfaction, or a release under seal. Mere submission to the injury for any time short of the period limited by statute for the enforcement of the right of action cannot take away such right, although under the name of *laches* it may afford a ground for refusing relief under some particular circumstances; and it is clear that even an express promise by the person injured, that he would not take any legal proceedings to redress the injury done to him, could not by itself constitute a bar to such proceedings, for the promise would be without consideration, and therefore not binding."(2)

25. **Owner, if can be made to pay compensation in the absence of acquiescence.**—According to the English law rule, stated in *Ramsden* v. *Dyson*(1) the possessor of the legal right is entitled, in the absence of acquiescence on his part, to claim possession of the property from the wrongdoer with all the improvements effected by him. As has been stated in Note 22, this rule has been followed in this country only subject to the exception that the wrongdoer is allowed to remove the materials of any construction which he may have erected on the land. As a general rule the wrongdoer cannot claim any *compensation* for the improvements made by him.(2) But if he has acted *bona fide* believing that he has a right to build or improve

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8. (1748) 26 E R 1198 : 3 Atk 692, Stiles v. Cowder.

9. 1933 Cal 612 (613, 614) [AIR V 20].
('97) 21 Bom 749 (754) (DB).
('89) 12 Mad 320 (323) (DB).

10. 1931 P C 79 (82) [AIR V 18] : 58 Cal 1235 : 58 Ind App 91.

Section 51 — Note 24

1. (1878) 47 L J Ch 381 (389) : 8 Ch D 286.

2. *See also* 1942 Nag 59 (60) [A I R V 29] : ILR (1942) Nag 232. (27 Bom 515 at p. 532, *Foll.*)
1927 Nag 180 (183) [AIR V 14].
1925 Oudh 258 (260) [AIR V 12] : 28 Oudh Cas 114.

Section 51 — Note 25

1. (1865) 1 H L 129 (170, 171) : 149 R R 543.

2. 1918 Mad 419 (419) [AIR V 5] (SB).
1916 Mad 220 (221, 222) [AIR V 3] : 38 Mad 710 (FB).
1939 Mad 247 (250) [AIR V 26].
1935 Bom 219 (221, 222) [AIR V 22] (DB).
1935 Cal 541 (544) [AIR V 22] : 62 Cal 492.
1923 All 11 (11) [AIR V 10].
1920 Pat 109 (110) [AIR V 7].
1916 L B 81 (83) [AIR V 3] : 8 L B R 433 (DB).

the land, there arises an equity in his favour which will entitle him to claim compensation for the improvements though there has been no acquiescence on the part of the true owner.(3) This will be on the principle on which this section is based namely that a man cannot enrich himself at the expense of another.

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52. During the [a][pendency] in any Court having authority [b][c][within the limits of India excluding the State of Jammu and Kashmir] or established beyond such limits] by [d][the Central Government [e][* * *]], of [f][any] suit or proceeding [g][which is not collusive and] in which any right to immoveable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.

Transfer of property pending suit relating thereto.

[g][*Explanation.*—For the purposes of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceeding in a Court of competent jurisdiction, and to continue until the suit or proceeding has been disposed of by a final decree or order, and complete satisfaction or discharge of such decree or order has been obtained, or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force.]

a. *Substituted* for "active prosecution" by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), S. 14.

b. *Substituted* for "in the Provinces or established beyond the limits of the Provinces" by A.L.O., 1950 [26-1-1950].

c. *Substituted* for "within the limits of Part A State and Part C States" by the Part B States (Laws) Act, 1951 (III of 1951), S. 3 and Schedule [1-4-1951].

d. *Substituted* for "the Governor-General in Council" by A. O., 1937 [1-4-1937].

e. The words "or the Crown Representative" were *omitted* by A. C. A. O., 1948 [23-3-1948].

f. *Substituted* for "a contentious" by Act XX of 1929, S. 14.

g. *Inserted ibid.*

1915 Lah 235 (236) [AIR V 2] (DB).
('06) 2 Nag L R 4 (5, 7).
('01) 5 Cal W N 846 (858) (DB).
('89) 12 Mad 320*n* (324*n*, 325*n*) (DB).
('02) 6 Cal W N 134 (140) (DB).
('98) 22 Bom 1 (16). (17 Bom 736 and 18 Bom 66 referred to.)
('66) 1866 Pun Re No. 48, p. 65 (66).
(1900) 27 Cal 570 (586) (DB).
('03) 27 Mad 211 (222) (DB).
('96) 20 Bom 1 (6, 7) (DB).
('94) 16 All 328 (332).
('87) 10 Mad 112 (114) (DB). (Case before T. P. Act—Decided on principle of Hindu law.)
('10) 37 Mad 1 (13) (DB).

3. 1926 Mad 314 (316) [AIR V 13].

1920 Bom 87 (87, 88) [AIR V 7] : 44 Bom 950 (DB). (Compensation was granted on the special equity arising from the facts of the particular case.)
1916 Lah 239 (244) [AIR V 3] (DB). (Do.)
('78) 3 Cal L R 194 (196).
1915 Lah 305 (306) [AIR V 2].
1914 Mad 84 (85) [AIR V 1] (DB).
('02) 29 Cal 871 (884) (DB). (No bona fide belief proved—Compensation was not awarded.)
[*See also* 1949 All 757 (761) [AIR V 36 C 282] : ILR (1950) All 606. (Bona fide improvement by trespasser—Entitled to enjoy usufruct of trees or improvement — Owner may claim compensation for use and occupation of land but not price of fruit or compensation for improvement.)]

State Amendments

GUJARAT

In its application to the State of Gujarat, the amendments made in section 52 are the same as those of Maharashtra.

MAHARASHTRA

In its application to the pre-Reorganisation State of Bombay—

(1) the Transfer of Property and the Indian Registration (Bombay Amendment) Act, 1939 (Bom. XIV of 1939) shall apply to notices in respect of suits or proceedings which relate to immovable properties situate wholly or partly in the [Greater Bombay][a] with effect from such date as may be directed by the State Government in this behalf by notification in the Official Gazette :

Provided that the State Government may by similar notification direct that the provisions of the said Act shall apply to such notices relating to immovable properties situate wholly or partly in such other area as may be specified in the said notification.

a. *Substituted* for "City of Bombay" by Bom. Act XVII of 1945, S. 9 and Sch. E read with Bom. Act LVII of 1956, S. 3.

(2) section 52 shall be *renumbered* as sub-section *(1)* of that section, and

(i) in sub-section *(1)* so renumbered after the word "question", the words and figures "if a notice of the pendency of such suit or proceeding is registered under section 18 of the Indian Registration Act, 1908", and after the word "property" where it occurs for the second time the word "after the notice is so registered," shall be *inserted*; and

(ii) after the said sub-section *(1)* so *renumbered* the following shall be *inserted*, namely :—

"*(2)* Every notice of pendency of a suit or a proceeding referred to in sub-section *(1)* shall contain the following particulars, namely :—

(a) the name and address of the owner of immoveable property or other person whose right to the immoveable property is in question ;

(b) the description of the immoveable property the right to which is in question:

(c) the Court in which the suit or proceeding is pending ;

(d) the nature and title of the suit or proceeding ;

(e) the date on which the suit or proceeding was instituted."

— Bom. Act XIV of 1939, Ss. 2 and 3 [15-6-1939].

(3) "The provisions of the Transfer of Property and the Indian Registration (Bombay Amendment) Act, 1939 (Bom. XIV of 1939) which amend the Transfer of Property Act, 1882, in its application to the pre-Reorganisation State of Bombay are hereby extended to, and shall be in force in that part of the State of Bombay to which they did not extend immediately before the commencement of this Act [namely, the Transfer of Property (Bombay Provision for Uniformity and Amendment) Act, 1959]; and the Transfer of Property Act, 1882 shall, from the commencement of this Act, be deemed to be amended accordingly also in that part of the State."

— Bom. Act LVII of 1959, S. 3 [14-10-1959].

(4) The provisions of Bom. Act 14 of 1939 were extended to Shahada, Nandurbar and Taloda Talukas of West Khandesh District and Dohal Taluka and Jhalod Mahal of Panch Mahal District (now in Gujarat) by the Bombay Extension of Laws to Non-scheduled (partially excluded) Areas Act 1954 (LXVIII of 1954), S. 2 (1) [15-11-1954].

Synopsis

1. Scope of the section.
2. Applicability of section.
3. This section and S. 51.
4. This section and res judicata.
5. This section and Government grants.
6. This section and S. 41. See Note 16 on Section 41.
6a. This section and S. 100.
7. Rights existing before suit not affected.
8. "During the pendency."
8a. "Suit or proceeding." See Note 12.
9. Proceeding must be pending before a Court.
10. Pendency of suit when commences.
11. Pendency of suit, how long continues.
12. Pendency of proceeding when commences and how long it continues.
13. "Which is not collusive."

14. Right to immovable property must be directly and specifically in question.
15. Applicability of doctrine of lis pendens to movable property.
16. Only property in litigation cannot be transferred.
17. Administration suit.
18. Mortgage suits.
19. Partition suits.
20. Suits for maintenance.
21. Pre-emption suit.
22. Suit for establishing will.
23. Suit for cancellation of trust deed.
24. Suit for specific performance of contract.
25. Winding up proceedings.
26. Suits for declaration of title.
27. "Transferred or otherwise dealt with."
28. Transfer executed before suit.
29. Transfer executed before but registered after suit.
30. Transfers by operation of law.
31. Transfer by or in execution of decree or order.
32. Compulsory sales for recovery of Government dues.
33. Sale under S. 88 of the Criminal Procedure Code.
34. Transfer by permission of Court.
35. "So as to affect the rights of."
36. "Any party."
37. "Any other party"—Co-defendants.
38. "Any decree or order."
39. Lease pendente lite.
40. Transferee pending suit is representative of transferor — Party within S. 47, Civil Procedure Code.
41. Injunction on party to suit not to transfer.
42. Subsequent reversal or modification of decree or order, how far affects sale in execution of such decree, or the assignment of such decree.
43. Registration of lis pendens.

1. Scope of the section. — This section is an expression of the principle of the maxim *pendente lite nihil innovetur* (pending a litigation nothing new should be introduced)(1) and provides that *pendente lite*, neither party to the litigation, in which any right to immovable property is in question, can alienate or otherwise deal with such property so as to affect his opponent.(2) It is intended to protect the parties to a litigation against alienations by their opponent during the pendency of the suit.(3) The law of *lis pendens* is an extension of the law of *res judicata* and makes the adjudication in the suit binding on alienees from parties pending suit, just as much as the law of *res judicata* makes the adjudication binding on the parties themselves and on alienees from them *after* the decree.(4)

The doctrine of *lis pendens* has been recognized in England from very ancient times.(5) But the theory on which it was rested was not clearly settled until the decision in *Bellamy* v. *Sabine*(6) in 1857.

In *Worsley* v. *The Earl of Scarborough*(7) decided in 1746 the Lord

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Section 52 — Note 1

1. 1932 P C 57 (60) [AIR V 19]: 59 Ind App 138: 54 All 189.
1965 Punj 415 (420) [A I R V 52 C 133] : I L R (1965) 2 Punj 97 (FB).
('59) 38 Pat 389 (421, 422) (DB).
1957 Pat 729 (730, 731) [A I R V 44 C 218] : 36 Pat 1139 (DB).
1943 Cal 227 (230) [AIR V 30] (DB).
1939 Bom 403 (404) [AIR V 26]. (Doctrine applies to a suit for maintenance by a Hindu widow claiming a charge on specific property and if a decree creating a charge is passed.)

2. 1965 Punj 415 (420) [AIR V 52 C 133] : ILR (1965) 2 Punj 97 (FB).
1957 Pat 729 (731) [AIR V 44 C 218] : 36 Pat 1149 (DB).
1957 Pat 408 (413) [AIR V 44 C 122] (DB).
('50) 1950 Trav-Co L R 23 (29) (DB).
('26) 98 Ind Cas 1039 (1042) (DB) (Oudh).

3. 1918 Mad 578 (579) [A I R V 5]: 41 Mad 458 (SB).
1959 Punj 490 (496) [AIR V 46 C 150].
1957 Pat 729 (731) [A I R V 44 C 218] : 36 Pat 1139 (DB).
1915 Cal 536 (538) [AIR V 2] (DB).

4. 1918 Mad 578 (580) [AIR V 5] : 41 Mad 458 (SB). (Section applies to auction sale as well.)
1959 Punj 490 (496) [AIR V 46 C 150].
1957 Pat 729 (731) [A I R V 44 C 218] : 36 Pat 1139 (DB).

5. (1687) 23 E R 585 (585) : 1 Vern 459, Self v. Madox.
(1728) 24 E R 825 (825) : 2 P Wms 482, Sorrell v. Carpenter.
(1832) 58 E R 329 (335) : 5 Sim 247, Landon v. Morris.

6. (1857) 44 E R 842 : 26 L J Ch 796.

7. (1746) 26 E R 1025 (1025) : 3 Atk 392.

Chancellor rested the doctrine on 'implied notice' to the purchaser of the pending litigation. He observed as follows :

> ". . . . for as it is a transaction in a sovereign Court of Justice, it is supposed all people are attentive to what passes there, and it is to prevent a greater mischief that would arise by peoples' purchasing a right under litigation, and then in contest."(8)

In *Bishop of Winchester* v. *Paine*(9) decided in 1805 Sir William Grant rested the doctrine on general convenience and not on any implied notice. He observed as follows :

> "Ordinarily, it is true, the decree of the Court binds only the parties to the suit. But he, who purchases during the pendency of the suit, is bound by the decree, that may be made against the person, from whom he derives title. The litigating parties are exempted from the necessity of taking any notice of a title, so acquired. As to them it is as if no such title existed. Otherwise, suits would be indeterminable: or which would be the same in effect, it would be in the pleasure of one party, at what period the suit should be determined. The rule may sometimes operate with hardship upon those, who purchase without actual notice: yet general convenience requires its adoption; and a mortgage, taken *pendente lite*, cannot be exempted from its operation."

The leading case on the subject is *Bellamy* v. *Sabine*(10) decided in 1857. The Lord Chancellor (Lord Cranworth) observed :

> "It is scarcely correct to speak of *lis pendens* as affecting a purchaser through the doctrine of notice, though undoubtedly the language of the Courts often so describes its operation. It affects him not because it amounts to notice, but because the law does not allow litigant parties to give to others, pending the litigation, rights to the property in dispute, so as to prejudice the opposite party."

> "Where a litigation is pending between a Plaintiff and a Defendant as to the right to a particular estate, the necessities of mankind require that the decision of the Court in the suit shall be binding, not only on the litigant parties, but also on those who derive title under them by alienations made pending the suit, whether such alienees had or had not notice of the pending proceedings. If this were not so, there would be no certainty that the litigation would ever come to an end."

After referring to certain cases which were to the effect that *lis pendens* was implied notice to all the world, his Lordship continued :

> "The language of the Court in these cases, as well as in *Worsely* v. *The Earl of Scarborough*,(11) certainly is to the effect that *lis pendens* is implied notice to all the world. I confess, I think that is not a perfectly correct mode of stating the doctrine. What ought to be said is, that *pendente lite*, neither party to the litigation can alienate the property in dispute so as to affect his opponent. The doctrine is not peculiar to Courts of Equity."

Turner, L. J., in the same case observed that the doctrine rested not on any peculiar tenets as to implied or constructive notice but

> "upon this foundation that it would be plainly impossible that any action or suit could be brought to a successful termination if alienations *pendente lite* were permitted to prevail."

See also the undermentioned cases(12) arising in this country following the

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8. *See also* (1862-63) 1 Hyde 160 (168).
(1871) 15 Suth W R 372 (374). (If a purchase is made of property in litigation while such litigation is actually going on, the purchaser is affected in the same manner as if he had notice of the dispute, though in point of fact he had no express notice or actual knowledge of the circumstances.)

9. (1805) 32 E R 1062 (1063, 1064) : 8 R R 131.

10. (1857) 1 De G & J 566 (578) : 44 E R 842 (847, 848).

11. (1746) 26 E R 1025 (1026) : 3 Atk 392.

12. ('07) 29 All 339 (345) : 10 Oudh Cas 314 : 34 Ind App 102 (PC).
1920 Mad 391 (392) [A I R V 7] : 43 Mad 37 (SB).
1946 Lah 142 (144) [AIR V 33 C 31] : ILR (1946) Lah 467 (FB). (Transferee pendente lite is affected though he took the transfer without notice of the lis.)
('05) 29 Bom 435 (447) (FB).
('80) 6 Bom 168 (173) (FB).
1966 Madh Pra 318 (323) [AIR V 53 C 80].
('66) ILR (1966) 1 Mad 538 (547).
1962 Ker 309 (312) [A I R V 49 C 87] : I L R (1962) 2 Ker 55.

same view. The doctrine of *lis pendens* as applied in England was applied in this country even before the enactment of this Act.(13) This section is merely a legislative enactment of the doctrine so applied.(14) The right created by this section is a 'statutory right' and the mere fact that a person has made certain admissions against his interest would not deprive him of the right which the statute gives him. If, however, a person makes certain false statements which mislead the transferee, he will not be allowed by the Courts to take advantage of his own fraud.(15)

The scope of the section was described by Pal, J., of the Calcutta High Court in the undermentioned case(16) as follows:

"The requirements of the section are: (1) the pendency of a suit, (2) non-collusive character of the suit, (3) any right to immovable property being in question in that suit, (a) being in question directly and specifically, (4) the other party (other than the party making the transfer *pendente lite*) having some right under the decree in that suit. The consequence of the doctrine is that the transaction *pendente lite* shall not be allowed to affect the right under the decree."

1962 Madh Pra 34 (35) [AIR V 49 C 16] : I L R (1960) Madh Pra 797 (DB).
1965 Punj 415 (420) [A I R V 52 C 133] : I L R (1965) 2 Punj 97 (FB).
1959 Bom 475 (477) [A I R V 46 C 141] : I L R (1959) Bom 94. (Notice of suit to transferee not essential.)
1957 Pat 729 (731) [AIR V 44 C 218] : 36 Pat 1139 (DB).
1954 Sau 82 (84) [AIR V 41 C 35].
('50) 55 Mys H C R 174 (178) (DB).
1949 Bom 367 (371) [AIR V 36 C 96] : ILR (1949) Bom 480 (DB).
1943 Cal 227 (230) [AIR V 30] (DB).
1937 Bom 244 (251) [AIR V 24] (DB). (Doctrine is not based upon notice, but upon expediency.)
1934 Mad 585 (587) [AIR V 21].
1932 Pat 270 (271) [AIR V 19] : 11 Pat 415 (DB). (Transfer was held good as it was made prior to the person's being impleaded in a property suit.)
1931 Bom 539 (542) [AIR V 18].
1930 Cal 539 (543) [AIR V 17] (DB).
1929 All 943 (945) [AIR V 16] : 52 All 139 (DB). (Subsequent mortgagee paying off prior incumbrance is entitled to claim charge — Doctrine does not apply to such a case—Obiter.)
1929 All 601 (602) [AIR V 16].
1928 Bom 65 (66) [AIR V 15]: 52 Bom 208 (DB).
1927 Bom 93 (95) [AIR V 14] : 51 Bom 37 (DB). (Per Fawcett J.)
1925 Cal 239 (244) [AIR V 12] (DB).
1922 Pat 394 (395) 1 Pat 5 (DB). (It is doubtful as to whether the doctrine applies to movable property.)
('13) 16 Oudh Cas 148 (152) (DB).
('10) 13 Oudh Cas 98 (102) (DB).
('07) 29 All 76 (81).
('07) 9 Bom L R 1173 (1177) (DB). (Effect of the doctrine is not to annul the conveyance but to render it subservient to the rights of the parties to the litigation.)
('06) 1906 Pun Re No. 7, p. 17 (19). (Litigating parties are exempted from taking notice of a title acquired during the litigation.)
('03) 27 Bom 266 (268, 269) (DB). (Rule applies to court-sales.)
('01) 28 Cal 23 (27) (DB).
(1900) 23 All 60 (62) (DB).
('91) 13 All 371 (373) (DB).
('89) 12 Mad 439 (441, 442) (DB).
1889 All W N 91 (92) (DB).
('88) 1 C P L R 19 (22). (Where the period of appeal was only one month, and the appeal was duly filed; held that there was all along active prosecution of the suit within the meaning of the section.)
('86) 9 Mad 92 (96) (DB).
('82) 8 Cal 690 (698) (DB).
('77) 1877 Bom P J 81 (DB).
('74-75) 7 Mad H C R 104 (111) (DB).
('74) 22 Suth W R 547 (547) (DB).
('74) 21 Suth W R 349 (351) (DB).
('74) 11 Bom H C R 24 (28, 29) (DB).
('74) 11 Bom H C R 64 (66, 67).
('72-73) 6 Mad H C R 75 (80) (DB).
('72-73) 6 Mad H C R 234 (238) (DB).
[*See also* 1924 Bom 467 (468) [A I R V 11] (DB).]
See also Note 6a.

13. ('80) 6 Bom 168 (172) (FB).
('80) 2 All 826 (827) (DB).
('78) 4 Cal 789 (792) (DB).
('74) 21 Suth W R 349 (351) (DB).
('74) 22 Suth W R 547 (547) (DB).
('74) 1874 Bom P J 189 (DB).
('74) 11 Bom H C R 139 (143) (DB).
('74) 11 Bom H C R 24 (30) (DB).
('74) 11 Bom H C R 64 (66, 67).
('74-75) 7 Mad H C R 610 (611) (DB). (The doctrine of lis pendens does not depend upon notice.)
('73) 10 Suth W R 469 (473) (DB).
('73) 20 Suth W R 204 (205) (DB).
('71) 8 Bom H C R (AC) 55 (61) (DB).
('72-73) 6 Mad H C R 75 (80) (DB).
('67) 7 Suth W R 225 (226) (DB).
(1862-63) 1 Hyde 160 (167).

14. 1959 Andh Pra 280 (285) [AIR V 46 C 85] (DB).
1931 Oudh 63 (64) [AIR V 18] (DB).

15. ('40) 44 Cal W N 783 (786).

16. 1943 Cal 227 (230) [AIR V 30] (DB).

See also the undermentioned cases to the same effect.(16a)

The broad purpose of this section is to maintain the *status quo* unaffected by the act of any party to the litigation pending its determination. The applicability of the section cannot depend on the matters of proof or the strength or weakness of the case on one side or the other in *bona fide* proceedings. To apply any such test is to misconceive the object of the enactment.(17)

The limitation imposed by this section on the right to dispose of property which is subject-matter of litigation is not violative of Arts. 19 and 31 of the Constitution of India.(18)

2. Applicability of section. — The Act does not apply to the Punjab. This section does not therefore in terms apply to it. But the section is only an enactment of a general principle of law and therefore the general principles underlying the section have been applied in the Punjab.(1) See also the undermentioned cases.(2) The principle of this section applies to agricultural leases also.(3)

The effect of S. 36 (2) of the Bengal Money-lenders Act (10 of 1940) is to preclude the doctrine of *lis pendens* from applying in so far as it concerns restoration of possession of properties sold by the decree-holder *pendente lite*.(4)

3. This section and section 51. — In *Velusamy Naicker* v. *Bommachi Naicker*(1) it was observed by the High Court of Madras that a *party* to a pending litigation is not entitled to claim any compensation for improvements made by him *pendente lite* with full knowledge of the risk he runs in doing so. In *Moti Chand* v. v. *British India Corporation Ltd.*,(2) where the *transferee pendente lite* made improvements pending litigation, it was held by the Allahabad High Court that such transferee had no right to claim any compensation from the decree-holder who ousted him under the decree. The view was rested on the principle enunciated by that Court in *Shafiq* v *Samiulla*,(3) where it was observed that S. 52 was a special section and S. 41 a general provision and, in the case of a conflict between the two, the special section must prevail over the general. The Kerala High Court has held that S. 51 is controlled by this section.(4)

16a. 1962 Madh Pra 34 (35) [AIR V 49 C 16] : ILR (1960) Madh Pra 797.
1957 Pat 729 (731) [AIR V 44 C 218] : 36 Pat 1139 (DB).

17. 1948 P C 147 (149) [AIR V 35 C 39] : 75 Ind App 165 : I L R (1949) 1 Cal 234. (Where a suit ends in a compromise decree, if the section otherwise applies to the case its applicability will not be affected by the fact that the suit was based on an instrument which required registration but which was not registered — AIR 1943 Cal 227, Confirmed.)
1957 Pat 729 (731) [AIR V 44 C 218] : 36 Pat 1139 (DB).

18. 1967 Raj L W 231 (236).

Section 52 — Note 2

1. 1930 Lah 356 (357) [AIR V 17] : 11 Lah 258 (FB).
('03) 1903 Pun Re No. 80 p. 345 (349) (FB).
('26) 96 Ind Cas 450 (451) (Lah).

2. 1956 Trav-Co 147 (151) [AIR V 43 C 55] : ILR (1955) Trav-Co 823 (FB). (Though T. P. Act was not on the statute book of Travancore the rules of S. 52 were being enforced by the Courts in that area.)
1951 Trav-Co 187 (188) [AIR V 38 C 73] (DB). (Principles underlying S. 52 apply in Travancore-Cochin, though Act does not.)
('51) ILR (1951) Trav-Co 570 (574) (DB). (Though the Transfer of Property Act is not law in Travancore its principles have invariably been adopted by Courts in that State when questions covered by its provisions came up for decision.)
1942 Pesh 43 (45) [AIR V 29].

3. ('55) ILR (1955) Madh B 416 (420).
1949 All 257 (260) [AIR V 36 C 101] : ILR (1949) All 449.

4. ('53) ILR (1953) 1 Cal 101 (104).

Section 52 — Note 3

1. ('13) 21 Ind Cas 219 (221) (DB) (Mad).

2. 1932 All 210 (214) [AIR V 19] (DB).

3. 1929 All 943 (945) [AIR V 16] : 52 All 139 (DB).

4. ('58) 1958 Ker L T 557 (558).

4. This section and res judicata.—As seen in note 1, the law of *lis pendens* is an extension of the law of *res judicata* and makes the adjudication in the suits binding on alienees from parties pending suit. This section however cannot prevail against the rule of *res judicata*. When there is an apparent conflict between the rule of *lis pendens* and the bar of *res judicata* the latter will prevail.(1a)

X mortgaged certain property to *A* on 29th June 1909. *A* filed a suit on the mortgage in 1920 and obtained a decree in 1922, and on 7th November of that year purchased the property in execution of his decree. Meanwhile, on 28th October 1920, *X* mortgaged the property to *B*. *B* sued on 17th July 1924 on his mortgage making *A* a party to the suit. Nothing was alleged in derogation of *A's* right to priority under his mortgage. *B* obtained a decree in 1924 and purchased the property in execution of his decree in 1926. The question was, as between *A* and *B*, who had the better title. It was held that although the mortgage in favour of *B* was made pending *A's* mortgage suit and was therefore vitiated by *lis pendens*, nevertheless, if *A* was bound to have raised a plea as to his priority rights, and did not raise it, the rule of *res judicata* would prevailed over the rule of *lis pendens*, but in view of the fact that *A's* priority right was not questioned in *B's* suit, it was held that he was not bound to have the plea, that the rule of *res judicata* did not apply, and that therefore *A* was entitled to the property in priority to *B*.(1)

5. This section and Government grants. — A "Government grant" within the meaning of the Government Grants Act, 1895, is not governed by any of the provisions of this Act and is consequently not governed by this section also. But every transfer made by a Government officer is not necessarily a "Government grant" within the meaning of that Act. *A* lease granted by a Government Officer in charge of a 'khas mahal' is not a "Government grant" and consequently if such lease is made pending a a suit in respect of such property, the doctrine of *lis pendens* would apply to such lease.(1)

6. This section and Section 41.—See Note 16 on Section 41.

6a. This section and section 100. — Where in a suit for maintenance the plaintiff seeks a charge over the property and obtains a decree creating a charge over the property but the defendant transfers the property for consideration to a stranger during the pendency of the suit and before the passing of the decree, can the transferee plead that the charge created by the decree subsequent to the transfer in his favour cannot be enforced against the property in his hands on the ground that he is a transferee for valuable consideration and without notice of the charge and therefore protected under S. 100 of the Transfer of Property Act? No, the transferee cannot claim such protection. The reason is that the provisions of S. 100 would not apply to a case of transfer during the pendency of a litigation. That section is a general provision relating to a charge and provides that a transferee after the charge would be affected only if he has notice of the same. It does not provide as to what might happen if the transfer takes place befores the charge is created. Such a case when it happens pending

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Section 52 — Note 4

1a. ('51) ILR (1951) Trav-Co 32 (39). (1934 Cal 552 [AIR V 21], Rel. on.)

1949 Bom 367 (373) [AIR V 36 C 96]: ILR (1949) Bom 480 (DB). (Once a judgment is duly pronounced by a competent Court in regard to the subject-matter of the suit in which the doctrine of lis pendens applies that decision is res judicata and binds not only the parties thereto but also the transferees pendente lite from them.)

1. 1934 Cal 552(553) [AIR V 21]:61 Cal 494(DB).

Section 52 — Note 5

1. 1935 Cal 746 (747) [AIR V 22] : 63 Cal 523 (DB).

the suit covered by S. 52 under which the transfer cannot take place to the detriment of the person in whose favour the charge is created.(1) When a decree creating a charge and providing for its execution is passed, it does not put an end to the suit. The *lis* in such a case continues so long as the maintenance is due under the decree. Hence a transfer of property over which a charge is created is affected by the doctrine of *lis pendens* even though the transfer is after the decree, if the properties remain charged. The transferee would be bound by the charge whether he takes it with or without notice.(2) [See also Note 20 and S. 100 Note 28.]

7. Right existing before suit not affected. — The doctrine of *lis pendens* does not operate so as to defeat any right existing before the date of the suit.(1) Thus

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Section 52 — Note 6a

1. ('59) 1959 Andh L T 509 (510).

1959 Bom 475(477) [AIR V 46 C 141]:ILR (1959) Bom 94. (A I R 1927 Mad 502, Diss. from.)

('58) 62 Cal W N 288 (290).

1953 Mad 71 (72) [AIR V 40 C 23] (DB).

1945 Mad 126(127) [AIR V 32] : ILR (1945) Mad 726 (DB). (Section 100 of the T. P. Act as amended in 1929, does not override S. 52, and cannot be read without regard to what is said in S. 52.)

1944 Bom 191 (193) [AIR V 31] : ILR (1944) Bom 274 (DB).

[*See also* 1959 Bom 269 (271) [AIR V 46 C 83] : ILR (1959) Bom 266. (Charge decree obtained in money suit by consent of parties can be enforced against purchaser pendente lite.)

1955 Trav Co 234 (235) [AIR V 42 C 97]. (The principle of lis pendens applies not only to a case where the plaintiff seeks to enforce a pre-existing charge, but also to a case in which the plaintiff asks for the grant of a charge.)]

[But see ('48) 53 Mys H C R 219 (240) (FB). (A charge created by the decree in a suit for maintenance does not relate back to the institution of the suit for maintenance claiming charge so as to affect alienation of property after the filing of the suit but before the decree is made.)]

2. 1951 All 141 (151, 153) [AIR V 38 C 16] : ILR (1953) 1 All 284 (FB). (AIR 1939 All 687, Overruled.)

1930 Mad 988 (990) [AIR V 17] (DB). (Where a person purchases property from one of the parties after an order creating a charge is passed in an inter-pleader suit the transfer is pendente lite.)

1945 Mad 350 (351) [AIR V 32]. (There is no conflict between Ss. 52 and 100, S. 52 expressly provides for all cases of decrees in suits relating to immovable property, whether they involve a mortgage, or a charge or recovery of possession, and provides that no party to the suit can transfer or otherwise deal with the property so as to affect the rights of any other party thereto under any decree or order which may be made therein except under the authority of the Court. It makes no exception in favour of a bona fide transferee for value without notice.)

See also Notes 11 and 20.

Section 52 — Note 7

1. 1967 S C 1390 (1395) [AIR V 54 C 291] : (1967) 2 S C W R 71 : ILR 46 Pat 870. (Lease by mortgagor before institution of suit by mortgagee for sale—Lessee acquires interest in right of redemption and is entitled to redeem — Lessee not made party to suit by mortgagee — Decree in suit does not bind him and his right of redemption will continue to exist.)

1958 S C 838 (844) [AIR V 45 C 114] : 1959 SCR 878 : ILR (1958) Punj 2225.

('63) ILR (1963) Bom 246 (254) (DB).

('63) ILR (1963) Madh Pra 702 (712). (Where the earlier contractees had a superior right of specific performanee against the subsequent contractees, the sale deed taken by them privately during the pendency of the subsequent contractee's suit would not be affected by the decree in favour of the subsequent contractees.)

1958 Andh Pra 722 (723) [AIR V 45 C 212] : ILR (1958) Andh Pra 595 (DB).

1957 Punj 238 (243) [AIR V 44 C 89] (DB).

1951 Pat 613 (615) [AIR V 38 C 174].

('45) 50 Mys H C R 258 (DB).

1950 Orissa 210 (211) [AIR V 37 C 37] : I L R (1950) Cut 486 (DB).

1943 Cal 577 (584) [AIR V 30].

1937 All 108(110) [AIR V 24] (DB). (Final decree in a mortgage suit passed before a suit for redemption was filed—Lis pendens does not apply.)

† 1934 Mad 585 (587) [AIR V 21]. (Decree in favour of prior mortgagee to which subsequent mortgagee was not a party—Decree in suit on second mortgage — Sale to A in execution of second mortgage decree — Then sale to B in execution of prior mortgage decree — Sale to A not affected by *lis pendens* though it was during the pendency of a suit on prior mortgage —The reason is that if rights are not affected, the remedy to enforce those rights must also continue.)

a mortgagee who has a power of sale under S. 69 can exercise his power even during the pendency of a suit for redemption.(2) An attaching creditor who is entitled to redeem a mortgage does not lose this right by reason of the fact that he gets the property sold in execution of his decree after a suit is instituted on the mortgage.(3) A sale *pendente lite* in execution of a decree on a mortgage executed before the date of suit will be subject to the doctrine of *lis pendens* and will not affect the rights of the parties under any decree or order passed in the suit. But this will not take away the right of the mortgagee under his mortgage which was executed before the date of the suit. It has been held in some cases(4) that a sale in pursuance of a decree on a mortgage executed before suit is merely a logical result of a transfer which has been made before suit and consequently the doctrine of *lis pendens* does not affect such a sale which is therefore valid and is not affected by any decree or order passed in the suit. A contrary view has also been expressed in the undermentioned cases.(5) It is submitted that the last view is correct. See the Civil Procedure Code, O. 34, R. 1 Note 19 (given in Appendix) as to the effect of a sale in execution of a decree on one mortgage during the pendency of a suit on another mortgage on the same property. As to whether a sale to a person made in recognition of his pre-existing superior or equal pre-emptory rights is affected by doctrine of *lis pendens*, see Note 21.

1931 Lah 435 (436) [AIR V18] (DB). (Do.)
('08) 1908 Pun Re No. 26, p. 144 (145) (DB).
1929 Lah 589 (590) [AIR V 16] (The right of the defendants pre-emptors had accrued before the declaratory suit was instituted and also they had obtained their decree for pre-emption long prior to the institution of this suit; held that the doctrine did not affect their right.)
('12) 16 Ind Cas 779 (779) (DB) (Mad). (Suit by puisne mortgagee — Private purchase pendente lite by prior mortgagee in discharge of his debt —Prior mortgagee disregarding his sale and suing on his mortgage—*Held*, the sale was affected by *lis pendens* but his rights as a mortgagee were intact and he could proceed on the basis of his mortgage.)
('80) 2 All 826 (827) (DB). (Prior mortgage with a stipulation prohibiting subsequent mortgage —Mortgagor subsequently mortgaging the property—Suit by second mortgagee—Sale to prior mortgagee by mortgagor during the suit—*Held* sale is affected by lis pendens but the prior mortgagee's right under the stipulation is not affected.)
[*See also* 1916 Pat 282 (284) [AIR V 3] (DB). (Mortgage in favour of plaintiff—Suit on mortgage and purchase by plaintiff in execution of mortgage-decree — In the meantime property sold to defendant for arrears of revenue — *Held* purchase at revenue sale was subject to plaintiff's mortgage – Interest of original mortgagor having passed at the revenue sale to defendant, purchase at execution sale of mortgage-decree against original mortgagor did not give plaintiff right to possession—Plaintiff held had right to put mortgaged property to sale if defendant failed to redeem.)]

2. 1922 Mad 390 (391) [AIR V 9] : 45 Mad 774. (DB).
('78) 2 Bom 252 (255) (DB).

3. 1932 All 356 (357) [AIR V 19] (DB).
1928 Nag 97 (98) [AIR V 15] : 23 Nag L R 164. (Attaching creditor purchasing equity of redemption pending mortgage suit — Right to redeem under S. 91 existing before the suit—Held that right was not affected by *lis pendens*. Overruled on another point by AIR 1936 Nag 209 (FB).)

4. 1931 All 466 (485) [AIR V 18] : 53 All 1023 (FB). (Per Mukerji, J.)
('48) 53 Mys H C R 219 (240) (FB).
('58) 1958 Ker L T 836 (838, 839).
1957 Ker 48 (50) [AIR V 44 C 30] : ILR (1957) Ker 35 (DB).
1950 Mad 189 (190) [AIR V 37 C 80].
('49) 27 Mys L Jour 61 (69) (DB).
1945 Nag 86 (93) [AIR V 32] : ILR (1944) Nag 852 (DB).
1939 Cal 655 (656) [AIR V 26] (DB). (Mortgage prior to institution of maintenance suit –Mortgage sale taking place during pendency of it— Purchaser is not affected.)
1934 Nag 36 (38) [AIR V 21] : 30 Nag L R 284. (Foreclosure.)
1934 Mad 585 (587) [AIR V 21].
1932 Mad 566 (573) [AIR V 19]:56 Mad 115(DB).
('05) 32 Cal 891 (905) (DB). (Per Mitra J.)
Also see Note 31.

5. †1931 All 466 (480, 481) [AIR V 18] : 53 All 1023 (FB). (Per majority of Full Bench— Mukerji, J., Contra.)
1962 Bom 191 (196) [AIR V 49 C 41]: ILR (1961) Bom 977.
1959 Punj 490 (495, 496) [AIR V 46 C 150].
1943 Cal 577 (585) [AIR V 30]. (Suit by prior simple mortgagee without impleading puisne mortgagee. Puisne simple mortgagee filing suit to which prior mortgagee was a party. During pendency of suit by puisne mortgagee, property was sold in execution of decree of prior mortgagee and was purchased by prior mortgagee. Sale held was affected by *lis pendens*.)
1928 Lah 505 (507) [AIR V 15].

8. "During the pendency."—The words used in the old section were 'during the active prosecution.' This was apparently based on certain decisions of the English Courts that in order that the doctrine of *lis pendens* may apply, the suit should be "kept alive and in activity."(1) But the words led to much uncertainty in the application of the rule and caused a divergence of judicial opinion. Thus, it was held in some cases that if a decree was not executed for a long time it was not "actively prosecuted" within the meaning of this section and that the doctrine did not apply to a sale made after such decree.(2) In other cases a delay in the execution of the decree was held not to affect the right of the decree-holder.(3) In a third class of cases it was held that the active prosecution of a suit or proceeding ended with the decree or final order,(4) though it was recognized that if the decree or order was the inception of further proceedings, the *lis* might continue till final orders were passed in such proceedings.(5) Thus, it was held that a decree in a suit for account did not determine the *lis*.(6) In a fourth class of cases it was held that if an appeal was filed after a delay, there was no active prosecution.(7) It was to remove this uncertainty, the words "active prosecution" were removed and the word "pendency" and the Explanation were substituted.(8) It did not introduce any new rule of law but merely gave legislative sanction to judicial pronouncements in which it had been held that the *lis* continued till the end of the proceedings in execution.(9) The amendment is not retrospective in operation and in cases of transfers before the date of the amendment, the question whether the suit was actually prosecuted must be determined with reference to the law as interpreted by decisions before that date.(10)

Section 52 — Note 8

1. (1831) 39 E R 236 (238, 239) : 9 L J Ch 276, Kinsman v. Kinsman.
('88) 12 Bom 217 (221) (DB).

2. 1960 Ker 98 (100) [AIR V 47 C 46] ILR(1959) Ker 820. (Where a transfer was executed by the defendant on the date of filing the suit, there is no presumption that the filing of the plaint is to be considered as taking place at the earlier period of the day.)
1931 Nag 138 (140) [A I R V 18]. (Suit for specific performance—Decree passed—No execution over two years — Delay being inordinate lis held not to continue.)
('13) 37 Bom 621 (628) (DB). (Decree obtained in 1902 — Alienation in 1906 — Execution proceedings commenced in 1907 — Held, lis not continued.)
('13) 9 Nag L R 155 (157).
[*See also* 1932 Bom 301 (303) [AIR V 19].]

3. ('11) 9 Ind Cas 840 (841) (Cal). (Four years.)
('05) 32 Cal 891 (906) (DB). (Per Mitra, J.)

4. *See* ('05) 2 All L Jour 294 (296) (DB).

5. 1917 Mad 128 (132) [AIR V 4] (SB).
1932 Bom 301 (302) [AIR V 19].
1921 Mad 30 (37) [AIR V 8] : 44 Mad 232 (DB).
('88) 12 Bom 217 (220) (DB).
('98) 22 Bom 939 (942) (DB). (The lis pendens, except in administration suits and suits for an account, and in suits of a similar nature in which the decree is the inception of subsequent proceedings, ends with the decree.)
('98) 1898 Bom P J 386 (DB).
('13) 37 Bom 621 (628) (DB).
[*See also* ('89) 1889 Bom P J 99 (DB). (12 Bom 217, Followed.)]

6. (1746) 26 E R 1025 (1026) : 3 Atk 392, Worsley v. Scarborough (Earl.)
(1842) 59 R R 726 (729) : 2 Dr & War 356, Higgins v, Shaw.
('01) 23 All 331 (334) (DB).

7. 1917 Lah 13 (14) [AIR V 4] (DB). (Cross-objections filed after a delay of two and a half years — Cross-objections whether treated as an appeal or not, plea of *lis pendens* not available as they were filed after delay.)
[*See also* ('11) 12 Ind Cas 849 (850). (Low Bur.) (*Held* that even if the application for review were held to re-open the lis pendens, the applicant was not entitled to the benefit of the right, as he was clearly guilty of laches in not prosecuting his proceeding actively and without remission.)]

8. 1937 P C 260 (261) [AIR V 24] : 31 Sind L R 652. (Question of active prosecution of a suit is one of fact.)
1959 Bom 475 (477) [AIR V 46 C 141) : ILR (1959) Bom 94.

9. ☆1932 All 210 (212, 213) [AIR V 19] (DB).

10. 1944 P C 96 (99) [AIR V 31] : 24 Pat 89 : I L R (1945) Kar (PC) 28. (When the mortgage came into existence before the amendment of 1929 came into force, the doctrine of *lis pendens* applicable to the case is that enacted in S. 52 before it was amended by Act XX of 1929.)
1931 Nag 138 (140) [AIR V 18]. (Decree not executed for two years—*Held*, no active prosecution.)

A party relying on the provisions of this section must establish that his suit was instituted before the execution of the deed of transfer which he is impeaching.(11)

8a. "Suit or proceeding."—See Note 12.

9. Proceeding must be pending before a Court. — The doctrine applies only where the *lis* is pending before a *Court*. A Collector acting under S. 43 of the Madras Marumakkathayam Act (XXII of 1933) is not a Court for the purposes of this section.(1) But a Registrar of Co-operative Societies acting under the Co-operative Societies Act (II of 1912) is a Court and a proceeding before him will operate as a *lis pendens*.(2) A Revenue Court dealing with partition proceedings is a Court and the proceedings will operate as *lis pendens*.(3)

The Court must be one which *has authority within the limits of India* excluding the State of Jammu and Kashmir or is established beyond such limits by the Central Government. A *foreign Court* is not a Court for the purposes of this section.

Thus, the Courts in England and France are foreign Courts.(4) A suit in a foreign Court is, therefore, not *lis pendens*.(5)

The Court contemplated is a Court *competent* to try the suit. Where the Court has *no jurisdiction* to try the suit, a transfer pending such suit cannot operate as *lis pendens* and cannot affect any decrees or orders in such suit.(6) In the undermentioned case(7) it was held that a suit filed on the equity side of the Supreme Court of Calcutta did not operate as *lis pendens* so as to affect a transfer of immovable property in the mofussil inasmuch as the Supreme Court has no jurisdiction over property in the mofussil. The present High Courts have, under their Letters Patents, power to try suits relating to land partly within their jurisdiction and partly without it, provided the leave of the Court is obtained for doing so. When the High Court so acquires jurisdiction to determine the suit, the suit will operate as *lis pendens*.(8) It must be noted that a higher Court cannot be said to have no jurisdiction merely because the suit should, under S. 15 of the Civil Procedure Code, be filed in a Court of a lower grade.(9)

10. Pendency of suit when commences. — The explanation to the section makes it clear that a suit *commences* from the date of the presentation of the plaint in a Court of competent jurisdiction. This is in accordance with the provisions of

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Also see S. 2, Note 5.

[But see 1945 Bom 409 (412) [A'R V 32] (DB). (Section 52 as amended is retrospective — Submitted not good law in view of the Privy Council decision in AIR 1944 P C 96 which is not noticed.)]

Section 52 — Note 9

1 1939 Mad 151 (152) [AIR V 26].

2. 1934 Mad 40 (42) [AIR V 21] : 57 Mad 426.
[*See* 1942 Mad 24 (25) [AIR V 29]. (Madras Co-operative Societies Act, VI of 1932).]

3. 1927 All 679 (680) [A I R V 14] : 50 All 22 (DB).
[*See also* 1968 Orissa 36 (37) [A I R V 55 C 15] : 33 Cut L T 974 : 1968 Cri L J 336. (Principle under the section applies to proceeding before Revenue or a Rent Court.)

1948 Nag 283 (284) [A I R V 35 C 93] : ILR (1948) Nag 324. (Proceedings before a Revenue Court may also operate as *lis pendens* — Even if S. 52 does not apply *proprio vigore* principle underlying it must apply — Case under C. P. Tenancy Act.)]

4. ('84) 8 Bom 571 (574).

5. ('96) 19 Mad 257 (262) (DB). (Suit in the Court at Singapore.)

6. 1953 Trav-Co 573 (574) [AIR V 40 C 223].
1938 Bom 121 (125) [A I R V 25] : ILR (1937) Bom 895 (DB).
[*See also* 1957 Mad 214 (216) [A I R V 44 C 72]. (Section 52 expressly limits the operation of the doctrine of *lis pendens* to suits in respect of immovable properties situated within India and not in territories outside India.)]

7. ('69) 11 Suth W R 554 (555) (DB).

8. 1931 Cal 763 (767) [A I R V 18] : 58 Cal 598 (DB).

9. ('10) 5 Ind Cas 691 (692) (DB) (Cal).
Also see Note 10.

O. 4, R. 1 of the Code of Civil Procedure. The doctrine of *lis pendens* therefore, applies to all alienations made from the date of the plaint itself.(1aa) Accordingly, the doctrine of 'lis pendens' has been held to be applicable to transfers made between the date of the presentation of the plaint and the date of the service of summons.(1a)

It is necessary that the plaint should be presented to the *competent* Court, i. e., competent to try the suit. Where the Court is not competent to try the suit and consequently returns the plaint presented to it for presentation to the proper Court and the plaint is subsequently represented to the competent Court, the suit will be deemed to commence only from the date of such subsequent representation.(1) The observations in the undermentioned cases(2) that the doctrine of *lis pendens* would apply even where the suit is presented in a wrong Court, must be deemed to be overruled by the explanation.(2a) A plaint presented to a Court of a *higher grade* must be taken to be presented to a competent Court, though, by virtue of S. 15 of the Code of Civil Procedure the suit should be instituted in the Court of the lowest grade competent to try it.(3) Consequently, the suit must be deemed to be pending from the date of the presentation of the plaint to the Court of the higher grade, though the plaint is returned by that Court and is subsequently represented in the Court of the lower grade.

Where a plaint is *rejected* for insufficient stamp and is again presented after making good the deficiency, the suit cannot be deemed to be pending from the date of the original presentation.(4) But where the Court instead of rejecting the plaint for insufficiency of stamp, receives the plaint and grants time to make good the deficiency the suit must be deemed to be pending from the date when it is first received.(5) So also where a suit is dismissed for default and is *restored*, it must be deemed to be pending from the date of the original presentation.(6) In the undermentioned case(7) where a transfer was made after the application for restoration and before the order was passed on it restoring the suit, it was, however, held that the order had the effect of restoring the suit from the date of the *application for restoration*.

Section 52 — Note 10

1aa. 1956 S C 593 (597) [AIR V 43 C 103] : ILR (1956) Mys 152 : 1956 S C R 451. (Pauper suit for maintenance and for creation of charge on specified property—Lis commences on the date of plaint and not on the date of decree which creates charge.)

1961 Punj 299 (301) [AIR V 48 C 90]. (Rule of computation contained in explanation applies in Punjab.)

1958 All 24 (25) [AIR V 45 C 7] (DB). (Mortgage suit.)

1957 Pat 729 (731) [AIR V 44 C 218] : 36 Pat 1139 (DB). (The *lis* commences on the date of the plaint and not on the date of the decree.)

1a. 1945 Mad 219 (221) [AIR V 32].
[*See also* 1948 P C 147 (149) [AIR V 35 C 39] : 75 Ind App 165 : I L R (1949) 1 Cal 234. (Transfer effected next day after institution of suit — Nothing to show that transferor was aware of institution of suit — Section held to apply to transfer.)]

1. 1957 Ker 10 (13) [AIR V 44 C 6] : ILR (1957) Ker 5 (DB).

1940 Nag 185 (186) [AIR V 27]: I L R (1941) Nag 652.

1933 Sind 117 (118) [AIR V 20] (DB).

2. 1927 Rang 145 (148) [AIR V 14] : 5 Rang 101 (DB).
('10) 5 Ind Cas 691 (692) (DB) (Cal).

2a. *See* 1957 Ker 10 (13) [AIR V 44 C 6] : ILR (1957) Ker 5 (DB). (1927 Rang 145 [AIR V 14] held not good law after amendment in 1929).

1933 Sind 117 (118) [A I R V 20] (DB). (1927 Rang 145 [AIR V 14] no longer good law.)

3. ('10) 5 Ind Cas 691 (692) (DB) (Cal).
Also see Note 9.

4. 1920 Cal 675 (676) [AIR V 7] (DB).

5. 1943 Bom 27 (30) [AIR V 30]. (Suit for specific performance of contract of sale—Plaint presented on 2nd September 1937 with deficit court-fee — Deficit fee paid with leave of Court on 28th September, 1936 — Attachment before judgment by another creditor of property on 22nd September, 1936 — Held, principle of *lis pendens* applied to the attachment.)

6. See the AIR Commentaries on the Code of Civil Procedure, 1908, 7th (1963) Edn., O. 9 R. 9, Note 1.

1959 Bom 475 (477) [A I R V 46 C 141] : I L R (1959) Bom 94.

7. 1919 Cal 40 (42) [AIR V 6] (DB).

A suit instituted in *forma pauperis* commences from the date when the application for leave to sue as a pauper is made and not when the same is registered as a suit.(8)

11. Pendency of suit, how long continues.—Under the section as it stood prior to the amendment of 1929, there was a difference of opinion as to how long the pendency of a suit continued. On the one hand, it was held that the general rule was that the *lis pendens* ended with the decree(1) except in suits in which the decree was the inception of further subsequent proceedings, e. g., administration suits, suits for account and suits of a similar nature.(2) It was, however, held that the taking of *execution* proceedings *revived* the *lis pendens* and while transfers made after decree and before the taking of execution proceedings were not subject to *lis pendens*,(3) transfers made during the pendency of execution proceedings were affected by the doctrine.(4) On the other hand, it was held that the *lis pendens* continued until the decree was fully executed(5) and consequently that a transfer made after the decree but before execution was taken out was affected by *lis pendens*.(6) An *appeal* was held to be a continuation of the suit(7) so as to make a transfer, made pending the suit or appeal(8) or after the decree and before the appeal was filed,(9) subject to the result of the appeal.

The present explanation introduced in 1929 gives effect to the second of the two conflicting views expressed above(10) and provides that the pendency of a suit continues until the suit is disposed of by a final decree and until such decree is fully executed or becomes barred by limitation.(11) A transfer made—

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8. ('61) 65 Cal W N 701 (705) (DB).
('53) 32 Pat 903 (916) : AIR 1955 N U C (Pat) 231.
1939 Mad 275 (275) [AIR V 26].
1936 Mad 853 (854, 855) [AIR V 23].
('98) 30 All 95 (102, 103) (DB).

Section 52 — Note 11

1. 1925 Cal 23 (25) [AIR V 12] (DB). (In order to constitute *litis pendentia* there must be a continuance of *litis contestatio* and, therefore, if the suit is ended by decree there is no longer any *lis pendens*.)
('98) 22 Bom 939 (942, 943) (DB).
[*See also* ('73) 20 Suth W R 204 (205) (DB). (Case before T. P. Act—Per Glover, J.)]

2. 1931 Mad 120 (122) [AIR V 18]. (Maintenance decree — Transfer in this case was made before the amendment.)
('98) 22 Bom 939 (942, 943) (DB).
('11) 39 Cal 220 (225) (DB). (Suit for possession and mesne profits.)

3. ('13) 37 Bom 621 (625, 629) (DB).

4. ('98) 22 Bom 939 (942, 943) (DB).
('76) 1 Cal 337 (344) (DB).
('98) 1898 Bom P J 38 (DB).
[*See also* ('13) 37 Bom 621 (625) (DB).

5. 1914 P C 96 (99) [A I R V 31] : I L R (1945 Kar (PC) 28 : 24 Pat 89. (A mortgagee executed after a mortgage decree and in the course of execution proceedings of the decree is subject to *lis pendens*.)
1927 Oudh 261(263) [AIR V 14]:2 Luck 496(DB).
('09) 3 Ind Cas 696 (699, 700) (DB) (Cal).

6. 1945 Mad 350 (350) [AIR V 32].
1934 Mad 353 (355) [AIR V 21] (DB).
1931 Mad 120 (122) [AIR V 18]. (Transfer before the amendment of the Act.)
1918 Nag 221 (224) [AIR V 5] : 14 Nag L R 176.

7. 1929 Bom 262 (264) [AIR V 16] : 53 Bom 453 (DB). (3 Bom 214, followed.)

8. ('01) 23 All 60 (63) (DB). (Transfer made pending appeal though at the instance of Court —Doctrine applied.)
('88) 15 Cal 94 (99) (DB). (Transfer pending suit is subject to result to appeal.)
('85) 9 Mad 130 (132) (DB). (Purchase *pendente lite*.)
('84) 6 All 506 (509) (DB). (Do.)
('12) 13 Ind Cas 641 (641) (All). (Pending appeal mortgage was executed.)
[*See also* ('84) 7 Mad 96 (99) (DB). (Pending appeal—Case before the Act.)]

9 1915 Mad 495(498) [AIR V 2]:38 Mad 535(DB).
('08) 31 Mad 268 (270) (DB). (Transfer after decree but before appeal, is affected.]
(1900) 28 Cal 23 (27) (DB).
('88) 1 C P L R 19 (22).
[*See also* ('73) 20 Suth W R 204 (206) (DB). (Case before T. P. Act—Per Mitter, J.)

10. 1945 Mad 350 (350) [AIR V 32].
1934 Mad 353 (355) [A I R V 21] (DB). (The explanation seems to embody the Madras view that the lis in a mortgage suit continues until the actual sale in execution of the decree.)
1931 Mad 120 (122) [AIR V 18].

11. 1959 Ker 67 (71) [A I R V 46 C 28] : I L R (1958) Ker 1266 (FB).

(1) during the pendency of execution proceedings,(12) or of an appeal from the decree,(13) or

(2) between the date of the decree and the date of the execution application, or

(3) between the date of the decree and the date of filing the appeal,(13aa) or

(4) between the date of the death of the original defendant and the expiry of the time prescribed for bringing his legal representative on record;(13a) or

(5) during the continuance in force of a charge created by a decree for maintenance.(13b)

would, under the present explanation, be clearly affected by the *lis pendens*.

The Madras High Court has held that even in the case of a declaratory charge decree the *lis* continues until the possibility of enforcing the charge by a separate suit remains(13c). But the Allahabad High Court is of the view that in the case of declaratory decree not admitting of execution proceedings being taken the *lis* ends with the passing of the decree.(13d)

It was held in a case before the amendment that a cross-objection under O. 41, R. 22 is not an appeal and is not a continuation of the suit for the purpose of *lis pendens*.(14) It is doubtful whether this view is correct in view of the explanation. It was also observed in a case(15) before the amendment that an application for *review* or *revision* cannot be said to be a continuation of the suit so as to attract the operation of the doctrine of *lis pendens*. It is doubtful whether this view also would be correct under the present section. As to the retrospective effect of the amendment of the section in 1929, see Note 8.

1958 All 24 (25) [AIR V 45 C 7] (DB).
1951 All 141 (153) [AIR V 38 C 16] : ILR (1953) 1 All 284 (FB).
1929 Mad 197 (197) [A I R V 16] (DB). (A mortgage suit does not finally come to an end with the passing of a preliminary decree.)
1945 Mad 350 (350) [AIR V 32].
1930 Oudh 362 (364) [A I R V 17] (DB). (The section applies to transfers made during the pendency of execution proceedings also.)
[*See also* 1953 Mad 71 (72) (Pr 8) [A I R V 40 C 23] (DB).
1941 Pat 577 (580) [A I R V 28] : 20 Pat 346 (SB). (Lis pendens extends right to the conclusion of the litigation including the appellate stages and the execution proceedings.)]

12. ('53) 32 Pat 903 (916) : A I R 1955 N U C (Pat) 231.
1949 Pat 304 (307) [A I R V 36 C 87] : 27 Pat 1132 (DB).
1937 Oudh 127 (129) [AIR V 24] (DB).
[*See also* 1934 Mad 40 (43) [AIR V 21] : 57 Mad 426. (Execution of award in Civil Court — Transfer pending execution — S. 52 applies — Even if S. 52 does not in terms apply, the doctrine of *lis pendens* applies.)]

13. 1966 Orissa 98 (102) [AIR V 53 C 40] (DB).
1963 Guj 30 (32) [A I R V 50 C 6]. (Proceeding under O. 33, R. 1, C. P. C. — Question of sufficient means — Property subject matter of previous litigation, appeal from which, still pending — Property cannot be taken into account.)
1959 Ker 67 (71) [A I R V 46 C 28) : I L R (1958) Ker 1266 (FB).
('50) 55 Mys H C R 174 (179) (DB).
1932 All 210 (212) [AIR V 19] (DB). (In a mortgage suit lis continues at least till the passing of a final decree.)

13aa. ('64) ILR (1964) 14 Raj 1120 (1121).
1959 Bom 475 (477) [A I R V 46 C 141] : I L R (1959) Bom 94.

13a. 1945 Mad 219 (221) [AIR V 32].

13b. ('58) 62 Cal W N 288 (290). (Transfer after preliminary decree declaring charge but before final decree.)
1951 Orissa 306 (310) [A I R V 38 C 75] : I L R (1949) 1 Cut 336 (DB).
1945 Mad 350 (351) [AIR V 32].
Also see Notes 6a and 20.

13c. 1950 Mad 396 (396) [AIR V 37 C 178].

13d. 1951 All 141 (153) [AIR V 38 C 16] : ILR (19 3) 1 All 284 (FB).
[*See also* 1957 All 575 (582) [A I R V 44 C 169] (DB). (Where a decree declares an annual allowance to be a charge on the property but does not direct the sale of the property in enforcement of the claim, the transferees will not be subject to the doctrine of lis pendens.)
1917 Lah 13 (14) [AIR V 4] (DB).

15. ('11) 12 Ind Cas 849 (850) (Low Bur.)

12. Pendency of proceeding when commences and how long it continues. — The words *suit or proceeding* show that the word *proceeding* is something different from *suit*. In the Code of Civil Procedure the word *proceeding* has been construed as referring to all proceedings of an *original* nature such as guardianship and probate proceedings.(1) It is conceived that the same meaning will apply to the word *proceeding* as used in this section. Thus, an application under O. 21, R. 58, or under O. 21, R. 100 of the Code of Civil Procedure(2) is a proceeding which will operate as *lis pendens* on transfers made during the pendency thereof. So also an application to file an award in Court.(3)

The proceeding will commence on the making of an application or petition in a Court of competent jurisdiction and will continue till a final *order* is passed in it and complete satisfaction or discharge of such order has been obtained. The same principles as stated in Note 10, regarding the return, representation, etc., of a plaint will apply to a proceeding also.

A claim *suit* under the provisions of O. 21, R. 63 of the Code of Civil Procedure must be regarded as a continuation of the claim proceedings or as a proceeding by way of appeal against the claim order, and the claim proceedings must be deemed to continue until the claim suit is finally disposed of: consequently a transfer executed between the date of the claim order and the claim suit will be affected by *lis pendens*.(4)

In the undermentioned case(5) it was observed that the claim order was not a *final* order within the meaning of this section until, either a suit to contest the order is finally decided or the period of limitation has expired.

In *The Official Assignee of Madras* v. *Ramchandra Aiyar*(6) Ramesam, J., doubted if the pendency of an insolvency petition, by reason of which there is an undischarged insolvent and his properties are vested in the Official Assignee so that they may be utilised for paying off the creditors, can be regarded as a pending litigation for the purpose of applying the doctrine of *lis pendens*.

Amendment proceedings:—An application for amendment is similar to the plaint. Amendment proceedings commence from the date of the presentation of the amendment application and not from the date when the amendment is ordered. The delay caused by the Court in ordering the application ought not to prejudice the parties. Thus, where in a suit for maintenance claiming a charge on property *X*, an application for amendment seeking to include property *Y* is made, an alienation of property *Y* made subsequent to the date of the application but prior to the date on which the amendment is ordered, will be affected by the doctrine of *lis pendens*.(7)

Section 52 — Note 12

1. See S. 141 of the Civil Procedure Code and the A I R Commentaries thereon, 7th (1963) Edn.

2. 1935 Oudh 462 (464) [A I R V 22] : 11 Luck 283 (DB). (Application under O. 21, R. 100.) [But see 1947 Mad 458 (460) [AIR V 34 C 247] : ILR (1948) Mad 415. (Section 52 has no application to a petition under O. 21, R. 100, Civil P. C.)]

3. 1946 Bom 207 (210) [AIR V 33 C 56] : I L R (1945) Bom 885 (DB). (Application to file award granting charge for maintenance is on same footing as plaint in ordinary maintenance suit in which charge is claimed.)

('92) 1892 Bom P J 5 (6) (DB).

4. ('57) 1957-1 Andh W R 285 (288).
1951 Nag 194 (197) [AIR V 38 C 45] : ILR (1951) Nag 241.
†1939 Oudh 178 (179) [AIR V 26] : 14 Luck 543.
'937 Rang 473 (474) [AIR V 24].
1925 Nag 82 (85) [AIR V 12] : 22 Nag L R 67.
†1915 Mad 495(498) [AIR V 2] : 38 Mad 535(DB).

5. 1940 Lah 497 (498) [AIR V 27].

6. 1928 Mad 735 (741) [AIR V 15] : 51 Mad 417 (FB).

7. 1945 Mad 219 (220) [A I R V 32]. (Fact that transferor did not know that property Y was included until the amendment was ordered is of no consequence.)

13. "Which is not collusive." — The section used the words *a contentious suit* before it was amended in 1929. This gave rise to a conflict of opinions as to what exactly was meant by the word *contentious* Prior to the decision of the Privy Council in *Faiyaz Husain* v. *Prag Narain*(1) the following views had been expressed :

(1) a suit becomes contentious *only when the summons* is served on the defendant ;(2)
(2) a suit becomes contentious only when the *written statement* is filed;(3)
(3) a suit becomes contentious only when *issues are framed* in the case ;(4)
(4) a suit is not contentious if it ends in a *consent* decree(5) or in an *ex parte* decree ;(6)
(5) the word *contentious* is used in the sense which it has in probate practice and means the opposite of common form or voluntary business ; (7)
(6) a suit would become contentious even if *one* of several defendants was not served with the summons;(8)
(7) if a suit is subsequently contested it becomes a contested suit from the beginning ;(9)
(8) a contentious suit means a real and not a collusive suit.(10)

In *Faiyaz Husain's case*,(11) referred to above, their Lordships of the Privy Council overruled the view that a suit cannot be contentious until the summons was served on the defendants. After the decision in *Faiyaz Husain's case*(12) the following views were expressed :

(1) a suit cannot be said to be not *contentious* on the ground that the summons was not served on the defendant ;(13)
(2) a suit cannot be said to be not contentious by reason of the fact that it ends in a compromise decree,(14) or in an *ex parte*

Section 52 — Note 13

1. ✠('07) 29 All 339 (345) : 34 Ind App 102 : 10 Oudh Cas 314 (PC). (Suit contentious in its origin and nature is also contentious within the meaning of this section though a summons is not served on the opposite party.)

2. ('98) 1 Oudh Cas 280 (283).
('99) 21 All 408 (409) (DB).
('91) 1891 Pun Re No. 30, p. 171 (178) (DB). (Doctrine will not apply to a case of sale made after an appeal was filed and before notice of the appeal.)
('88) 15 Cal 647 (651) (DB).
('88) 12 Mad 180 (182) (DB).

3. ('04) 31 Cal 658 (662) (DB).

4. ('99) 1899 Pun Re No. 32, p. 161 (165) (DB).

5. *See* ('03) 6 Oudh Cas 294 (298). (Decree in suit going in appeal — Appeal struck off on request of the appellant who was not desirous of prosecuting it — Held, suit was not contentious.)

6. ('04) 31 Cal 745 (753) (DB).

7. ('06) 29 Mad 426 (430) (FB). (12 Mad 439, Overruled.)

8. ('06) 28 All 196 (198, 199) (DB). (It cannot be held that a suit can be regarded as contentious as against some of the defendants and not contentious as against the others.)

9. ('99) 27 Cal 77 (84) (DB).
[*See also* ('04) 31 Cal 745 (752) (DB).]

10. ('07) 31 Bom 393 (404) (DB).

11. ('07) 29 All 339 (345) : 34 Ind App 102 : 10 Oudh Cas 314 (PC).

12. ('07) 29 All 339 (345) : 34 Ind App 102 : 10 Oudh Cas 314 (PC).

13. 1915 Nag 89 (91) [A I R V 2] : 11 Nag L R 21. (Lease granted during the pendency of a contentious partition proceeding.)
1919 Lah 427 (427) [AIR V 6] (DB). (Re-sale by a non-proprietor to a proprietor taking place after the institution of the suit.)
('08) 30 All 95 (102, 103) (DB). (Suit in forma pauperis—Lis begins as soon as application to sue in forma pauperis is filed.)
('08) 30 All 467 (468) (DB). (After the filing of a suit for pre-emption but before service of summons on the defendants, the defendant vendee sold the property, claimed to a second vendee.)

14. ✠('06) 29 Mad 426 (429, 430) (FB).

decree ;(15)

(3) a contentious suit is one other than a collusive or friendly suit brought by agreement of parties;(16)

(4) the section becomes operative from the very moment of the institution of a *bona fide* suit which is not collusive.(17)

The removal of the words "contentious suit" and the substitution of the words *which is not collusive* clearly express the law as laid down by their Lordships of the Privy Council in *Faiyaz Husain's case* (18) and by the various High Courts subsequent to *Faiyaz Husain's case.*(19) It is now clear that the fact of suing, in itself initiates a contest and starts the *lis.*(20) The mere fact that the suit ended in a compromise decree,(21) or in an *ex parte* decree,(21a) or that the defendant admits the plaintiff's claim(22) does not render the suit a non-contentious or collusive one.

A *collusive* suit is not a real suit at all(23) and the doctrine of *lis pendens* does not apply to such suits.(24) There is a fundamental distinction between a proceed-

('30) 1930 Mad W N 572 (576). (Case decided before the amendment came into force.)
1930 All 354 (355) [A I R V 17] (DB). (Suit for pre-emption—Suit contentious at its inception.)
1928 Oudh 146 (148) [AIR V 15] (DB). (Lease during pendency of suit — Suit by successful claimant to avoid lease and eject lessee.)
1925 Pat 462 (464) [AIR V 12] : 4 Pat 619 (DB). (The fact that the compromise was the result of inducement in money makes no difference.)
1924 Mad 359 (360) [AIR V 11] (DB). (A sale of property pending a mortgage suit relating to the same is affected by the doctrine of lis pendens — The fact that the suit was finally compromised does not make it non-contentious.)
1923 Cal 252 (256) [AIR V 10] (DB).
1922 Cal 358 (361) [AIR V 9] : 49 Cal 220 (DB).
1919 Pat 146 (154) [AIR V 6] : 4 Pat L Jour 580 (DB). (But a compromise should not be a collusive one in order to defraud the purchaser.)
('13) 18 Ind Cas 177 (181) (DB) (Cal). (Suit to enforce simple mortgage, ending in compromise.)
('10) 13 Oudh Cas 98 (100) (DB).
('10) 6 Nag L R 140 (142). (A suit to enforce a mortgage lien on immovable property.)
('09) 3 Ind Cas 696 (699) (DB) (Cal). (Suit for specific performance — The doctrine of lis pendens applies notwithstanding that the conveyance had not been executed and that the vendee had not paid the purchase-money.)
('08) 8 Cal L Jour 153 (156) (DB). (A suit for sale on a mortgage praying relief against the mortgagors.)

15. 1930 All 354 (335) [AIR V 17] (DB).
1920 All 246 (247) [AIR V 7] : 42 All 319 (DB).
('09) 3 Ind Cas 791 (792) (DB) (Cal). (In this case after the passing of an ex parte preliminary mortgage decree but before that decree was made absolute the mortgagor sold his interest in the property.)
('08) 8 Cal L Jour 153 (156) (DB).
('11) 11 Ind Cas 464 (465) (DB) (Cal). (A purchase of the mortgaged property by the mortgagee, in execution of an ex parte mortgage decree has priority over a previous purchase by an execution creditor in execution of a money decree obtained against the mortgagor during the pendency of the mortgage suit.)

16. 1930 All 354 (355) [AIR V 17] (DB).
('30) 1930 Mad W N 572 (577). (Every real suit is contentious—Case before the amendment.)
1922 Cal 358 (361) [A I R V 9] : 49 Cal 220 (DB).
1915 Mad 884 (884) [A I R V 2] : 38 Mad 450 (DB). (31 Cal 658 and 745, held to be erroneous.)
('99) 27 Cal 77 (92) (DB). (Transfer of an undivided share after the institution of a partition suit.)
[But see ('07) 31 Bom 393 (398) (DB). (Friendly suits may be contentious.)]

17.† 1929 All 943 (945) [A I R V 16] : 52 All 139 (DB).

18. ('07) 29 All 339 (345) : 34 Ind App 102 : 10 Oudh Cas 314 (PC).

19. ('07) 29 All 339 (345) : 34 Ind App 102 : 10 Oudh Cas 314 (PC).

20. 1940 Nag 8 (13) [AIR V 27] (DB). (Essence of doctrine is that the property in question should form a subject-matter of a dispute.)

21. ('53) 32 Pat 903 (917) : A I R 1955 N U C (Pat) 231.
1951 Nag 194 (196) [AIR V 38 C 45] : ILR (1951) Nag 241.
('50) 55 Mys H C R 174 (179) (DB).
1949 Bom 367 (372) [AIR V 36 C 96] : ILR (1949) Bom 480 (DB).
1934 Pat 270 (271) [AIR V 21].
[*See also* 1948 P C 147 (149) [AIR V 35 C 39] : ILR (1949) 1 Cal 234 : 75 Ind App 165 (PC). (Section applies to compromise decree.)]

21a. 1949 Bom 367 (372) [A I R V 36 C 96] : ILR (1949) Bom 480 (DB).

22. 1937 Nag 400 (402) [A I R V 24] : I L R (1937) Nag 452.

23. 1963 Mad 300 (301) [AIR V 50 C 108] : ILR (1963) Mad 594 (DB).
('07) 31 Bom 393 (398) (DB).
('82) 6 Bom 703 (711, 712).

24. ('58) 71 Mad L W 391 (398).

ing which is collusive and one which is fraudulent. In the former, the claim is fictitious, the contest is unreal and the decree is a mere mask. In the latter, the claim is untrue but the claimant obtains in his favour the verdict of the Court by practising fraud on the Court. While in collusive proceedings the combat is sham, in a fraudulent suit it is real and earnest.(24aa) Whether the suit or the proceedings which resulted in the decree and the sale in execution thereof are collusive is essentially a question of fact.(24a) The collusion need not be at the inception but might well develop during pendency of the proceedings.(24b) A *friendly* suit brought to obtain a declaration of the rights of parties cannot be said to be *collusive* within the meaning of the section.(25) The conflict of opinion that had been expressed before the amendment as to whether a *friendly* suit was a *contentious* suit or not(26) is no longer of any importance. But though a collusive suit does not operate as *lis pendens*, a decree passed therein may be binding on the actual parties to the suit.(27)

An abandoned suit is very much like a collusive one and the dismissal of a suit brought about by the abandonment by the plaintiff will not operate to affect the title secured by a purchaser *pendente lite*.(28)

14. Right to immovable property must be directly and specifically in question. — The section applies only to suits or proceedings in which any right to immovable property is directly and specifically in question.(1a) The question whether a right to immovable property is directly and specifically in question is not one of mere form. It is really a question of substance of the litigation and if the property transferred is not actually in litigation the section will not apply even though the plaint prima facie includes it.(1aa) Suits or proceedings for *personal* reliefs against the defendants are outside this section. Thus, a proceeding under O. 34, R. 6 of the

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1954 Mys 26 (29) [AIR V 41 C 11] : ILR (1953) Mys 332.

1946 Oudh 99 (101) [AIR V 33 C 37] : 21 Luck 185 (DB).

1935 Pat 230 (230) [AIR V 22].

('13) 16 Oudh Cas 225 (231) (DB).

24aa. 1956 S C 593 (599) [A I R V 43 C 103] : ILR (1956) Mys 152 : 1956 S C R 451.

24a. 1956 S C 593 (598) [A I R V 43 C 103] : ILR (1956) Mys 152 : 1956 S C R 451.

24b. ('58) 71 Mad L W 391 (398). (If there is collusion in obtaining the decree section will not apply.)

1955 Trav-Co 3 (5) [AIR V 42 C 3] : ILR (1954) Trav-Co 794 (DB). (A suit may be collusive in its very inception or a decree may be obtained by collusion in a suit which was honestly begun. 7 Trav L R 42, 18 Trav L J 478 and 18 Trav L J (SN) 147, *Diss. from.)*

25. ('07) 31 Bom 393 (398) (DB).

26. See cases cited in foot-note (16) to the effect that a friendly suit is not contentious.

27. ('87) 11 Bom 708 (713) (DB).

28. 1963 Mad 300 (301) [AIR V 50 C 103] : ILR (1963) Mad 592 (DB).

Section 52 — Note 14

1a. 1963 Pat 319 (320) [AIR V 50 C 93]. (Suit for declaration that defendant was not adopted by plaintiff's husband—During pendency of suit certain properties transferred by plaintiff—Compromise decree—Held scope of title suit could not be enlarged by compromise decree into a suit with respect to properties—Doctrine of lis pendens not applicable.)

1957 Andh Pra 454 (456) [A I R V 44 C 142] : ILR (1956) Andh Pra 137 (DB). (The property to which the doctrine of lis pendens applies is property which is "the subject-matter of the suit.")

1957 Pat 729 (731) [A I R V 44 C 218] : 36 Pat 1139 (DB).

('50) 55 Mys H C R 174 (195) (DB).

[*See also* 1957 Pat 408 (413) [A I R V 44 C 122] (DB). (Section 52 prohibits alienation, or any transaction in respect of immovable property, forming the subject-matter of any suit or proceeding.)]

1aa. 1957 Pat 408 (413) [AIR V 44 C 122] (DB). (Where by virtue of the lease of a part of the mortgaged property, such property is free from encumbrance and consequently it is not in controversy at all in the proceedings for the mortgage award to the knowledge of both the mortgagor and the mortgagee, the inclusion of the property in the application for award does not alter the position.)

('50) 55 Mys H C R 174 (195) (DB) (It is not enough if the property is specified without the right to it being directly in issue.)

Code of Civil Procedure(1) or a suit for rent(2) or a simple suit for money(3) does not operate as *lis pendens*. The mere fact that in such a suit an 'injunction' is granted against the defendant from alienating his property(4) or an *attachment* is made of his properties(5) does not make the suit one, in which a right to such property is directly and specifically in question. In *Worsley* v. *The Earl of Scarborough*(6) where money was secured upon an estate and, in a suit in the Court of Chancery, the main question was, as to the right to the money and the question relating to the estate on which the money was charged was only *collaterally* and not *directly* in question, it was held that the purchaser of the estate pending the suit was not affected by *lis pendens*. A suit against *X* as legal representative of *Y*, for recovery of money to be realised from the *assets* of *Y* in the hands of *X*, is not one in which the right to the property constituting the assets is directly and specifically in question.(7) In *Anundo Moyee* v. *Dhonendro Chunder*(8) which was a case before the Act, where *X* had attached certain properties in the mofussil before a suit for foreclosure had been instituted in the High Court of Calcutta, and purchased the same in execution pending the foreclosure suit their Lordships of the Privy Council held distinguishing the case of *Bishop of Winchester* v. *Paine*(9) that the decree for sale made in the foreclosure suit could not operate as a judgment *in rem* in the mofussil, but operated only *in personam* and could not affect the title of persons who were no parties to the suit.

The underlying principle of this section is that no immovable property which is the subject-matter of the litigation can be transferred or dealt with by any party to the suit to the detriment of the other party. The decree may be for possession or sale of the property or it may only create a charge on the property. But whatever the nature of the decree, it is binding on the person to whom the property is transferred during the litigation.(10) Though a charge is not an 'interest' in immovable property, it

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1. 1930 Oudh 93 (95) [A I R V 17]: 5 Luck 625 (DB). (Simple money decree.)

2. 1952 Pat 9 (11) [AIR V 39] : 30 Pat 317. (To make lis pendens act as notice to purchaser suit must relate specifically to estate and not to money secured on it.)

1949 Nag 114 (115) [AIR V 36 C 42] : ILR (1948) Nag 573. (Suit for rent of holding—Sale of holding during pendency of execution proceedings in suit is not hit by lis pendens.)

†1928 Cal 441 (442, 443) [AIR V 15]: 53 Cal 701 (DB). (Lis pendens to be a notice to a purchaser, suit must relate specifically to the estate and not to money secured on it.)

1926 Cal 191 (192) [AIR V 13] (DB). (Proceedings under Bengal Tenancy Act.)

1936 Cal 279 (281) [AIR V 23]: 63 Cal 1117. (Do.)

3. 1959 Andh Pra 280 (286) [A I R V 46 C 85] (DB). (Decree for mesne profits is nothing more than a simple decree for money.)

1957 Pat 408 (414) [AIR V 44 C 122] (DB).

1940 Oudh 104 (105) [AIR V 27]. (Dower suit — Decree does not create charge on property in hands of heirs of the deceased Muhammadan —Section 52 does not, therefore, apply if the heirs mortgage the property in their hands bona fide and for value subsequent to the decree but pending the appeal.)

1932 Bom 301 (302) [AIR V 19].

1931 Oudh 63 (65) [AIR V 18] (DB). (Claim for dower is simple money claim.)

('80) 1880 Pun Re No. 113 p. 276 (282) (DB). (Suit for merely a money decree on a mortgage bond.)

4. 1930 All 387 (388, 389) [AIR V 17].
[*See* 1914 Lah 356 (357) [AIR V 1] (DB).]
[*See also* 1930 Lah 858 (859) [AIR V 17].]

5. 1950 Bom 278 (285, 286) [A I R V 37 C 80] : ILR (1950) Bom 114 (DB).

1941 Mad 208 (214) [AIR V 18] (DB). (AIR 1929 All 846 and 6 Ind Cas 40, followed.)

1929 All 846 (846, 847) [AIR V 16]. (Attachment operates as a valid prohibition against alienation only from the date of proclamation under O. 21, Rule 54.)

1915 Oudh 157 (158) [AIR V 2].

†('10) 6 Ind Cas 40 (42) (DB) (Cal).

6. (1716) 26 E R 1025 (1026) : 3 Atk 392.

7. † ('10) 8 Ind Cas 1208 (1209) (Low Bur).
('08) 1908 Pun L R No. 52 p. 129 (135) (DB).
('03) 26 All 28 (31, 32) (DB). (Dissenting from 19 All 504.)
[*See also* '82) 9 Cal 406 (409) (DB).
('06) 2 Cal L Jour 138 (141) (DB).]

8. ('71) 14 Moo Ind App 101 (109) (PC).

9. (1805) 32 E R 1062 (1063) : 8 R R 131.

10. †1941 Bom 191 (193) [A I R V 31] : I L R (1941) Bom 274 (DB). (The principle of lis pen-

amounts to a "right to immovable property" within the meaning of this section.(11) The Calcutta High Court has held that though a decree for arrears of rent creates a first charge on the property it does not render the suit itself as one in which a right to immovable property is directly and specifically in issue.(11aa) The Orissa High Court has held that a charge under S. 74 of the Orissa Tenancy Act is not a charge within the meaning of S. 100 of this Act and a proceeding in execution of a rent decree is not one in which any right to immovable property is in dispute between the parties until a valid attachment is effected.(11aaa) The Patna High Court has also held that a charge referred to in S. 65 of the Bihar Tenancy Act is not a charge within the meaning of S. 100 of this Act and a transfer after the rent decree but before execution will not attract the provisions of this section.(11aaaa) Where the genuineness of a deed, such as a deed of settlement, is only in question, there is no right to immovable property directly and specifically in question.(11a)

An easement being a right or interest in immovable property, S. 52 will apply to a case where *A* obtains a decree against *B* for an injunction restraining him from interfering with his right to drain off water through his lands and *C* purchases the property from *B* after the passing of the decree.(11b)

In a suit under S. 36, Bengal Money-lenders Act (10 of 1940), the right to immovable property is not directly and specifically in question.(11c)

A suit or proceeding, in which, at its inception, no question as to right to any property is directly or specifically raised, may, at a subsequent stage thereof become a suit or proceeding in which such question is involved. Thus, a suit for maintenance in which no charge is asked for against any property is not, at its inception, one in which any right to immovable property is in question. But if the decree declares a charge on any particular property, the litigation *thereafter* becomes one in which such right is in question and a subsequent transfer of the property will be affected by *lis pendens*.(12) Similarly, where in a suit for mesne profits, the defendant furnishes security of specific immovable property for any amount that may be decreed in the suit, the litigation becomes, from the date the security is given, one in which a right to immovable property is in question. A transfer, therefore, of such property after the

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dens in S. 52 applies to a suit for maintenance in which it is sought to have certain properties charged for the maintenance and lis applies to those properties if they are charged under the decree. If the decree creates a charge, that charge is in all cases binding on the transferee and the question of notice is immaterial.)

11. 1956 S C 593 (597) [AIR V 43 C 103]: ILR (1956) Mys 152 : 1956 S C R 451. (Suit for maintenance with prayer for charge on specific properties.)

1966 Madh Pra 318 (323) [AIR V 53 C 80].

1959 Bom 475 (477) [A I R V 46 C 141] : I L R (1959) Bom 94. (Suit by Hindu wife for maintenance claiming charge on husband's property. AIR 1927 Mad 502, Diss. from.)

1951 All 141 (146, 151, 153) [AIR V 38 C 16] : ILR (1953) 1 All 284 (FB).

1945 Cal 322 (325) [AIR V 32] (DB).

†1943 Cal 227 (231) [AIR V 30] (DB).

[But see 1964 Bom 1 (4) [AIR V 51 C 1] : I L R (1963) Bom 509 (DB).

1943 Oudh 354 (360) [AIR V 30] : 19 Luck 1 (FB). (The essence of the doctrine of lis pendens is that immovable property should form the subject-matter of the dispute and proceedinge involving a charge on immovable property do not imply that a right to immovable property is directly and specifically in question.)]

11aa. 1951 Cal 221 (224) [AIR V 38 C 42]: ILR (1951) 1 Cal 283 (DB).

11aaa. 1951 Orissa 41 (45) [A I R V 38 C 16] : ILR (1950) Cut 195 (DB).

11aaaa. 1952 Pat 9 (11) [A I R V 39] : 30 Pat 317 (DB).

11a. 1945 Mad 454 (456) [AIR V 32].

11b. 1955 Andhra 199 (200) [AIR V 42 C 73] : ILR (1955) Andhra 257.

11c. ILR (1953) 1 Cal 101 (105) : A I R 1955 N U C 2069.

12. †1936 Mad 589 (592) [AIR V 23]. (Essential to constitute lis pendens stated.)

[*See also* 1944 Bom 191 (193) [AIR V 31] (DB). (Decree creating charge for maintenance comes under section.)]

date on which it is given as security will be affected by *lis pendens.*(13) Where a security bond for due performance of decree is executed not by any surety, but by the judgment-debtor himself and is accepted by the Court at a time when the decree is being enforced against his person, it is perfectly competent for the execution Court to enforce the liability that is created under the bond as accepted by Court. Persons who have taken the subsequent hypothecation bond from the judgment-debtor are not entitled in law to any notice of the proceedings in execution based on the order on the security bond and the rights acquired by these persons are clearly affected by the rule of *lis pendens.*(13a) So also where, in execution of a simple money decree against *A* as the legal representative of *B*, certain properties of *A* were attached and *A objected* to such attachment, it was held in a case, before the Act, that from the moment the objection was raised, the right to the property became the subject-matter of the litigation, and that a subsequent transfer thereof would be affected by *lis pendens.*(14) In *Bazayet Hossein* v. *Dooli Chand*(15) where, in a suit by creditors of a deceased person against his heirs for recovery of money from out of the assets, a *decree* was passed directing the defendants to account for the property, a transferee, who took the property after the decree, was held affected by *lis pendens.* A contrary view has, however, been taken by the Nagpur High Court,(16) namely that the doctrine of *lis pendens* will not apply unless from the *very beginning* of the suit or proceeding the right to the property was in question, and that, where in a suit for money, a charge is declared by the decree on certain property, a transfer of the property subsequent to the decree, is not affected by *lis pendens.* Their Lordships relied upon the decision of the High Court of Patna in the undermentioned case.(17) In that case the plaintiff sued for the recovery of money and also claimed that certain properties should be charged for the amount that may be decreed, but the Court granted merely a money decree without giving any charge on any property. It was held that a transfer of the property pending the suit was not affected by *lis pendens* for two reasons, *firstly* that the actual decree did not affect in any way the property transferred, and secondly, that the suit, even though asking for a charge in the plaint, was not one in which any right to immovable property was in question. It is submitted that the Nagpur view is not correct. Nor is the second reason given by the Patna High Court correct.

A suit which, at its inception, is one in which a right to property is in question, may, at a subsequent stage, cease to involve any such question, in which case, it will cease to operate as *lis pendens.* Thus, where in a mortgage suit for sale of the mortgaged property, a money decree was passed against the defendant and subsequent to the decree, the defendant transferred the mortgaged property, it was observed by their Lordships of the Privy Council that so long as the decree stood, the title of the defendant to the property was not "directly and specifically in question."(18) In such cases, really, the transfer does not affect in any way the rights of the parties under the decree.(19)

A transfer made *before* the property is brought within the control and

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13. 1936 Mad 589 (592) [AIR V 23].
[*See also* 1953 Trav-Co 364 (366) [AIR V 40 C 140] (DB). (1936 Mad 580 [AIR V 23], Rel. on.)]

13a. 1953 Trav-Co 364 (366) [AIR V 40 C 140] (DB).

14. ('73) 19 Suth W R 197 (197) (DB).

15. ('79) 4 Cal 402 (410) : 5 Ind App 211 (PC).

16. 1940 Nag 8 (13) [AIR V 27] (DB).

17. 1936 Pat 571 (572) [AIR V 23].

18. ('05) 32 Cal 198 (212, 217) : 39 Ind App 1 (PC).

19. 1936 Pat 571 (572) [AIR V 23].
Also see Note 35.

jurisdiction of the Court is not affected by *lis pendens*. Thus, where the plaintiff sued in respect of properties *x* and *y* and the defendant transferred property *z* while the suit was pending, but subsequently the plaintiff got the plaint amended by substituting property *z* for property *y* in the plaint description of property, it was held that the amendment did not relate back to the date of the plaint and that the transfer of *z* was not affected by *lis pendens*.(20) But the amendment order will relate back to the date of application for amendment. Hence, a transfer of property *z* in the above illustration after the date of application for amendment, but before it is ordered, will be clearly affected by *lis pendens*.(20a)

The section will apply only where the property transferred is the *same* as the property in litigation. It has been held in some cases(21) that in order that the doctrine of *lis pendens* may apply, the property in litigation must be described with sufficient precision so that its identity can be ascertained. This view appears to be based on the theory that *lis pendens* operates as *notice* to the alienee and that the description of the property must be sufficiently precise to put him on his guard. It was accordingly held in the undermentioned case,(22) that an alienee who *knew* that the particular property was in litigation cannot rely upon the fact that the property was misdescribed in the plaint. In the case noted below(23) the High Court of Bombay pointed out that the doctrine of *lis pendens* is not based on any theory of notice, and that therefore the knowledge of the alienee as to the identity of the property he is buying, with the property described in the plaint, is immaterial, but it held that the real question was whether the *parties knew*, from the description given in the plaint what properties exactly were included in the litigation. It is submitted that the doctrine of *lis pendens* is based neither upon the theory of notice to the alienee nor upon the fact that the party transferring *know* that the property is included in the litigation. If *as a fact* the property is the subject of litigation, then a transfer thereof will be affected by *lis pendens*. The question of the description of property in the plaint or proceeding is merely relevant in order to find out whether the property transferred is, or is not, included in the litigation.

15. Applicability of doctrine of lis pendens to movable property. — This section does not, in terms, apply to the transfers of *movable* property *pendente lite*. But does the principle underlying the section apply to such cases? In *Wigram* v. *Buckley*(1) it was held by the Court of Appeal in England that the doctrine of *lis pendens* does not apply to personal estate other than chattel interests in land. Lindley, L. J., observed :

> "If the doctrine of *lis pendens* were applicable to personal property generally, bankers and others could not safely make advances on ships or goods and that which represents them in commerce—for example, bills of lading, dock warrants, wharfingers' receipts, nor upon stock and share certificates, nor upon debentures or policies, nor even on negotiable securities, without making searches in the Judgment Registry Office. Such a doctrine would paralyse the trade of the country, and there is no warrant for it either in the statutes relating to *lis pendens* or in the decisions of the Courts."

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20. 1962 Mys 189 (189) [AIR V 49 C 62] : ILR (1962) Mys 312.

1920 Nag 92 (92, 93) [AIR V 7].

1919 All 320 (321, 322) [AIR V 6] : 41 All 534 (DB).

20a. 1945 Mad 219 (220) [AIR V 32].

21. 1935 Oudh 49 (51) [AIR V 22] (DB).

†('40) 44 Cal W N 783 (784, 785). (What description will be sufficient in a particular case would depend on the facts of that case.)

('09) 2 Ind Cas 85 (86, 87) (Cal).

22. 1921 Cal 730 (741) [AIR V 8] (DB).

23. 1937 Bom 244 (252, 253) [AIR V 24] (DB).

Section 52 — Note 15

1. (1894) 63 L J Ch 689 (692, 693) : (1894) 3 Ch 483 (493).

The view taken in *Wigram's case*(2) was followed in this country in the undermentioned cases(3) and it was held that the principle underlying the section had no application to *movable* property. A different view has, however, been taken in some cases. In *Banke Behari Lal* v. *Raghubir Dayal*(4) Sulaiman, J., expressed the view that the principle of the section would be applicable to movable property. In *Talari* v. *Viswanathan*(5) it was observed *obiter* that the principle of the section was applicable to movable property 'if the alienee is proved to have had notice of the pending suit'.(6) It is submitted that these views are not correct.

16. Only property in litigation cannot be transferred. — The section applies only where the property *in litigation actually* is transferred. It cannot, obviously, apply where the property transferred is other than the one in litigation.(1)

There is no general doctrine of law that *nothing* that accrued between the date of the suit and the date of the decree could alter the relations existing between the parties. Where, therefore, *A*, a cosharer in a village sold *his shares* to a stranger, and *B* another cosharer instituted a suit for pre-emption but during the pendency of the suit the stranger obtained by gift from another cosharer *another share* in the village and thus himself became a cosharer, it was held by their Lordships of the Privy Council that *B* lost his right to pre-emption.(2) This case was decided on a state of law which existed prior to the enactment of the Agra Pre-emption Act, XI of 1922, which provided in S. 19 that the right of pre-emption must not only exist at the date of the suit, but also at the date of the decree. The Act has, however, now been amended by the Agra Pre-emption (Amendment) Act (U. P. Act IX of 1929), and as amended, a right of pre-emption cannot be defeated by any voluntary transfer made in favour of the vendee after institution of a suit for pre-emption.

As for repeal of the Agra Pre-emption Act, see S. 339 of the U. P. Zamindari Abolition and Land Reforms Act (1 of 1951).

17. Administration suit. — An administration suit like any other suit will operate as *lis pendens* if the property transferred is directly and specifically in question in the suit. In a mere general claim for administration of a trust or of a deceased person's estate, the suit does not operate as *lis pendens*, for though a property included in the estate may be *directly* in question it cannot be said to be *specifi-*

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2. (1894) 63 L J Ch 689 (692, 693) : (1894) 3 Ch 483, Wigram v. Buckley.

3 1962 Ker 309 (312) [AIR V 49 C 87] : I L R (1962) 2 Ker 55.
1952 Mad 59 (59, 60) [AIR V 39 C 29].
('39) 29 Trav L Jour 1252 (1255) (DB).
1943 Mad 94 (97) [AIR V 30] (DB). (36 Bom 189, Followed.)
('12) 36 Bom 189 (198) (DB).
(1901) 25 Bom 406 (422).
('96) 9 C P L R 22 (24, 26).
[*See* ('01) 23 All 331 (335) (DB). (Assumed that doctrine does not apply to movable property — But mortgage decree held to be immovable property and the doctrine held applied to the transfer of such decree.)]
[*See also* 1922 Pat 394 (395, 396) [AIR V 9] : 1 Pat 5 (DB). (It is more than doubtful if the doctrine of lis pendens is applicable to movable property.)]

4. 1930 All 380 (381, 382) [AIR V 17] (DB). (Transfer of decree.)

5. 1915 Mad 502 (502) [AIR V 2] (DB).

6. [*See also* 1934 Mad 40 (43) [AIR V 21) : 57 Mad 426].

Section 52 — Note 16

1. 1953 Trav-Co 573 (574) [AIR V 40 C 223]. (Where the suit is for redemption of the mortgage in favour of defendant No. 1 and not for the redemption of the sub-mortgages granted by defendant No. 1 it does not mean that the plaintiff was redeeming the sub-mortgages directly and therefore transfer of possession by sub-mortgagee during the pendency of the suit for redemption cannot be vitiated.)]
1925 Nag 274 (277) [AIR V 12] : 21 Nag L R 133.
('40) 44 Cal W N 783 (784, 785).

2. 1932 P C 57 (60) [AIR V 19] : 59 Ind App 138 : 54 All 189. (AIR 1929 All 53 (FB), Approved.)

cally in question.(1) But where the particular property is sufficiently indicated in the suit, the suit would operate as *lis pendens*.(2) Thus, where a Commissioner is appointed in the suit and he makes a report o the Court in which he finds that a particular land should be dealt with as the estate of the deceased person, the property comes from that time directly and specifically in question.(3) So also where an administration order is passed in the suit for sale of certain specified property.(4)

In *Chatturput Singh* v. *Maharaj Bahadoor*,(5) their Lordships of the Privy Council held that a transfer, after an order for sale by the Receiver in an administration suit, and before such sale is subject to the result of the suit by virtue of the doctrine of *lis pendens*. Their Lordships also observed that apart from the doctrine of *lis pendens* there was a broader proposition of law applicable to such cases and their Lordships stated the proposition as follows :

> "When the estate of a deceased person is under administration by the Court or 'out of Court,' a purchaser from a residuary legatee or heir buys subject to any disposition which has been or may be made of the deceased's estate in due course of administration. In fact 'the right of the residuary legatee or heir is only to share in the share ultimate residue which may remain for final distribution after all the liabilities of the estate, including the expenses of administration, have been satisfied'."

In *Puran Chand* v. *Monmotho Nath*,(6) a suit was filed against the trustees of a certain estate for the ascertainment of the respective rights of the parties interested in the trust deed and for directions as to the administration of the trust. By an interim decree R. N. was declared entitled to one-sixth share of the property *X* and, after other declarations, it was ordered that the trustees should retain the costs of the suit out of the trust properties. Thereupon, while further proceedings in the suit were still pending, R. N. mortgaged his one-sixth share to *M*. Subsequently, a further order in the suit was passed that property *X* should be sold for raising monies for payment of the costs of the trustees and the property was sold to *N*. It was held that *M* took his mortgage only subject to the further orders of the Court in the suit and therefore took it only subject to the sale. Their Lordships of the Privy Council further held relying upon *Chatturput Singh* v. *Maharaj Bahadoor*,(7) that the principle of the decision applied equally to a suit for administration of the trust as to a suit for the administration of a deceased person's estate.

In *Ma Chit Su* v. *National Bank of India Ltd.*,(8) where pending a suit for administration in the Chief Court, the property comprised in the suit was sold under the permission granted by a subordinate Court to the administrator appointed by it in a proceeding under the Probate and Administration Act, 1881, and the administrator

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Section 52 — Note 17

1. 1923 Rang 69 (70) [AIR V 10] (DB). (Suit between an heir and an administrator—Alienation by the administrator.)
1924 Rang 221 (232) [AIR V 11] : 2 Rang 4 (DB). (Do.)
[*See also* 1927 Rang 186 (187) [AIR V 14] : 5 Rang 266 (DB).]

2. 1924 Rang 221 (229) [AIR V 11] : 2 Rang 4 (DB).
(1887) 35 Ch D 297 (305) : 56 L J Ch 530 (535), Price v. Price.
[*See also* (1768) 27 E R 439 (439) : Amb 676, Walker v. Smalwood.]

3. 1930 Rang 132 (136) [AIR V 17] : 7 Rang 734 (DB). (Doctrine applies to transfers under Court sales independently of T. P. Act.)

4. 1925 Cal 395 (398) [AIR V 12] : 51 Cal 1033 (DB).

5. ('05) 32 Cal 198 (218) : 32 Ind App 1 (PC).
[*See also* 1925 Cal 395 (397) [AIR V 12] : 51 Cal 1033 (DB).
1925 Cal 703 (704) [AIR V 12] (DB).
1941 Rang 79 (80) [AIR V 28] : 1940 Rang L R 826 (DB).]

6. 1928 P C 38 (39) [AIR V 15] : 55 Cal 532 : 55 Ind App 81.

7. ('05) 32 Cal 198 (217) : 32 Ind App 1 (PC).

8. 1925 P C 261 (263) [AIR V 12].

was a party to the suit in the Chief Court, their Lordships of the Privy Council observed as follows:

> "The suit for an administration of the estate had been entertained by the Chief Court, and was pending in that Court; and it is difficult for their Lordships to understand that the Legislature could have intended that when a suit for administration of an estate is before a Court competent to entertain it and to order that accounts should be taken in the suit, any other Court should have power to grant permission for the sale of property (part of the estate); but it appears from the judgments in this suit of the Chief Court that according to some rules of practice of the Chief Court, the Chief Court recognised a power of another Court to grant permission, for the sale of property of the estate before the Chief Court."

18. Mortgage suits. — The doctrine of *lis pendens* applies to mortgage suits also. In such suits the equity of redemption of the mortgagor is directly and specifically in question(1) and a transfer either privately by the mortgagor(2) or by way of compulsory sale in execution of a decree or otherwise(3) would be affected by the

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Section 52 — Note 18

1. ✠ 1931 All 466 (480) [AIR V 18] : 53 All 1023 (FB).
1922 Nag 89 (91) [AIR V 9] (FB).
1943 Cal 577 (584) [AIR V 30].
1954 Sau 82 (84) [AIR V 41 C 35].
1930 All 597 (599) [AIR V 17] (DB). (Transfer of property after final decree but before complete satisfaction of it.)
1933 All 201 (202) [AIR V 10] : 55 All 235 (DB). (Transfer of property pending foreclosure proceeding.)
('10) 13 Oudh Cas 50 (52) (DB).
('08) 8 Cal L Jour 153 (155) (DB).
†('13) 18 Ind Cas 177 (178, 179) (DB) (Cal). (Suit to enforce a simple mortgage.)
[*See also* ('21) 63 Ind Cas 144 (144) (DB) (All). (Final decree for sale—Judgment-debtor transferring his interest in the property mortgaged —The transfer or the fact that the transferee's name did not appear in the decree held no impediments to the sale and did not affect the rights of the decree-holder to realise his money.)]

2. 1967 S C 1390 (1395) [AIR V 54 C 291] : ILR 46 Pat 870. (Lease by mortgagor pending suit for sale by mortgagee.)
1937 P C 260 (261) [AIR V 24] : 31 Sind L R 652.
('88) 15 Cal 756 (761) : 15 Ind App 97 (PC).
1957 Ker 121 (124) [AIR V 44 C 70] (DB).
1954 Trav-Co 38 (40) [AIR V 41 C 13] (DB). (Suit on mortgage pending — Subsequent mortgage on same property — Property sold in execution of decree obtained in suit — Property goes to auction-purchaser free of charge created during pendency of suit.)
1943 Lah 113 (118) [AIR V 30] (DB). (A subsequent mortgage effected during the pendency of a suit by a prior mortgagee against the mortgagor does not, under the rule of lis pendens, affect the rights of the prior mortgagee, and the subsequent mortgagee cannot impugn the rights of the latter except to the extent to which he is protected by the rule of subrogation.)
1937 Pat 13 (13) [AIR V 24] : 15 Pat 372 (DB). (Sale.)
('36) 1936 Mad W N 1069 (1069). (Suit by assignee of prior mortgagee — Assignee obtaining decree and purchasing suit property — Suit by subsequent mortgagee — Prior mortgagee's assignee impleaded — Sale by assignee of prior mortgagee to stranger during pendency of latter suit—Transfer hit by doctrine of lis pendens.)
1918 Bom 105 (106) [AIR V 5] : 43 Bom 240 (DB). (Mortgage.)
1916 Oudh 232 (233) [AIR V 3] : 18 Oudh Cas 369.
(1900) 22 All 243 (245) (DB). (A second mortgagee who takes a mortgage from a defendant mortgagor during the pendency of a suit on a prior mortgage, should be treated as a representative of the defendant in execution of decree within the meaning of S. 244, Civil Procedure Code (1882).
('89) 1889 All W N 91 (91) (DB). (Mortgage.)
('84) 6 All 444 (446) (DB). (It makes no difference that the purchase is by a registered document, while the suit is on an unregistered one relating to the same property.)
('74) 11 Bom H C R 64 (67) (DB). (Registered mortgage during pendency of suit by mortgagee under unregistered deed for foreclosure and sale —Rule of lis pendens applied.)
('74) 1874 Bom P J 189 (DB). (Sale.)
1935 Oudh 49 (51) [AIR V 22] (DB). (Do.)
('75) 23 Suth W R 382 (382) (DB). (Suit on an unregistered mortgage — During the suit, sale by mortgagor by registered deed — *Held*, sale was subject to the doctrine of lis pendens.)

3. ('88) 15 Cal 756 (761) : 15 Ind App 97 (PC).
†1931 All 466 (480) [AIR V 18] : 53 All 1023 (FB).
1962 Bom 191 (196) [AIR V 49 C 41] : ILR (1961) Bom 977.
('62) 1962-2 Mad L J 336 (337).
1959 Ker 133 (135) [AIR V 46 C 41] : ILR (1958) Ker 480 (DB). (Sale in execution of money decree subsequent to mortgage suit.)
1958 All 24 (25) [AIR V 45 C 7] (DB). (AIR 1931 All 466 (FB), Rel. on.)
('55) ILR (1955) 1 All 673 (685) (DB). (House sold for realization of arrears of income-tax

doctrine of *lis pendens*. The transferee would be bound by the decree in the suit.(4) He takes it subject to the incidents of the suit.(5) and one of the incidents is that a purchaser under the decree in the suit gets a good title against all persons whom the suit binds.(6) He cannot claim to redeem the mortgagee or purchaser in execution of the decree on the ground that he was not a party to the suit, though he could have redeemed the mortgagee before the sale.(7)

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after preliminary mortgage decree and during pendency of mortgage suit is hit by doctrine of lis pendens, and is subject to the rights of the mortgagee.)

1952 All 298 (299) [AIR V 39]. (Revenue sale under S. 162, U. P. Land Revenue Act (1901) for realisation of money due to a Co-operative Bank — Sale taking place during pendency of a mortgage suit – Subsequent sale in execution of mortgage decree – Purchaser under revenue sale is bound by sale in execution of mortgage decree.)

1952 Nag 341 (347) [AIR V 39] : ILR (1952) Nag 211 (FB). (Purchaser in sale held under S. 157, C. P. Land Revenue Act during pendency of mortgage suit in respect of that property is bound by the decree in view of S. 52.)

1950 Orissa 36 (41) [AIR V 37 C 5] : ILR (1949) 1 Cut 557 (DB). (Rent decree under S. 199, Orissa Tenancy Act — Mortgage suit on the holding pending — Execution sale under rent decree before passing of final decree in mortgage suit — Decree-holder purchaser gets only right of redemption which is barred on confirmation of sale under final decree in mortgage suit.)

('50) 1950 Trav-Co L R 636 (640) (DB). (1 T L J 28 and 16 T L J 510 (FB), Rel. on.)

1949 Mad 207 (208) [AIR V 36 C 90].

1943 Trav L R 133.

1929 All 601 (602) [AIR V 16]. (Auction sale in execution of Government dues.)

1928 Lah 505 (507) [AIR V 15]. (Sale in execution of decree in a suit by a puisne mortgagee during the pendency of suit by a prior mortgagee to which the puisne mortgagee was a party is affected by lis pendens.)

('11) 9 Ind Cas 772 (773) (Rang). (Sale in execution of money decree against mortgagor.)

('98) 1898 Bom P J 38 (DB). (Sale of the same property by Court in execution of money decree.)

1925 Oudh 496 (498) [AIR V 12] : 29 Oudh Cas 37 (DB). (Sale of property in execution of money decree.)

1917 Bom 151 (152) [AIR V 4] : 42 Bom 215 (DB). (Transfer effected under another Court's order pending suit.)

('74) 11 Bom H C R 139 (143) (DB). (Sale in execution of money decree pending suit.)

4. 1954 Trav-Co 38 (40) [AIR V 41 C 13]. (Suit on mortgage pending — Subsequent mortgage — Properties sold in execution of decree obtained in suit — Property goes to auction-purchaser free of charge created during pendency of suit.)

('33) 142 Ind Cas 188 (189) (Cochin) (DB).

1940 Cal 150 (152, 153) [AIR V 27] (DB).

1933 All 201 (202) [AIR V 20] : 55 All 235 (DB).

1928 Mad 612 (613) [AIR V 15] (DB).

('89) 16 Cal 335 (363) (DB). (Where a mortgage decree becomes inoperative by reason of the law of limitation a purchaser pendente lite is no longer bound by it.)

Also see S. 60, Note 54.

('85) 9 Bom 141 (145) (DB). (Redemption suit by mortgagor — Transfer of a part of the property pendente lite.)

5. 1967 S C 1390 (1395) [AIR V 54 C 291] : ILR 46 Pat 870.

1933 All 201 (202) [AIR V 20] : 55 All 235 (DB).

1922 Cal 235 (236) [AIR V 9] (DB).

6. 1967 S C 1390 (1395) [AIR V 54 C 291] : ILR 46 Pat 870.

1954 Trav-Co 38 (40) [AIR V 41 C 13]. (Suit on mortgage pending — Subsequent mortgage — Properties sold in execution of decree obtained in suit — Property goes to auction purchaser free of charge created during pendency of suit.)

1918 Bom 105 (106) [AIR V 5] : 43 Bom 240 (DB).

('74) 1874 Bom P J 189 (DB). (Purchaser at sale in execution of decree acquires better title than the purchaser pendente lite.)

7. 1967 S C 1390 (1395) [AIR V 54 C 291] : ILR 46 Pat 870.

('90) 18 Cal 164 (178) : 17 Ind App 201 (PC).

1950 Orissa 36 (41) [AIR V 37 C 5] : ILR (1949) 1 Cut 559 (DB) (Rent decree under S. 199, Orissa Tenancy Act — Mortgage suit on the holding pending — Execution sale under rent decree before passing of final decree in mortgage suit — Decree-holder purchaser gets only right of redemption which is barred on confirmation of sale under final decree.)

1948 Nag 97 (99) [AIR V 35 C 37] : ILR (1947) Nag 719. (He is bound by the result of the lis and cannot claim a right to redeem the mortgaged property. The same principle applies to a person acquiring title by adverse possession.)

1933 All 201 (203) [AIR V 20] : 55 All 235 (DB). (Suit for foreclosure — No authority of the Court for transfer was obtained.)

1929 All 601 (602) [AIR V 16].

1925 Oudh 496 (498) [AIR V 12] : 29 Oudh Cas 37 (DB).

('99) 26 Cal 966 (970) (DB).

('09) 4 Ind Cas 731 (732) (DB) (Cal).

[*See also* 1940 Cal 150 (152, 153) [AIR V 27] (DB).

1934 All 972 (973) [AIR V 21]. (If a defendant wanted to take advantage of a private sale made by a mortgagor after the decree in mortgage suit it is his duty to intervene in the execution proceedings and to pay the mortgage-money and to stop the sale, and after the sale had taken place, it is not open to the purchaser from the mortgagor, against whom a decree for sale has been passed, to say that he could nul-

An application to file an award directing the sale of mortgaged property is an original proceeding to which the doctrine of *lis pendens* will apply.(8) A suit for contribution under S. 82 operates as a *lis pendens* and a transfer pending such a suit would be subject to the result of such suit.(9)

Where pending a suit between the mortgagor and the mortgagees, the mortgagor sold the equity of redemption to a stranger and the amount decreed as due in the first Court was increased in appeal, the purchaser was held bound by the result of the appeal and not entitled to claim that he was liable to pay only such sum as had been decreed at the time of the purchase as due to the mortgagees.(10)

The *lis* in a mortgage suit continues until the mortgage decree is fully executed,(11) or, where the suit is one for foreclosure, until a final decree foreclosing the mortgagor's right is passed.(12) A transfer by the mortgagor of the mortgaged property between the date of the decree and before the date of the sale in execution of the decree, will be affected by *lis pendens*.(13) So also will be a transfer by him between the dates of the preliminary and final decrees.(14) In an old case before the Act it was held that a transfer by the mortgagee of the mortgaged property when a suit by him

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lify the purchase under the mortgage decree.) Also see S. 60, Note 54.

[See however 1946 Mad 51 (52) [AIR V 33 C 24]. (Maintenance decree creating charge — Execution and sale under decree — Mortgage of charged properties after decree but before sale — Mortgagee was held entitled to redeem and pay off charge decree holder at any time before sale was confirmed.)]

8. ('80) 4 Bom 34 (36, 37) (DB).

9. ('91) 13 All 371 (373) (DB).

10. 1929 P C 243 (245) [AIR V 16] : 56 Ind App 339 : 51 All 686.

11. 1934 Mad 353 (354, 355) [AIR V 21] (DB).
1931 Mad 120 (122) [AIR V 18]. (The same principle applies to maintenance suit.)
1929 Mad 197 (197) [AIR V 16] (DB). (A mortgage suit does not finally come to an end with the passing of a preliminary decree.)
1927 All 309 (310) [AIR V 14]. (A person claiming under a transfer during the pendency of a mortgage suit cannot prescribe a title against the mortgagee by adverse possession until the latter becomes entitled to actual possession by virtue of his purchase in execution of his mortgage decree.)
†(1925) Mad 1039 (1039, 1040) [AIR V 12].
1921 Cal 730 (741) [AIR V 8] (DB).
('40) 44 Cal W N 783 (786). (Lis in mortgage suit does not terminate till the security has been realised for satisfaction of the judgment-debt.)
('11) 9 Ind Cas 1027 (1028) (DB) (Cal).
('10) 6 Ind Cas 40 (41) (DB) (Cal).
('10) 6 Nag L R 140 (142).
✠('01) 23 All 331 (334) (DB).
[*See also* ('67) 7 Suth W R 67 (67) (DB). (A purchaser under a decree for sale obtained by the mortgagee under a simple mortgage does not purchase subject to a conditional sale executed by the mortgagor after the prior mortgagee had obtained a decree of sale, but before the property was actually sold.)]

12. ✠('07) 29 All 76 (80, 81).

13. 1931 All 466 (480) [AIR V 18] : 53 All 1023 (FB).
1931 Pat 64 (67) [AIR V 18] : 10 Pat 234 (DB).
1925 Mad 1039 (1040) [AIR V 12].
1918 Cal 524 (525) [AIR V 5] (DB). (Purchase in execution of a money decree, after the passing of a mortgage decree, but before the sale of the property in execution thereof.)
1915 Sind 9 (9,10) [AIR V 2] : 9 Sind L R 86 (DB). (Second mortgage executed after the decree for sale on the first mortgage.)
('21) 63 Ind Cas 144 (144) (DB) (All).
('11) 9 Ind Cas 840 (840) (Cal).
('11) 10 Ind Cas 49 (50) (DB) (Cal).
('09) 3 Ind Cas 791 (792) (DB) (Cal). (Suit though proceeded *ex parte*, still was held to be a 'contentious' one.)
('09) 1 Ind Cas 213 (215) (DB) (Cal).
('09) 1 Ind Cas 62 (66) (DB) (Cal).
('09) 4 Ind Cas 731 (731, 732) (DB) (Cal). (Revenue sale of share of estate during pendency of execution proceedings on a mortgage decree.)
('08) 7 Cal L Jour 1 (35) (DB). (Reversed on another point in 40 Cal 89 (PC).)
('05) 2 Cal L Jour 288 (300) (DB).
('05) 32 Cal 891 (906) (DB).
('04) 9 Cal W N 171 (174).
('04) 28 Bom 361 (363) (DB).
('98) 22 Bom 939 (943) (DB).

14. 1935 Oudh 49 (51) [AIR V 22] (DB).
1932 All 210 (212) [AIR V 19] (DB).
1926 Nag 21 (22) [AIR V 13] : 23 Nag L R 86. (Decree for foreclosure.)
1925 Nag 132 (134) [AIR V 12] : 22 Nag L R 110. (Decree for foreclosure.)
1915 All 27 (28) [AIR V 2] (DB).
('10) 6 Nag L R 140 (142).
[*See also* ('55) ILR (1955) 1 All 673 (685) : AIR 1955 N U C 1698. (Sale of property under S. 162, U. P. Land Revenue Act (1902) for recovery of arrears of income-tax held after preliminary mortgage decree is affected by doctrine of lis pendens.)]

for foreclosure was pending, could not be allowed to stand between the mortgagor and those rights to redeem which that suit, in its ultimate issue, may have left open and affirmed to him.(15)

See also Note 7.

19. Partition suits. — A suit for partition of immovable property is one in which rights to immovable property are directly and specifically in question. Such suits will therefore operate as *lis pendens*. A transferee of property pending such a suit will therefore be bound by the decree passed in the suit.(1) In some cases(2) before the amendment of the section it was, however, held that a partition suit was not necessarily a *contentious suit* and that the question whether it was a *contentious* suit would depend upon the facts of the particular case. These cases are no longer law in view of the amended section. But it has been held in a recent case of the Calcutta High Court(3) that a partition suit in which there is no contest as to the fractional share of the parties is not one in which their rights to the immovable property are directly and specifically in question, and that S. 52 does not apply to such a case. A similar view has been expressed by the Oudh Chief Court in the undermentioned case.(3a)

Where joint family property belonging to *A* and *B* was mortgaged to *C*, and pending a suit for partition between *A* and *B*, *C* purchased the whole property (the share of the plaintiff *A* as well as of the defendant *B*) in execution of his decree on the mortgage, it was held that the suit for partition could not continue, as *C*, having purchased the property could not be both a plaintiff as well as a defendant, and that his purchase could not be annulled by invoking the doctrine of *lis pendens*.(4)

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15. '67) 8 Suth W R 399 (403) (DB).

Section 52 — Note 19

1. 1966 Orissa 98 (102) [AIR V 53 C 40] (DB).
1961 Ker 335 (335, 336) [AIR V 48 C 114]. (Tenant inducted by party during pendency of partition suit is bound by decree.)
('58) 1958-1 Andh W R 85 (86) (DB). (Sale after institution of partition suit — Prior agreement to sell does not affect application of S. 52 — Overruled on another point in A I R 1959 Andh Pra 523 (FB).)
('54) 1954 B L J R 356 (359) : AIR 1955 N U C 1597.
1946 Pat 306 (309) [AIR V 33 C 108] : 25 Pat 13 (DB). (A partition suit operates as *lis pendens* with the result that the purchaser of an undivided share pending a suit takes only that property which is allotted on partition to his vendor.)
1939 Mad 275 (275) [AIR V 26]. (Rule of *lis pendens* operates from date of application for leave to sue in *forma pauperis*, praying for partition.)
1936 Mad 887 (888, 889) [AIR V 23] : ILR (1937) Mad 66 (DB).
1936 Nag 125 (126) [AIR V 23] : ILR (1936) Nag 22 (DB).
1934 Lah 457 (458) [AIR V 21] (DB).
1931 All 45 (47) [AIR V 18] (DB). (Auction sale.)
1928 Bom 65 (66) [AIR V 15] : 52 Bom 208 (DB).
1927 All 679 (680) [AIR V 14] : 50 All 22 (DB). (Transfer during partition proceedings in Revenue Court—Doctrine of *lis pendens* applies.)
1924 Nag 393 (394) [AIR V 11] (DB).
1915 Nag 89 (90) [AIR V 2] : 11 Nag L R 21. (Agricultural lease during pendency of transfer proceedings.)
('30) 1930 Mad W N 572 (576). (Partition suit is not non-contentious suit.)
('98) 26 Cal 127 (128, 129).
('26) 98 Ind Cas 1039 (1042) (DB) (Oudh). (Mortgage of a grove.)
†('13) 18 Ind Cas 492 (493) (DB) (All). (A transfer of mortgage debt during a partition suit is a transfer of immovable property.)
(1900) 27 Cal 77 (83, 84) (DB).
[*See also* ('28) 107 Ind Cas 195 (197) (Nag).]

2. 1928 Nag 198 (198, 199) [AIR V 15].
1917 Nag 44 (44, 45) [AIR V 4] : 14 Nag L R 18. (*Held*, the doctrine of lis pendens did not affect a transfer made after institution of partition proceedings but before raising of question of title.)
('97) 1 Cal W N 62 (64) (DB). (Overruled in AIR 1926 Cal 714 (FB).)

3. 1941 Cal 436 (437, 438) [AIR V 28].

3a. 1946 Oudh 99 (101) [AIR V 33 C 37] : 21 Luck 185 (DB).

4. 1929 Cal 697 (699) [AIR V 16] : 57 Cal 597 (DB).
[*See also* 1946 Pat 306 (309) [AIR V 33 C 108] : 25 Pat 13 (DB). (Partition suit of joint family property—Sale of property pending suit in execution of decree for pre-partition debt binding on whole family—No provision made in

20. Suits for maintenance. — A maintenance suit in which a *charge* is asked for against properties described in the plaint is one wherein the right to immovable property is directly and specifically in question and the doctrine of *lis pendens* applies to such suits.(1) The *lis* commences on the date of the plaint and not on the date of the decree which creates the charge.(1a) The fact that the whole family property is enumerated in the schedule of the plaint but the charge is asked to be given on *a sufficient portion* thereof(2) or the decree gives a charge only against some of the properties though a charge is asked for against all the properties(3) does not prevent the applicability of the doctrine of *lis pendens*.

But where no charge is claimed in the maintenance suit and properties are described in the schedule of the plaint for the purpose merely of determining the amount of maintenance, no question of *lis pendens* arises.(4)

Where properties are charged by the decree awarding maintenance, a transfer of such properties is affected by the doctrine of *lis pendens* even though the transfer is after decree, so long as the properties remain charged under the decree.(5) The *lis*

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decree in the partition suits. as to above debt —Execution sale not affected by lis pendens. AIR 1929 Cal 697, Rel. on.)]

Section 52 — Note 20

1. 1928 Mad 713 (719) [AIR V 15] (FB).
1967 Mad 126 (126) [AIR V 54 C 37].
1966 Madh Pra 318 (324) [AIR V 53 C 80].
('59) 1959 Andh L T 509 (510).
1959 Bom 475 (477) [AIR V 46 C 141] : ILR (1959) Bom 94. (AIR 1927 Mad 502 Diss. from.)
1955 Mad 571 (575) [AIR V 42 C 166].
('53) 32 Pat 903 (916) : AIR 1955 N U C 231.
1951 All 141 (146, 151) [AIR V 38 C 16] : I L R (1953) 1 All 284 (FB). (AIR 1943 Oudh 354 (FB), Dissented from; AIR 1939 All 687 : ILR (1939) All 885, Overruled.)
('51) 1951-1 Mad L Jour 143 (145). (Suit by Hindu wife against her husband for maintenance and for charge — Alienation by husband pending such suit is affected by lis pendens—1927 Mad 502 [AIR V 14], Diss. from.)
1946 Bom 207 (209) [AIR V 33 C 56]: ILR (1945) Bom 885 (DB).
1945 Mad 219 (221) [AIR V 32].
1945 Mad 126 (127) [AIR V 32] : ILR (1945) Mad 726 (DB).
†1944 Bom 191 (192) [AIR V 31]:ILR (1945) Bom 274 (DB).
1943 Cal 227 (232) [AIR V 30] (DB).
1940 Bom 395 (396) [AIR V 27]: ILR (1941) Bom 1 (DB). (Affirming AIR 1939 Bom 403.)
1939 Cal 655 (656) [AIR V 26] (DB). (In this case, however, the mortgage was prior to the institution of maintenance suit — Purchaser at a mortgage sale which took place during pendency of the maintenance suit was held not to be hit by lis pendens.)
1939 Bom 403 (404) [AIR V 26]. (Even if the sale is to pay off the mortgage prior to the institution of the maintenance suit.)
1936 Mad 84 (85) [AIR V 23] (DB).
†1935 Mad 867 (869) [AIR V 22]:59 Mad 101(DB).
1930 Mad 824 [832) [AIR V 17] : 54 Mad 132 (DB).
1929 Sind 102 (105, 106) [AIR V 16]. (Partition taking place subsequent to the institution of maintenance suit—Lis pendens applies.)
†('06) 29 Mad 508 (510) (DB).
('36) 169 Ind Cas 169 (171) (Nag).
[*See also* 1938 Mad 357 (358, 359) [AIR V 25] : ILR (1938) Mad 829 (SB).
1956 S C 593 (603) [AIR V 43 C 103] : ILR (1956) Mys 152 : 1956 S C R 451. (Charge-decree for maintenance—Purchaser in execution acquires good title subject to right of person having right of redemption of prior mortgage—Decree not open to attack by person taking transfer pending maintenance suit.)
1933 Mad 858 (859) [AIR V 20]. (Doctrine of lis pendens not applied because the property had devolved on official assignee in bankruptcy by operation of law.)]

1a. 1956 S C 593 (597) [AIR V 43 C 103] : ILR (1956) Mys 152 : 1956 S C R 451. (AIR 1927 Mad 502 and 53 Mys H C R 219 taking a contrary view must be held to be overruled.)
1959 Bom 475 (477) [AIR V 46 C 141] : ILR (1959) Bom 94. (AIR 1927 Mad 502, Diss. from.)

2. 1936 Mad 84 (85) [AIR V 23] (DB).

3. 1936 Mad 84 (85) [AIR V 23] (DB).

4. ('06) 19 Mad 271 (272, 273) (DB).

5. 1951 Orissa 306 (310) [AIR V 38 C 75] : ILR (1949) 1 Cut 336 (DB).
1945 Mad 350 (351) [AIR V 32].
1939 Bom 403 (405) [AIR V 26].
1935 Mad 867 (869) [A I R V 22] : 59 Mad 101 (DB).
1928 Mad 612 (612) [AIR V 15] (DB).
('36) 169 Ind Cas 169 (171) (Nag).
[*See also* 1946 Mad 51 (52) [A I R V 33 C 24]. (Maintenance decree charging properties—Sale in execution—Mortgage subsequent to decree and before sale — Right to pay off decree and redeem — Mortgagee is not barred by lis pendens from redeeming and paying off charge decree holder so long as execution sale under charge decree had not been confirmed.)]
Also see Notes 6a and 11.

in such a case continues so long as the maintenance is due under the decree.(6) The fact that the transfer was effected to pay off the plaintiff's husband's debts does not affect the above rule.(7)

It has been held that where the suit is only a *personal* claim for maintenance as, for example, by a Hindu wife against her husband, this section has no application inasmuch as no right to any immovable property is in question in the suit and an alienation by the husband of his properties pending such a suit is therefore not affected by *lis pendens*.(8)

An application to file an award creating a charge stands on the same footing as a plaint in the ordinary maintenance suit in which a charge is claimed. The doctrine of *lis pendens* applies to such proceedings.(9)

21. Pre-emption suit. — The doctrine of *lis pendens* applies also to suits for pre-emption, as in the case of other suits.(1) Even a resale of the property by the vendee in favour of the vendor pending the suit for pre-emption will be affected by *lis pendens* and cannot affect the pre-emptor's claim to a decree for pre-emption.(2)

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6. 1951 All 141 (153) [AIR V 38 C 16] : ILR (1953) 1 All 284 (FB). (Suit for maintenance — Decree specifically creating charge on specific immovable property is not merely a declaratory decree but is executable — Transferee of property whether with notice or otherwise is bound by decree until it is fully satisfied— AIR 1943 Oudh 354 (FB), Dissented from: AIR 1939 All 687, Overruled.)
1946 Bom 207 (209) [A I R V 33 C 56] : I L R (1945) Bom 885 (DB).
1945 Mad 350 (350) [A I R V 32]. (Maintenance suit—Decree creating charge—Sale after decree but before execution — Purchaser cannot succeed against purchaser in execution of charge decree.)
1935 Mad 867 (869) [AIR V 22] : 59 Mad 101 (DB).
† ('36) 169 Ind Cas 169 (171) (Nag). (A maintenance decree creating a charge and ordering periodical payments in future is in its nature an executory decree — It remains valid and operative during the period the decree-holder lives—The lis should therefore be held to be pending until the death of the decree-holder.)
[*See also* 1950 Mad 396 (396) [AIR V 37 C 178]. (Declaratory charge decree — Lis continues until possibility of enforcing charge by separate suit remains.)]
[See however 1957 All 575 (582) [AIR V 44 C 169 (DB). (Decree declaring a sum to be a charge on property but not directing sale of property in enforcement of charge—Transferee not subject to doctrine of *lis pendens*.)]

7. 1940 Bom 395 (396) [AIR V 27] : ILR (1941) Bom 1 (DB). (No distinction between the debt of husband and the debt of the joint family.)
[*See also* 1944 Bom 191 (193) [AIR V 31] : ILR (1944) Bom 274 (DB). (Even if the purchaser has paid off a previous mortgage he is bound by the charge.)]

8. 1939 Bom 403 (404) [AIR V 26].
[*See* 1927 Mad 502 (502) [AIR V 14]. (The mere fact that the plaintiff mentions in the plaint all the property of the husband would not make the property subject-matter of the suit.)]

9 1946 Bom 207 (210) [A I R V 33 C 56] : ILR (1945) Bom 885 (DB).

Section 52 — Note 21

1. 1958 S C 838 (842) [A I R V 45 C 114] : 1959 S C R 878 : ILR (1958) Punj 2225.
1946 Lah 142 (143) [AIR V 33 C 31] : ILR (1946) Lah 467 (FB).
1930 Lah 356 (357) [A I R V 17] : 11 Lah 258 (FB).
*1941 Lah 433 (441) [A I R V 28] : ILR (1942) Lah 155 (FB).
1964 Cur L J 200 (201) (Punj).
1952 Nag 51 (53) [A I R V 39] : ILR (1951) Nag 830 (FB).
1947 Lah 175 (176) [AIR V 34 C 32].
1946 Nag 367 (371) [A I R V 33 C 103] : ILR (1943) Nag 758. (Overruled on another point in 1952 Nag 51 [AIR V 39] (FB).)
1942 Pesh 43 (45) [AIR V 29].
† 1934 Oudh 303 (307) [AIR V 21] : 9 Luck 475.
1930 All 354 (355) [AIR V 17] (DB).
1929 All 440 (441) [AIR V 16] (DB).
1927 All 336 (337) [AIR V 14] : 49 All 516 (DB).
1926 All 179 (180) [AIR V 13] : 47 All 923 (DB).
1926 All 180 (181) [AIR V 13] : 48 All 221 (DB).
1925 All 502 (502) [AIR V 12] (DB).
1925 All 487 (488) [AIR V 12] : 47 All 625 (DB).
1919 Lah 427 (427) [AIR V 6] (DB).
1914 Oudh 352 (353) [A I R V 1] : 17 Oudh Cas 150.

2. 1929 All 440 (441) [AIR V 16] (DB).
1926 All 179 (180) [AIR V 13] : 47 All 923 (DB).
1925 All 487 (488) [AIR V 12] : 47 All 625 (DB).
1925 All 502 (502) [AIR V 12] (DB).
1918 All 401 (401) [AIR V 5] (DB).
('11) 11 Ind Cas 645 (646) (DB) (All).
† ('09) 5 Nag L R 136 (145). (Pre-emption is a right of substitution and not of re-purchase.)
('06) 2 Nag L R 150 (157). (Sale to vendor after decree.)

But it has been held that a sale pending a pre-emption suit in *favour of a person* having an *equal or superior* right of pre-emption to that of the plaintiff, does not conflict with the doctrine of *lis pendens* and is therefore valid.(3) The reason given is that the sale does not really vest any new rights. All that the vendee does in such a case is to take the bargain in the assertion of his pre-existing pre-emption right and hence the sale does not offend the doctrine of *lis pendens*.(4) It is necessary, however, that the transfer should have been *in recognition of the superior right*. A transfer made in favour of a person having a superior right but not in recognition of such right, will be affected by *lis pendens*.(5) Where the transferee had, at the time of the transfer to him, lost his right of pre-emption, by lapse of time, the transfer will be affected by *lis pendens*,(6) although made in performance of an agreement entered into at a time when his right to sue for pre-emption was subsisting and in express recognition of such right.(6a) Where pending a suit for pre-emption, the defendant vendee sold the property again to a third person, and the plaintiff thereupon got the plaint amended by impleading the third person as a party, who raised the question of his own preferential right of pre-emption, and the same was heard and decided against the plaintiff, it was held that the latter could not thereafter fall back upon S. 52 and claim that the sale to the third party was affected by *lis pendens*.(7)

The vendee-defendant in a pre-emption suit can improve his status pending the suit by dealing with the land, so as to defeat the claim of the pre-emptor.(8) Thus

3. 1952 Nag 51 (54) [AIR V 39]: ILR (1951) Nag 830 (FB). (1946 Nag 367 [A I R V 33], Overruled.)
1949 East Punj 193 (195) [AIR V 36 C 39] : ILR (1949) East Punj 305 (FB).
1946 Lah 142 (145) [A I R V 33 C 31]: I L R (1946) Lah 467 (FB).
1941 Lah 433 (436) [AIR V 28] : ILR (1942) Lah 155 (FB).
1930 Lah 356 (357) [AIR V 17]: 11 Lah 258 (FB).
1960 J & K 112 (114, 115) [AIR V 47 C 49] (DB). (Plaintiff pre-emptor in order to succeed must show his superior right of pre-emption.)
1935 Lah 808 (809) [AIR V 22] (DB). (Superior right.)
('10) 1910 Pun Re No. 7 : 5 Ind Cas 249 (251). (Do.)
1935 Lah 529 (532) [A I R V 22] : 16 Lah 921 (DB). (Equal rights.)
1923 All 294 (294) [A I R V 10] (DB). (Equal rights.)
('11) 1911 Pun Re No. 53 : 10 Ind Cas 367 (369) (DB). (Transfer to person having superior right of pre-emption.)
('11) 10 Ind Cas 842 (843) (Lah). (This equal or superior right must be subsisting at the date of sale.)
[*See also* ('06) 2 Nag L R 150 (157). (Equal right—Obiter.)]
[But see ('08) 30 All 467 (469) (DB). (Sale pendente lite to person having equal right — Lis pendens applies and plaintiff is entitled to a decree.)
1926 All 180 (181) [A I R V 13] : 48 All 221 (DB). (Lis pendens applies even where sale is made to a person having an equal right — But proper procedure is to divide the property between the two plaintiffs and the vendee pending suit.)

4. 1958 S C 838 (844) [A I R V 45 C 114] : 1959 S C R 878 : ILR (1958) Punj 2225. (If the pre-existing right became unenforceable by reason of the fact of limitation or otherwise, the transfer though ostensibly made in recognition of such a right in fact creates only a new right pendente lite. AIR 1954 Pepsu 59, Reversed.)
1946 Lah 142 (145) [AIR V 33 C 31] : ILR (1946) Lah 467 (FB).
1966 Punj 179 (181) [AIR V 53 C 38] (DB). (1964 Cur L J 200, Affirmed.)
('63) ILR (1963) Bom 246 (254) (DB).
1931 Lah 435 (435) [AIR V 18] (DB).
1929 Lah 589 (590) [AIR V 16].
('11) 1911 Pun Re No. 53 : 10 Ind Cas 367 (370) (DB).
('08) 1908 Pun Re No. 26, p. 144 (146).

5. 1949 East Punj 193 (195) [A I R V 36 C 39]: ILR (1949) East Punj 305 (FB).
1921 Lah 363 (363) [AIR V 8] (DB).

6. 1958 S C 838 (844) [A I R V 45 C 114] : 1959 S C R 878 : ILR (1958) Punj 2225.
1946 Lah 142 (144) [AIR V 33 C 31] : ILR (1946) Lah 587 (FB).
1921 All 105 (106) [AIR V 8] (DB).
1914 All 356 (357) [AIR V 1] : 36 All 60 (DB).
1914 Oudh 352 (352) [AIR V 1]: 17 Oudh Cas 150.
('11) 1911 Pun Re No. 30 : 10 Ind Cas 1007 (1008) (DB).

6a. 1946 Lah 322 (325) [AIR V 33 C 63] : I L R (1947) Lah 213 (FB).

7. † ('05) 27 All 544 (547) (FB).
1929 All 440 (441) [AIR V 16] (DB).

8. 1941 Lah 433 (442) [A I R V 28] : ILR (1942) Lah 155 (FB).

where a vendee with an equal right of pre-emption with the plaintiff has lost it by associating a stranger with himself as a joint purchaser, he can buy the stranger's share during the suit and thus remove the defect in his title.(9)

22. **Suit for establishing will.** — In a suit by devisees under a will for establishing the will, the heir at law is at liberty to invalidate the will. An alienation by the devisees pending the suit will be affected by *lis pendens*.(1)

23. **Suit for cancellation of trust deed.** — A suit for the cancellation of a trust deed and for recovery of the immovable property comprised in the trust, is a suit in which the right to immovable property is directly aud specifically in question.(1)

24. **Suit for specific performance of contract.** — Suits for specific performance of contracts to transfer immovable property are suits in which the right to immovable property is directly and specifically in question and constitute *lis pendens*.(1)

25. **Winding up proceedings.** — A petition to wind up a company does not constitute a *lis pendens* against a contributory of the company.(1) As to insolvency proceedings, see Note 12.

26. **Suit for declaration of title.**—Suits for declaration of title to immovable property are suits in which rights to immovable property are directly and specifically in question and consequently the doctrine of *lis pendens* applies to such suits.(1) Where a suit was for a declaration that the sale deed executed by the widow in respect of certain property was not binding on the reversioners, it was held that the right to the immovable property the alienation of which was sought to be set aside was involved directly and specifically in the suit.(2)

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9. 1941 Lah 444 (446) [AIR V 28] : I L R (1942) Lah 190 (FB).

Section 52 — Note 22

1. (1742) 26 E R 509 (509) : 2 Atk 175, Garth v. Ward.

Section 52 — Note 23

1. 1925 Cal 239 (244) [AIR V 12] (DB).

Section 52 — Note 24

1. 1948 P C 147 (149) [A I R V 35 C 39] : I L R (1949) 1 Cal 234 : 75 Ind App 165.
1964 Mys 269 (274) [AIR V 51 C 67] (FB).
1962 Madh Pra 34 (36) [A I R V 49 C 16] : I L R (1960) Madh Pra 797. (Suit for specific performance of subsequent agreement for sale of property pending—Execution of sale deed on basis of prior agreement for sale—Hit by doctrine of lis pendens — Notice of suit to prior purchaser not necessary.)
1962 Madh Pra 25 (27) [A I R V 49 C 13] : I L R (1961) Madh Pra 97 (DB).
('58) 1958 Ker L T 836 (839).
1943 Bom 27 (30) [AIR V 30]. (Attachment before judgment of such property pending suit is subject to doctrine of lis pendens.)
1943 Cal 227 (230, 232) [AIR V 33] (DB).
1934 All 713 (714) [AIR V 21]. (A lease of property pending a suit for specific performance of an agreement to lease.)
1924 Mad 307 (307) [A I R V 11]. (Agreement to sell.)
1922 Cal 412 (414) [AIR V 9] : 49 Cal 495 (DB).
('09) 3 Ind Cas 696 (699) (DB) (Cal). (Purchaser at an execution sale is bound by the doctrine.)
('09) 2 Ind Cas 266 (267, 268) (DB) (Cal). (Contract of lease.)
[*See also* 1964 Orissa 176 (182) [A I R V 51 C 70] : I L R (1964) Cut 89 (DB). (Aggrieved party not establishing that under provisions of Specific Relief Act he is entitled to specific performance—S. 52 not applicable.)
1928 Nag 246 (247, 248) [A I R V 15]. (S contracting to purchase and obtaining decree for specific performance against C — Mortgage by C to A in the meantime — G purchasing subsequent to decree and redeeming the mortgage — S's decree is binding on G subject to proportionate repayment of the mortgage debt by S.)

Section 52 — Note 25

1. (1866) L R 2 Ch 171 (177) : 15 L T 523, In re Barned's Banking Co.; Ex parte Thornton.

Section 52 — Note 26

1. 1957 Pat 729 (731) [A I R V 44 C 218] : 36 Pat 1139 (DB).
1938 Lah 448 (451) [AIR V 25].
[*See also* 1916 Lah 379 (380) [AIR V 3] (DB).]
2. 1957 Andh Pra 454 (456) [AIR V 44 C 142] : I L R (1956) Andh Pra 137 (DB).

27. "Transferred or otherwise dealt with."—The words "otherwise dealt with" will include the following :

(1) The entering into a contract for sale of the land in suit, which is capable of specific performance.(1)

(2) Partition of the property in suit,(2) though a mere filing of a suit for partition is not a "dealing" with the property such as is contemplated by the section.(3)

(3) The obtaining of a collusive decree or order(4) relating to the property.

(4) The entering into a compromise with a third party regarding the subject-matter of the suit.(5)

(5) The erection of a fresh obstruction pending suit for removal of obstruction to property.(6)

(6) Surrendering property to a third person pending suit for possession.(7)

See also the undermentioned cases.(8)

In the undermentioned case,(8a) the doctrine of *lis pendens* has been applied to a case of acquisition of title by adverse possession pending a suit.

In the following cases, the acts of a party were held not to amount to any transfer or other dealing with the property in suit :

(1) Where a party to a pending suit entered into a compromise with a third party merely recognizing a transfer which had been made to him before suit.(9)

(2) *A* executed a mortgage in favour of *B* of certain properties and afterwards executed a trust deed vesting such property in the trustees. Subsequently, the trustees were discharged and *A* took possession of the properties. *B* then brought a suit on the mortgage and, pending the

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Section 52 — Note 27

1. 1917 Oudh 193 (194) [AIR V 4] : 20 Oudh Cas 13.

2. ('13) 37 Bom 427 (439) (SB).
1959 Ker 67 (72) [A I R V 46 C 28] : I L R (1958) Ker 1266 (FB). (I L R 37 Bom 427, Foll.)
1950 Assam 119 (126) [AIR V 37 C 47] : I L R (1950) 2 Assam 225 (DB).
('50) 1950 Trav Co L R 23 (30) (DB).

3. 1928 Mad 735 (741, 745) [AIR V 15]: 51 Mad 417 (FB). (Per Ramesam and Madhavan Nair, JJ.)

4. ('34) 11 Oudh W N 390 (392, 393) (DB).
('06) 1906 Pun Re No. 7, p. 17 (19). (Consent decree in favour of another pre-emptor during pre-emption suit—Lis pendens applies.)
('26) 96 Ind Cas 450 (451, 452) (Lah).

5. 1922 Lah 403 (404) [AIR V 9] : 3 Lah 264.

6. 1934 Lah 978 (979) [AIR V 21].

7. ('55) ILR (1955) Madh B 416 (419, 420): AIR 1955 N U C 3706. (Words "otherwise dealt with" in S. 52 include such transactions as a surrender of holding by tenants to zamindar during pendency of suit filed against them by certain persons for enforcing right to purchase the property.)
1925 Nag 421 (421) [AIR V 12] : 21 Nag L R 441.
1925 Nag 132 (134) [AIR V 12] : 22 Nag L R 110.
[*See also* 1953 Trav Co 12 (13) [AIR V 40 C 2]. (Surrender to a person having no title cannot operate as a surrender. It will, however, operate as an assignment.)]
[See however 1958 Pat 115 (118) [AIR V 45 C 49]. (Surrender by a Hindu widow in favour of nearest reversioner during pendency of suit by reversioner is not hit by doctrine of lis pendens.)]

8. 1953 Trav Co 573 (574) [AIR V 40 C 223]. (Transfer of possession pendente lite will be a transfer of property within S. 52.)
1924 Bom 434 (436) [AIR V 11] : 48 Bom 435 (DB). (Gift by A to B—Suit by A before registration of gift deed to revoke gift — B getting document registered pending suit—*Held*, per Macleod, C. J., that lis pendens applies.)
('88) 1888 Pun Re No. 102, p. 270 (271) (DB). (Mortgage with possession—Suit for pre-emption —Mortgagor executing simple money bond, pending suit, in substitution of mortgage bond —Pre-emption cannot be defeated by such act.)
1918 Cal 277 (278) [AIR V 5] (DB). (Settlement by ijardar with tenant during pendency of suit for ejectment held not binding on landlord.)

8a. 1948 Nag 97 (99) [AIR V 35 C 37] : I L R (1947) Nag 719.

9. 1929 Bom 337 (339) [AIR V 16] (DB).

suit, *A* appointed new trustees. It was held that *A's* act was not a "transfer or other dealing" with the property within the meaning of this section.(10)

(3) An adoption *pendente lite*.(11)

(4) An admission by a party to the suit of the execution of a deed before the Registering Officer.(12)

(5) Pending a mortgage suit, the mortgagor executed a mortgage to *X* for paying off other mortgages which had been executed prior to the suit in favour of *Y* and *Z*. It was held that *X* merely took over the prior mortgages and that the act of the mortgagor was not a new transaction or dealing with the property during the pendency of the suit.(13)

(6) An institution of a suit relating to the same property.(13a)

(7) Taking of forcible possession by one party from another during pendency of a litigation.(13b)

See also the undermentioned cases.(14).

28. Transfer executed before suit.—It has been seen in Note 7 that rights *existing* before the suit are not affected by *lis pendens*. It follows that this section has no application to transfers made *before* suit.(1) Where a person is, subsequent to the institution of a suit, added as a party to the suit, the general principle is that the suit must, as against him, be deemed to have been instituted only on the date when he was so made a party.(2) A transfer by such person *before* he was so made a party cannot, therefore, be affected by the doctrine of *lis pendens*.(3) On the same principle where a person, *not* a party to the suit, transfers property pending suit, and subsequently, is made a legal representative of a party who dies, the transferee cannot be affected by the doctrine of *lis pendens*.(4)

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10. 1939 Oudh 161 (172) [AIR V 26] : 14 Luck 548 (DB).

11. ('80) 5 Bom 630 (634, 635) (DB).

12. 1957 Punj 238 (243) [AIR V 44 C 89] (DB). ('13) 9 Nag L R 155 (157).

13. ('10) 7 Ind Cas 473 (473) (DB) (Cal). [*See also* 1929 All 943 (945) [AIR V 16] : 52 All 139 (DB).]

13a. 1948 Pat 111 (112) [AIR V 35 C 43].

13b 1965 Punj 415 (420, 423) [AIR V 52 C 133] : ILR (1965) 2 Punj 97 (FB). (Suit by A against B for declaration of title and possession—A taking forcible possession of suit land by evicting B during pendency of his suit — Suit dismissed — B's suit for possession after 12 years from date of his dispossession—S. 52 does not apply and A's adverse possession for more than 12 years is not affected—B's suit held barred by limitation under Art. 142, Limitation Act or alternatively under Art. 144. Per Grover and Dulat JJ., Dua J. contra.)

14. ('63) 1963-2 Andh W R 465 (471) (DB). (Suit for possession pending—One of the defendants redelivering land to another defendant on expiry of term of lease — *Held*, there was no surrender but expiry of lease by efflux of time —S. 52 did not apply.)

1924 Mad 602 (602) [AIR V 11] (DB). (Order under O. 21, R. 101 of Civil Procedure Code passed during the pendency of suit, by which defendant was put in possession of property and more than a year had elapsed before the suit was disposed of — *Held*, lis pendens did not apply.)

Section 52 — Note 28

1 1949 East Punj 193 (195) [A I R V 36 C 39] : ILR (1949) East Punj 305 (FB). (Transfer before suit to person having equal or superior right of pre-emption — Transferee can resist suit by another pre-emptor on the strength of his own pre-emptive right irrespective of whether transfer to him was made in recognition of his superior pre-emptive right or not — Form of transfer, so long as it can be shown that transferee acquired full title of vendee, is immaterial.)

1957 Ker 48 (50) [A I R V 44 C 30] : I L R (1957) Ker 35 (DB).

1915 Mad 805 (806, 807) [AIR V 2] (DB). (Sale by auction by Court before suit—Confirmation after suit—Lis pendens does not apply as purchaser's title arises on the date of sale though it is confirmed afterwards.)

2. See Limitation Act, S. 21 (1) and also Civil Procedure Code, O. 1, R. 10 (5).

3. 1932 Pat 270 (271) [AIR V 19] : 11 Pat 415 (DB). 1925 Mad 487 (488) [AIR V 12].

4. 1925 Bom 176 (177) [AIR V 12] (DB).

29. Transfer executed before but registered after suit. — The section cannot apply so as to affect a transfer of property made before suit but registered thereafter.(1) As pointed out by their Lordships of the Privy Council, while registration is a necessary solemnity in order to enforce a transfer, it does not suspend the transfer until registration actually takes place.(2) This view is also held by the undermentioned cases.(3)

30. Transfers by operation of law.—The words "the property cannot be transferred or otherwise dealt with *by any party* to the suit" clearly show that the section in terms does not apply to a transfer by operation of law. Section 2, Cl. (d) also makes this clear. A transfer by operation of law takes place in cases of succession, bankruptcy and forfeiture. Thus, where pending a suit, the defendant becomes an insolvent and his property vests in the Official Receiver, neither this section nor the principle of *lis pendens* applies.(1) But a sale by the Official Receiver is a private sale and not a sale by operation of law and therefore is governed by this section.(2) It has been held by the Nagpur High Court that the doctrine of *lis pendens* will apply to a person who perfects his title to property by adverse possession during the pendency of a suit.(3) But it is doubtful if this view is correct.

31. Transfer by or in execution of decree or order.—A transfer by way of a Court sale in execution of a decree or order, though involuntary, cannot be said to be a transfer by operation of law within the meaning of this Act, inasmuch as S. 2, cl. (d) draws a distinction between a transfer by operation of law and a transfer by or in execution of a decree or order. This *section*, in terms, does not apply to such transfers also.(1) The general principle of the

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Section 52 — Note 29

1. 1960 Ker 98 (100) [AIR V 47 C 46] : ILR (1959) Ker 820. (Transfer deed executed on date of filing suit but registered four days thereafter — Plaintiff not showing that he filed plaint earlier in point of time than the execution of transfer deed — Transfer, held not vitiated by lis pendens.)
1951 Pat 613 (616) [AIR V 38 C 174] (DB).
1925 Mad 710 (710) [AIR V 12] (DB). (Sale-deed executed before but registered after suit.)
1925 Mad 359 (359) [AIR V 12].
† 1922 Mad 249 (249, 258) [AIR V 9] (DB). (Suit on prior mortgage without impleading puisne mortgagee—Puisne mortgage registered pendente lite—Effect of.)
('77) 1877 Bom P J 81 (DB).
[See however 1960 J & K 112 (113) [AIR V 47 C 49] (DB). (Pre-emption suit — Deed of exchange between Defendant 1 and Defendant 3 executed before suit but registered after institution of suit — So far as plaintiff is concerned document is effective from date of registration under S. 47 of Registration Act (1908)—Plea of doctrine of lis pendens is open to plaintiff—In order to succeed he must show his superior right of pre-emption.)]
[But see 1921 Pat 150 (152) [AIR V 8] : 5 Pat L Jour 715 (DB).]
2. 1927 P C 42 (44) [AIR V 14] : 50 Mad 193 : 54 Ind App 89. (Case under S. 123, T. P. Act.)
3. 1925 Bom 210 (219, 227) [AIR V 12] : 49 Bom 388 (FB). (Deed duly executed—Donor cannot revoke before registration — Per Marten, Fawcett and Kincaid, JJ.)
1957 Punj 238 (243) [A I R V 44 C 89] (DB). (Vendee selling house sought to be pre-empted before institution of pre-emption suit — Sale deed registered after suit — Doctrine of lis pendens not applicable.)
1948 Pat 60 (61) [AIR V 35 C 22] (DB).

Section 52 Note 30

1. 1951 Mad 687 (691) [AIR V 38 C 217] (DB).
1939 Nag 128 (129) [AIR V 26].
1922 Mad 335 (336) [AIR V 9] (DB).
†('02) 25 Mad 406 (413, 423) (DB). (Official Receiver is not a 'voluntary' purchaser.')
[*See* ('03) 26 Mad 230 (236) (DB).]
[*See also* 1933 Mad 858 (859) [AIR V 20]. (Official Assignee held not bound by the decree passed in a suit instituted against the insolvent and his son.)]
2. 1945 Mad 350 (351) [AIR V 32].
3. 1948 Nag 97 (99) [AIR V 35 C 37] : ILR (1947) Nag 719.

Section 52 — Note 31

1. 1967 S C 1440 (1445) [AIR V 54 C 304] : (1967) 1 S C W R 585 : (1967) 2 S C R 18 : (1968) 1 S C J 68.
1958 All 24 (25) [AIR V 45 C 7].
1957 Pat 729 (731) [AIR V 44 C 218] : 36 Pat 1139 (DB).

doctrine of *lis pendens* will, however, apply to such cases.(2) In *Moti Lal* v.

('57) ILR (1957) 3 Cal 642 (643).
('54) 1954 B L J R 356 (358, 359) : AIR 1955 N U C 1597.
1952 Orissa 64 (68) [AIR V 39] : ILR (1952) Cut 277 (DB).
('51) ILR (1951) Trav-Co 570 (574) : AIR 1955 N U C 1043 (DB).
1950 Orissa 210 (211) [AIR V 37 C 37] : ILR (1950) Cut 486 (DB).
1930 Rang 132 (135) [AIR V 17] : 7 Rang 734 (DB).
('01) 23 All 60 (62) (DB). (Sale in execution pending an appeal in a suit under O. 21, R. 63.)
The contrary view expressed in the case noted below that the section applies to such cases is not correct :
1931 All 466 (480) [AIR V 18] : 53 All 1023 (FB).
('11) 9 Ind Cas 840 (840) (Cal). (Word, "herein" in S. 2, T. P. Act, interpreted.)
1931 All 45 (46, 47) [AIR V 18] (DB). (Suit for partition.)
1923 Cal 252 (256) [AIR V 10] (DB).
1922 Nag 81 (82) [AIR V 9].
1915 All 27 (28) [AIR V 2] (DB).
2. 1967 S C 1440 (1445) [AIR V 54 C 304] : (1967) 1 S C W R 585 : (1967) 2 S C R 18 : (1968) 1 S C J 68.
1922 Nag 89 (90, 92) [AIR V 9] (FB).
('96) 24 Cal 62 (74, 75) (FB).
1918 Mad 578 (579) [AIR V 5] : 41 Mad 458.
('62) 1962-2 Mad L Jour 336 (337).
1960 Cal 299 (302) [AIR V 47 C 76] (DB). (AIR 1939 Cal 709, Approved. AIR 1946 Pat 134 and AIR 1935 Pat 230, Dissented from.)
1959 Ker 133 (135) [AIR V 46 C 44] : ILR (1958) Ker 480 (DB). (Sale in execution of money decree subsequent to mortgage suit.)
1958 All 24 (25) [AIR V 45 C 7].
('58) 37 Pat 176 (193) (DB)
('57) ILR (1957) 3 Cal 642 (643).
1957 Pat 729 (731) [AIR V 44 C 218] : 36 Pat 1139 (DB).
('54) 1954 B L J R 356 (358, 359) : AIR 1955 N U C 1597.
1954 Trav-Co 299 (301) [AIR V 41 C 106] (DB).
1954 Trav-Co 122 (123) [AIR V 41 C 37] (DB).
1953 Pat 58 (59) [AIR V 40 C 18] : 31 Pat 722 (DB). (Doctrine of *lis pendens* applies to purchase at auction sale in execution of a decree.)
1952 Orissa 64 (68) [AIR V 39] : ILR (1952) Cut 277.
1952 Trav-Co 102 (103) [AIR V 39] : 1950 Trav-Co L R 665 (DB).
1951 Cal 481 (484) [AIR V 38 C 136] : ILR (1949) 1 Cal 378 (DB).
1951 Nag 194 (197) [AIR V 38 C 45] : ILR (1951) Nag 241. (Principle enunciated in S. 52 applies to auction sales.)
('51) ILR (1951) Trav-Co 570 (574) : AIR 1955 N U C 1043 (DB).
1950 Orissa 210 (211) [AIR V 37 C 37] : ILR (1950) Cut 486 (DB).
1950 Orissa 36 (41) [AIR V 37 C 5] : ILR (1949) 1 Cut 559 (DB). (In applying the doctrine of *lis pendens* law does not make any difference between a transfer inter vivos and an involuntary transfer.)
('50) 1950 Trav-Co L R 636 (640) (DB). (1 T L J 28 and 16 T L J 510 (FB), Rel. on.)
1949 Mad 207 (208) [AIR V 36 C 90].
1949 Nag 114 (115) [AIR V 36 C 42] : ILR (1948) Nag 573.
('48) ILR (1948) Nag 133 (139) (DB).
1948 Pat 111 (112) [AIR V 35 C 43].
1946 Lah 322 (328) [AIR V 33 C 63] : ILR (1947) Lah 213 (FB).
('45) 50 Mys H C R 258 (DB). (The language of T. P. Act is plain. The rule of *lis pendens* only applies to transfers by the plaintiff or defendant of their respective interests after the suit including transfers by Court sale in execution of money decrees against either party.)
1944 Bom 191 (193) [AIR V 31] : ILR (1944) Bom 274 (DB).
1943 Bom 27 (30) [AIR V 30]. (Doctrine of *lis pendens* applies to attachment before judgment.)
1943 Trav-Co L R 133.
1939 Cal 709 (710) [AIR V 26] : ILR (1939) 2 Cal 63.
1939 Cal 655 (656) [AIR V 26] (DB).
1939 Lah 146 (147) [AIR V 26].
1937 Nag 400 (401) [AIR V 24] : ILR (1937) Nag 452.
1937 Oudh 159 (163) [AIR V 24] : 12 Luck 540 (DB).
1936 Cal 590 (592) [AIR V 23].
1936 Lah 512 (513) [AIR V 23].
1934 Nag 36 (38) [AIR V 21] : 30 Nag L R 284.
1933 Mad 838 (838) [AIR V 20].
1933 Lah 10 (11) [AIR V 20].
1933 Lah 171 (172) [AIR V 20].
†1930 Mad 570 (572) [AIR V 17].
1930 Mad 824 (830, 832) [AIR V 17] : 54 Mad 132 (DB).
1930 Rang 132 (133, 135) [AIR V 17] : 7 Rang 734 (DB).
1929 All 601 (602) [AIR V 16].
1929 Bom 200 (201) [AIR V 16].
1927 Oudh 261 (263) [AIR V 14] : 2 Luck 496 (DB).
1925 Pat 462 (464) [AIR V 12] : 4 Pat 619 (DB).
1925 Oudh 496 (497, 498) [AIR V 12] : 29 Oudh Cas 37 (DB).
†1925 Oudh 30 (33) [A I R V 12]. (Absence of notice is immaterial.)
1924 Mad 307 (308) [AIR V 11] (DB).
1924 Bom 467 (467) [AIR V 11] (DB).
1923 Mad 442 (443) [AIR V 10] (DB).
1922 Pat 542 (543) [AIR V 9] : 1 Pat 287 (DB).
1920 Mad 126 (129) [A I R V 7] : 43 Mad 696 (DB). (Per Seshagiri Aiyar, J.—It applies when the purchaser knows the pendency of the litigation and purchases property deliberately ignoring the suit.)
1918 Mad 1098 (1098) [AIR V 5] : 40 Mad 955 (DB). (Per Napier, J.)
†1917 Oudh 111 (112) [AIR V 4].
1915 Oudh 1 (3) [AIR V 2].

Karrabuldin,(3) their Lordships of the Privy Council applied the doctrine of *lis pendens* a transfer of property in execution of a decree pending a suit for declaration of title to that property. Their Lordships further stated that the transfer will be affected by *lis pendens* notwithstanding that the *attachment* under which the property was sold, had been effected before the institution of the suit inasmuch as attachment did not confer any title on the attaching creditor.(4)

There is, however, a difference of opinion on the question whether a sale in execution of a *mortgage* decree, the mortgage having been executed before the institution of the suit, is affected by the doctrine of *lis pendens*. In the undermentioned cases(5) it has been held that it is not affected; while a contrary view has been expressed in other cases.(6) It is submitted that the latter view is correct.

1915 Cal 536 (538) [AIR V 2] (DB).
('09) 3 Ind Cas 696 (699) (DB) (Cal).
('09) 32 Cal 891 (906) (SB).
†('07) 11 Cal W N 828 (830) (DB).
✠('02) 27 Bom 266 (270) (DB).
('01) 28 Cal 23 (26) (DB).
†('01) 23 All 60 (64) (DB).
('26) 95 Ind Cas 213 (214) (Oudh).
('13) 16 Oudh Cas 148 (152) (DB).
('13) 18 Ind Cas 177 (179) (DB) (Cal).
('11) 11 Ind Cas 464 (465) (DB) (Cal).
('11) 9 Ind Cas 772 (773) (Low Bur).
('10) 6 Ind Cas 40 (41) (DB) (Cal).
('99) 3 Cal W N 323 (325).
('91) 14 Mad 491 (492) (DB).
('88) 15 Cal 94 (97, 99) (DB).
('86) 12 Cal 299 (301) (DB).
('82) 6 Bom 567 (570) (DB). (This would be so even when the property sold in execution was attached before suit.)
('78) 4 Cal 789 (792) (DB).
('74) 7 Mad M C R 104 (111) (DB).
('74) 21 Suth W R 349 (351) (DB).
[*See also* ('55) ILR (1955) 1 All 673 (685): AIR 1955 N U C 1698. (Sale under S. 162 of U. P. Land Revenue Act for realisation of arrears of income tax — Sale taking place after preliminary mortgage decree and during pendency of mortgage suit — Doctrine of lis pendens will apply.)
1952 Nag 341 (343) [AIR V 39]: ILR (1952) Nag 211 (FB). (There is no force in the contention that S. 52 does not apply to involuntary sales.)
1934 Mad 40 (43) [A I R V 21]: 57 Mad 426 (Obiter.)
('86) 12 Cal 414 (421): 12 Ind App 171 (PC).
1924 Mad 449 (450) [AIR V 11] (FB).
1930 All 638 (640) [AIR V 17] (DB). (Once a joint mortgage decree is passed against several items of property the mortgagee decree-holder is entitled to realise the entire amount from any part of these properties and he can also sell them in any order that he wishes to choose — Neither the judgment-debtor nor any transferee pendente lite from him is entitled to have the decretal amount split up and the liability apportioned.)]
Also see Section 2, Note 6.
[See however 1946 Pat 134 (135) [AIR V 33 C 57]: 24 Pat 695 (DB). (Doctrine of lis pendens not extended in 1882 by judicial decisions to transfers in invitum.)]
[But see 1935 Pat 230 (230) [AIR V 22].
('86) 10 Bom 400 (405, 406).
(1900) 3 Oudh Cas 170 (171).
('78) 1 All 588 (590) (DB).
('71) 15 Suth W R 308 (309) (DB).]

3. ('98) 25 Cal 179 (185): 24 Ind App 170 (PC).

4. Also see the following cases:
('06) 29 Cal 428 (431) (FB). (Attachment does not confer any title.)
('50) 1950 Trav-Co L R 636 (640) (DB).
1915 Oudh 1 (3) [AIR V 2].
('74) 21 Suth W R 349 (351) (DB).

5 ('48) 53 Mys H C R 219 (240, 241) (FB). (Sale of mortgaged property in execution of mortgage decree during pendency of maintenance suit is not hit by doctrine of lis pendens, when mortgage is prior to maintenance suit and mortgagee is not made party to that suit.)
('58) 1958 Ker L T 836 (838, 839).
1957 Ker 48 (50) [AIR V 44 C 30]: I L R (1957) Ker 35 (DB).
1950 Mad 189 (190) [AIR V 37 C 80]. (The reason being that the title of such purchaser relates back to the date of the mortgage.)
1950 Orissa 210 (211) [AIR V 37 C 37]: I L R (1950) Cut 486 (DB).
('49) 27 Mys L Jour 61 (69) (DB). (Suit on mortgage before suit for maintenance was instituted against mortgagor — Sale held in mortgage suit during pendency of maintenance suit is not affected by charge created in the maintenance suit.)
1945 Mad 91 (92) [AIR V 32]: ILR (1945) Mad 578 (DB). (AIR 1931 All 466 (FB), Dissented from; AIR 1932 Mad 566, Approved.)
1945 Nag 86 (93) [AIR V 32]: ILR (1944) Nag 852 (DB).
1942 Cal 394 (401) [AIR V 29] (DB).
1932 Mad 566 (573) [A I R V 19]: 56 Mad 115 (DB). (Dissenting from AIR 1917 Mad 751.)
1926 All 480 (486) [AIR V 13] (DB).
('05) 32 Cal 891 (906) (DB). (Per Mitra, J. — Bret, J., contra.)
Also see Note 7.

6. 1922 Nag 89 (91) [AIR V 9] (FB).
1931 All 466 (480, 489) [A I R V 18]: 53 All 1023 (FB). (Per Mukerjee, J., contra — 25 Cal 179 (PC) followed.)
1962 Bom 191 (196) (Pr. 5. 19, 20) [A I R V 49

Motilal's case,(7) referred to above, was one in which a sale in execution of a *mortgage* decree was held pending a suit for declaration and it was held that the doctrine of *lis pendens* will apply to the case. This decision has not been referred to in the cases holding that it is not affected.

Where the properties are brought to sale in pursuance of the same decree, the principle of *lis pendens* has no application.(8)

32. Compulsory sales for recovery of Government dues. – A compulsory sale for the recovery of Government dues is sometimes *free of all incumbrances* under the particular law applicable to the case, and is sometimes subject to incumbrances, like an ordinary sale in execution of a decree of a Civil Court, conveying only the right, title and interest of the judgment-debtor. In the former case the moment the sale takes place, the mortgage or other incumbrance is *extinguished*. Consequently, the sale, even though it takes place, pending a suit on the mortgage or other encumbrance, is not affected by *lis pendens*.(1) In the latter case, the sale would be governed by the general doctrine of *lis pendens*.(2) See also the undermentioned cases.(3)

C 41] : ILR (1961) Bom 977. (AIR 1950 Orissa 210 and AIR 1945 Mad 91 and A I R 1945 Nag 86, Dissent from; AIR 1931 All 466 (FB) and AIR 1958 All 24 and 24 Ind App 170 (P C), Rel. on.)

1959 Punj 490 (495, 496) [A I R V 46 C 150].

1948 Pat 111 (112) [AIR V 35 C 43]. (Suits by prior and subsequent mortgagees without impleading each other—Sale in execution of decree on prior mortgage during pendency of suit on subsequent mortgage—Is affected by lis pendens —AIR 1931 All 466 (FB), Foll.)

1914 Sind 131(132) [AIR V 1]:8 SindLR 264(DB). [*See also* 1921 Cal 792 (795) [A I R V 8] (DB). (Mortgagee-decree—Suit for redemption—During pendency of litigation sale in execution of mortgage decree—Held Court should not have ignored the event.)]

7. ('98) 25 Cal 179 (185) : 24 Ind App 170 (PC).

8. 1953 Mad 692 (693) [AIR V 40 C 261] : I L R (1953) Mad 1009 (DB).

Section 52 — Note 32

1. 1954 Trav-Co 122 (123) [AIR V 41 C 37] (DB). (Compulsory sale for arrears of Jenmikarom under Travancore Jenmi and Kudiyan Act (5 of 1071).

1952 Orissa 64 (68) [AIR V 39] : ILR (1952) Cut 277. (Rent sale of tenancy holding subject to Orissa Tenancy Act pending execution of mortgage decree against holding—Purchaser at rent sale is not affected by lis pendens by reason of provisions embodied in S. 220 of the Tenancy Act.)

1952 Trav-Co 230 (234) [AIR V 39] (DB).

1952 Trav-Co 96 (97) [AIR V 39] : ILR (1951) Trav-Co 554 (DB).

1952 Trav-Co 61 (62) [AIR V 39] : 1950 Trav-Co L R 333.

('51) ILR (1951) Trav-Co 570 (574) : AIR 1955 NUC 1043 (DB). (The prohibition is only against litigant parties dealing with properties in dispute and not against a paramount claim like that of State or a local body being enforced.)

('50) 1950 Ker L T 322 (327).

1939 Mad 256 (256) [AIR V 26]. (Sale of land by Collector for arrears of rent due from ryot to land-holder is not affected by doctrine of lis pendens.)

1929 Rang 175 (176) [AIR V 16] : 7 Rang 113 (DB). (Sale for arrears of property-tax under the Rangoon Municipal Act — Sale under that Act is free of incumbrances.)

[*See also* ('58) 37 Pat 176 (193) (DB). (Disputed property given in security by K for loan taken from Government under Bihar and Orissa Natural Calamities Loans Act (1 of 1934) — Collector's right to put up disputed property to sale in proceedings for realisation of loan, held to be paramount—Purchaser at such sale acquired the property free from all encumbrances.)

2. ('55) ILR (1955) 1 All 673 (675) : AIR 1955 NUC 1698. (Sale under S. 162 of U. P. Land Revenue Act (3 of 1901) for recovery of arrears of income-tax.)

1952 All 298 (299) [AIR V 39]. (Revenue sale under S. 162, U. P. Land Revenue Act (1901)—Sale during pendency of mortgage suit — Doctrine of lis pendens affects the sale—Purchaser's claim cannot prevail over the claim for possession by purchaser in sale held in execution of mortgage decree.)

1926 Mad 1161 (1163) [AIR V 13]. (Sale for recovery of dues under Abkari Act.)

('99) 26 Cal 966 (970) (DB). (Property sold at a revenue sale under Ss. 13 and 54 of Act 11 of 1859.)

('08) 7 Cal L Jour 1 (35) (DB). (Reversed on other grounds in 40 Cal 89 (PC).

†1922 Pat 542 (544) [AIR V 9] : 1 Pat 287 (DB). (15 Cal 546, Followed.)

('09) 4 Ind Cas 731 (731) (DB) (Cal). (Do.)

('03) 26 Mad 230 (236) (DB). (Sale for arrears of income-tax.)

3. 1952 Nag 341 (347) [AIR V 39] : ILR (1952) Nag 211 (FB).

33. Sale under section 88 of the Criminal Procedure Code.—Where after the institution of a suit for the specific performance of a contract to sell a particular property, the same was sold under the provisions of Ss. 88 and 89 of the Code of Criminal Procedure in proceedings taken against the defendant, it was held by the Bombay High Court that the doctrine of 'lis pendens' will apply to such a sale.(1)

34. Transfer by permission of Court. — The doctrine of *lis pendens* will not apply to a transfer made pending a suit, after obtaining the sanction of the Court *in which the suit is pending*, for such transfer.(1) The sanction by *another* Court for a transfer cannot except the transfer from the operation of *lis pendens*.(2) Otherwise every sale in execution of a decree pending a suit will be valid and this, as has been seen already, is not the law. A sale by the Official Receiver on a Hindu father's insolvency pending a suit for partition by the son is not affected by *lis pendens* where the sale is held after an application by the son for an injunction against the Receiver to stay the sale has been refused. In such a case, the sale must be deemed to be one which is held with the leave of the Court.(3)

35. "So as to affect the rights of." — A transfer or dealing *pendente lite* by a party to a suit or proceeding is not *ipso facto* void; it merely cannot affect the rights of any other party to the suit under any decree or order that may be made in the suit or proceeding.(1) and it is only *voidable* at the instance of

('84) 7 Mad 31 (37) (FB). (A sale by a landlord of a tenant's interest in his holding for non-payment of rent under the provisions of S. 38 of the Rent Recovery Act (Madras Act 8 of 1865) does not defeat existing encumbrances. 5 Mad 371, Overruled.)

('59) ILR (1959) Mys 242 (246). (Recovery proceedings under Land Revenue Code for recovery of certain amount due to co-operative societies, on certificate issued under S. 59 (1)(b) of Bombay Co-operative Societies Act (7 of 1925) — Gift during pendency of such proceeding is not hit by doctrine of lis pendens.)

Section 52 — Note 33

1. 1929 Bom 200 (201) [AIR V 16].

Section 52 — Note 34

1. 1926 Pat 94 (98) [AIR V 13] (DB).
2. 1917 Bom 151 (152) [AIR V 4] : 42 Bom 215 (DB). (Suit on mortgage pending in High Court —Sanction for transfer taken in District Court in Poona—Transfer held not excepted.)
3. 1943 Nag 101 (109) [AIR V 30] : I L R (1943) Nag 390 (DB).

Section 52 — Note 35

1. 1956 S C 593 (593, 602) [AIR V 43 C 103] : 1956 S C R 451 : ILR (1956) Mys 152.
1941 Lah 433 (442) [AIR V 28] : ILR (1942) Lah 155 (FB).
1965 Punj 415 (420) [AIR V 62 C 133] : ILR (1965) 2 Punj 97 (FB).
('63) ILR (1963) Madh Pra 702 (721). (Therefore, in each case it will have to be ascertained as to what rights are declared by the decree, which would be binding on the transferees pendente lite. AIR 1956 S C 593, Followed.)
1962 Bom 191 (197) [AIR V 49 C 41] : ILR (1961) Bom 977.
1959 Andh Pra 280 (285) [AIR V 46 C 85]. (Property covered by transfer not affected by partition decree passed in suit pending at the time of transfer — Property allotted to plaintiff, not from and out of properties covered by transfer — No charge for mesne profits created in partition decree — Doctrine of lis pendens not attracted.)
('59) 1959 Andh L T 436 (438).
1959 Mad 225 (226) [AIR V 46 C 72].
('59) 38 Pat 389 (422, 423) (DB).
1957 Cal 106 (109) [AIR V 44 C 32].
1957 Ker 121 (124) [AIR V 44 C 70] (DB).
1957 Pat 721 (731) [AIR V 44 C 218] : 36 Pat 1139 (DB). (1956 S C 593 [AIR V 43], Rel. on.)
1956 Trav-Co 147 (151) [AIR V 43 C 55] : ILR (1955) Trav-Co 823 (DB).
('54) ILR (1954) Bom 322 (328) : AIR 1955 NUC 912.
1954 Hyd 185 (188, 190) [AIR V 41 C 61] : ILR (1954) Hyd 250 (DB). (Per Ansari J.)—(Suit ending in compromise decree — Defendant getting contingent interest in the property — Condition precedent not fulfilled — Vendee's right to possession is not affected.)
1951 Cal 481 (484) [AIR V 38 C 136] : ILR (1949) 1 Cal 378 (DB).
('51) ILR (1951) Trav-Co 570 (574) : AIR 1955 NUC 1043 (DB).
('50) 55 Mys H C R 174 (180) (DB).
1947 Mad 18 (30) [AIR V 34 C 7] (DB).
1937 Bom 244 (251) [AIR V 24] (DB). (Misdescription of land in pleadings prevents operation of doctrine.)

such party.(2) In other words, the doctrine of *lis pendens* applies only to transfers and other dealings which are *inconsistent* with the rights declared by the decree or order in the suit or proceeding.(3) Rights not embodied in the decree or order are not protected by this section.(4)

Illustrations

(*1*) Where the plaintiff's suit is 'dismissed,' a transfer by the defendant *pendente lite* cannot be said to affect the plaintiff's rights under the decree. The transfer is, therefore, not vitiated by *lis pendens*.(5)

(*2*) Where, in a suit on a mortgage, only a *money* decree is passed, a transfer *pendente lite* by the defendant of the mortgaged property cannot be said to affect the rights of the plaintiff under the decree.(6)

1936 Nag 125 (126) [AIR V 23] : ILR (1936) Nag 22.
1931 Oudh 157 (158) [AIR V 18] (DB).
1928 Mad 635 (637) [AIR V 15] (DB).
1925 Nag 341 (342) [AIR V 12].
†1920 Mad 126 (128) [AIR V 7] : 43 Mad 696 (DB). (Per Oldfield J.)
1918 Mad 564 (2) (568) [AIR V 5].
('98) 2 Oudh Cas 330 (335).
('13) 16 Oudh Cas 148 (152) (DB).
†('07) 9 Bom L R 1173 (1177) (DB). (The effect of the doctrine of lis pendens is not to annul the conveyance but only to render it subservient to the rights of the parties to the litigation.)
1940 All 141 (142, 143) [AIR V 27]. (Do).
[*See* ('13) 37 Bom 427 (436, 441) (DB). (A partition between defendants pendente lite affects the plaintiff's rights under his redemption decree.)]
[*See also* 1964 Orissa 176 (182) [AIR V 51 C 70]: ILR (1964) Cut 89 (DB). (The words 'so as to affect the rights of any other party' assume that the parties' right must first be established.)
1959 Bom 475 (477) [AIR V 46 C 141] : ILR (1959) Bom 94. (Application of rule in S. 52 has to be adjudged by reference to claim made in suit and decree passed and not on academic consideration as to what true state of law applicable to the dispute between parties is and whether the decree was properly passed.)
1959 Ker 67 (71) (AIR V 46 C 28] : ILR (1958) Ker 1266 (FB). (A transfer or other dealing with suit property pendente lite is void as against decree-holder and he is entitled to ignore it.)
('36) 1936 Mad W N 1069 (1069). (Pendente lite transfer does not confer any title on transferee against plaintiffs.)]
1916 Sind 37 (42) [AIR V 3] : 10 Sind L R 42. (Mortgage.)
1928 Mad 878 (879) [AIR V 15] (DB). (Assignment of a decree during the pendency of another suit to which the assignor was a party —Assignee held bound by the decree passed in the suit.)
1928 Mad 612 (613) [AIR V 15] (DB). (Mortgage after maintenance decree had been passed— Mortgaged property held bound by the charge.)]

2. †1928 All 3 (5) : 50 All 290 (SB). (Per Sulaiman, J.)
1959 Orissa 157 (159) [AIR V 46 C 45] : ILR (1959) Cut 273 (DB).
1957 Cal 106 (109) [AIR V 44 C 32].
1954 Hyd 185 (188) [AIR V 41 C 61] : ILR (1954) Hyd 250.
1953 Nag 236 (236) [AIR V 40 C 94] : ILR (1952) Nag 150.
1945 Mad 454 (456) [AIR V 32]. (A stranger to a suit cannot question transfer on ground of lis pendens.)
1940 All 141 (142, 143) [AIR V 27].

3. 1956 S C 593 (602) [AIR V 43 C 103] : 1956 S C R 451 : ILR (1956) Mys 152. (The contention that a transferor pendente lite must for purposes of S. 52, be treated as still retaining title to the properties cannot be accepted.)
1954 Hyd 185 (188) [AIR V 41 C 61]: ILR (1954) Hyd 250 (DB). (Compromise decree held, not inconsistent with vendee's right.)
1948 Nag 316 (322) [AIR V 35 C 109] : ILR (1947) Nag 912 (DB). (Where the only right which a party to suit had in the litigation was to have the property brought to sale in satisfaction of a first charge, which, as such, obtains priority over all other charges, it was held that the creation of an encumbrance pending litigation did not affect that right.)
1943 Cal 577 (584) [AIR V 30]. (The rule simply protects a certain class of rights. It does not add to the potency of those rights. If the rights are themselves wanting in certain potency the rule of lis pendens shall not fill them with it, (Case relating to competing rights of prior and puisne mortgagees.))
1918 Mad 1015 (1097) [AIR V 5]: 40 Mad 955 (DB).

4. 1959 Andh Pra 280 (285, 286) [AIR V 46 C 85] (DB).
1945 Nag 281 (283, 284) [AIR V 32] : ILR (1945) Nag 651. (Held, rule of lis pendens did not apply because rights which defendants claimed did not arise under decree or order but arose under Land Revenue Act read with R. 33 of Rules made under Co-operative Societies Act (1912) and were confined to recovery of sum of money and not recovery of property under award.)
1919 Low Bur 103 (103, 104) [AIR V 6] : 10 Low Bur Rul 43 (DB).

5. 1938 Nag 30 (34, 35) [AIR V 25] : ILR (1940) Nag 94 (DB). (Application for leave to sue in forma pauperis in respect of certain lands dismissed.)

6. *See* ('80) 1880 Pun Re No. 113, p. 276 (279, 280) (DB). (Suit against heirs of mortgagor for

(3) During the pendency of a mortgage suit, the defendant executed a lease of the mortgaged property to a third party. But after the mortgagee obtained a decree in his suit he purchased by *private sale* from the mortgagor, the mortgaged property in full discharge of his decree. It was held that the decree having been satisfied, the lease could not be said to affect the rights of the mortgagee under his decree and was therefore not invalid.(7)

(4) *A*, having purchased the equity of redemption in certain property from the guardian of *B*, sued *C*, the mortgagee, for redemption. Pending that suit *B* filed a suit against *A* for setting aside the sale by the guardian, and the suit was compromised to the effect that both *A* and *B* should be entitled to the equity of redemption in certain shares. *B* was made a co-plaintiff in the redemption suit. It was held that the compromise did not affect the rights of *C*, the mortgagee.(8)

(5) Where the defendant in a mortgage suit, mortgaged the property *pendente lite* and with that money paid off the mortgage in suit, it was held that the subsequent mortgage was not one which affected the rights of the mortgagee-plaintiff and was not vitiated.(9) Similarly, where during the pendency of a suit upon a later mortgage the property in suit is sold to a third person who covenants to pay off an earlier mortgage and does so, the fact that the purchase becomes unavailable, by virtue of this section, as against the person who filed his suit prior to the sale, is not a ground for excluding the purchaser's right of subrogation.(9a).

(6) On 6th October 1888 *W* sued *D* for maintenance and alleged that a mortgage which had been made by *D* in favour of *V* could not affect the charge for maintenance on the property. *A* decree was passed on 22nd August 1890 for maintenance against *D's* interests in the properties but *subject to the right of V*. In execution of a decree which *V* had obtained against *D* on his mortgage before 6th October 1888, *V* purchased the property in 1889. In execution of the maintenance decree the properties were sold to *M* in 1920. It was held that *V's* purchase did not affect the rights of the plaintiff in the maintenance suit inasmuch as *V's* rights were expressly saved from its operation.(10)

(7) Where pending a suit by a legatee to establish his right to represent the deceased person, a creditor sold the property of the deceased in execution of a decree obtained by him against the widow as the legal representative of the deceased person, it was held that inasmuch as the plaintiff claimed only to represent the deceased, and as the widow was also a legal representative and the decree was against her as such the plaintiff was not affected by the transfer.(11)

See also the undermentioned cases.(12)

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recovery of money due on the bond without making reference to collateral security.)

1936 Pat 571 (572) [AIR V 23]. (Plaint in a simple money suit for contribution containing prayer that decree to be passed may be declared to be charge on defendant's share of property—Held that plaint was not one involving a claim against immovable property — Purchase of defendant's property during pendency of the suit held not affected by the doctrine of lis pendens.)

Also see Note 14.

7. 1939 All 611 (612) [AIR V 26]: ILR (1939) All 809.

8. 1929 Bom 337 (339) [AIR V 16] (DB).

9. 1925 Nag 21 (24) [AIR V 12].

9a. 1947 Mad 18 (30) [AIR V 34 C 7] (DB). (24 Mad 143 Rel. on.)

10. 1924 Mad 449 (450) [AIR V 11] (FB).

11. 1930 Mad 930 (938) [AIR V 17] 54 Mad 212.

12. 1959 Ker 67 (72) [AIR V 46 C 28]: ILR (1958) Ker 1266 (FB). (Decree for redemption of kanom property against karnavan—Partition during pendency of suit in appellate Court—After dismissal of appeal, possession of properties delivered to plaintiff in execution — Application under O. 21, R. 100 for redelivery filed by sharers—Plaintiff's right, held would not be defeated.)

1965 Mad 497 (501) [A I R V 52 C 182]: I L R (1966) 1 Mad 326. (Suit filed in 1958 by reversioner for declaration that alienation made in 1948 by widow would not be binding on him after death of widow—Re-conveyance of property by alienee during pendency of suit—Widow became absolute owner of property under S. 14 of Hindu Succession Act (1956) — Doctrine of lis pendens would not confer upon reversioner any rights higher than what he had on date of suit—Held, suit became infructuous.)

1966 Orissa 98 (102) [AIR V 53 C 40] (DB). (Partition suit filed by mother against her sons *A* and *B*—During pendency of appeal filed by *A*, plaintiff making gift of her share in favour of *B*—Transfer is hit by rule of lis pendens but does not affect rights of appellant *A* who will be entitled to his legitimate share.)

Where a party *assents* to a transfer by the other party *pendente lite* it cannot be said that his rights under the decree are affected by the transfer; consequently he cannot object to the transfer on the ground of *lis pendens.*(13) In *Mangat Rai* v. *Duli Chand*(14) *A* obtained a decree against *B* and in execution thereof purchased *B's* property. The sale was set aside and *A* filed an appeal. Thereafter *B* sold the property to *C* who deposited the decree amount into Court and the same was withdrawn by *A* in full satisfaction of the decree. Nevertheless the appeal was continued and ended in favour of *A*. It was held that having withdrawn the money from Court *A* could not be allowed to invoke S. 52 in order to impeach the sale by *B* to *C*. *A* brought a suit to enforce the contract for sale in his favour. When the suit was pending *B* brought a suit for redemption on the basis of purchase of the property from the original mortgagor during the pendency of the suit of *A*. *A* filed his written statement in it, but did not make *B* a party to his suit. He proceeded against his vendor and obtained an *ex parte* decree. It was held that when *A* filed a written statement in *B's* suit clearly he knew what *B* was claiming and as he did not make *B* a party to his suit he could not later on say that he was entitled to defeat the claim of *B* on the doctrine of *lis pendens.*(14a) Where certain property was sold under a mortgage-decree but the decree-holder had not disclosed, in the sale proclamation, the existence of another incumbrance on the property in his favour, it was held that he was estopped from contending that the purchase having been made during the pendency of the suit on that other mortgage was affected by *lis pendens.*(14b)

Where in a suit on behalf of a minor plaintiff, the next friend on behalf of the plaintiff and the defendant compromise the suit, under which certain property is transferred by the defendant to the minor plaintiff, it cannot be said that the compro-

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1946 Mad 51 (52) [AIR V 33 C 24].(Maintenance decree charging properties— Sale execution— Mortgage subsequent to decree and before sale— Right to pay off decree and redeem— Mortgagee is not barred by lis pendens from redeeming and paying off charge decree-holder so long as execution sale under charge decree had not been confirmed.)

1945 Bom 409 (413) [AIR V 32] (DB). (Mortgage decree—One of co-mortgagors *A* transferring his share during execution to *B*—Subsequent sale of mortgaged property in execution of decree held void so far as it affected *A's* share— *B* held not in worse position than *A* and not affected by doctrine of lis pendens.)

1921 Nag 69 (70) [AIR V 8] : 17 Nag L R 33. (First mortgagee *X* foreclosing without impleading second mortgagee *Y*—*Y* obstructing delivery of possession to *X*—X applying under O. 21, R. 100, C. P. C.—*Y* transferring his right to *Z* pending the proceedings — *Z* then suing for redemption of mortgage in favour of *X* — Held, the order for restoration of possession does not affect the right of redemption which *Z* had obtained from *Y* and as part of such right to obtain possession from *X*.)

1918 Oudh 318 (319) [AIR V 5]. (Mortgagee purchasing share of co-mortgagor pending redemption suit by another mortgagor— Latter's right to redeem his share not affected.)

('12) 16 Ind Cas 102 (103) (DB) (All). (Mortgage-decree — Subsequent lease—Sale thereafter to discharge mortgage-decree and decree discharged—Lease is not void against private purchaser.)

('11) 10 Ind Cas 16 (18) (DB) (Oudh). (In 1880 one *C* mortgaged certain share to *R* and *S* with possession—Three deeds of further charges were also executed—One *B* became entitled to a one-fourth of the interest of the mortgage executed by *C*—In 1896 *B* sub-mortgaged that one-fourth share to the appellant undertaking to put him in possession—In 1905 the appellant sued for possession and summons was served upon *C* on 22nd January 1905 — On February 16, 1905, *C* mortgaged his share to the respondents who subsequently redeemed the four mortgages of *C*—The appellant got a decree for possession— In a suit by the respondents for possession of the said share against appellant, it was held that under S. 52 the respondent could not take a valid mortgage and that he could get possession only by paying one-fourth of the total mortgage share to appellant.)

13. 1926 Cal 204 (207) [AIR V 13] (DB). (Alienation by Receiver — Party and Receiver taking advantage — *Held* that S. 52 did not apply.)

1918 Pat 299 (300) [AIR V 5] (DB).

14. 1933 All 579 (581) [AIR V 20] : 55 All 735 (DB).

14a. ('55) 34 Pat 156 (163) : AIR 1955 N U C 1095.

14b. 1953 Pat 58 (60) [AIR V 40 C 18] : 31 Pat 722 (DB). (1933 All 577 [AIR V 20], Foll.)

mise is vitiated by *lis pendens*, though if it is not for the benefit of the minor it may not be binding on the minor.(15)

Similarly, where pending a suit for partition, both the plaintiff and the defendant transfer their respective shares to the same person the doctrine of *lis pendens* cannot come into play.(16)

36. **"Any party."** — The doctrine of *lis pendens* cannot obviously apply to any alienation or other dealings made by a person who is not a *party* to the suit.(1) Thus, an assignment by a puisne mortgagee of his rights pending a suit to which he is not a party is not affected by *lis pendens*.(2) A person who is represented by an actual party to the suit is also a party to the suit for the purpose of this section. Thus where one of several legal representatives of a deceased mortgagor was made a defendant to a suit on the mortgage, it was held that he sufficiently represented the other heirs, and that a transfer, pending the suit, by another heir, who, though not an actual party, was represented by the defendant, was affected by *lis pendens*.(3) See also the undermentioned case.(3a)

Where the defendant to a suit dies, the *lis* continues against his legal representative even before he is brought on the record. Hence, an alienation made by the legal representative after the original defendant's death and before such legal representative is brought on the record is liable to be affected by the provisions of this section.(4)

37. **"Any other party" — Co-defendants.** — The words "any other party" obviously mean a party other than the *transferor* himself. The transferor himself and his representatives in interest cannot invoke the doctrine as against the transferee.(1)

Illustrations.

(1) *T* sued *D* for possession of certain property, and pending it he executed a mortgage of the property in favour of *W*. The suit was subsequently compromised to the effect that *T* and *D* should each take half the property. *D* was to pay off *W*'s mortgage and *T* was not to be liable for it. *W* then sued *T* on his mortgage. It was held that *T* could not invoke the doctrine of *lis pendens* as against his transferee *W* and claim that *W* should not enforce the mortgage against the property in his hands.(2)

(2) *X* obtained a money decree against *Y* and got his property attached in execution. Subsequently, *Y* mortgaged the property to *Z*, and still later, sold the property to *M* with the leave of the Court under O. 21 R. 83 of the Civil Procedure Code, and paid off the decree. *Z* then sued *M* on the mortgage. It was held that *M* merely stood in the

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15. 1935 Bom 54 (64) [AIR V 22] (DB).

16. 1929 Cal 697 (699) [AIR V 16] : 57 Cal 597 (DB).

Section 52 — Note 36

1. ('58) 37 Pat 176 (193) (DB).
1957 Pat 408 (414) [AIR V 44 C 122] (DB).
('54) I L R (1954) Nag 505 (510) : AIR 1955 N U C 1236.
1953 Trav-Co 12 (13) [AIR V 40 C 2].
1925 Bom 176 (177) [AIR V 12] (DB). (Sale by a person who was subsequently brought on record as legal representative of original defendant.)
[*See also* 1949 Mad 886 (892) [AIR V 36 C 399] : I L R (1949) Mad 904 (DB).]

2. 1932 Pat 272 (271) [AIR V 19] : 11 Pat 415 (DB).

3. ('03) 26 Mad 230 (234) (DB).

3a. 1968 Orissa 36 (38) [AIR V 55 C 15] : 33 Cut L T 974 : 1968 Cri L T 336. (Proceedings under Orissa Tenants Protection Act pending between landlord and defendants 1 to 3—A, defendant 4, in proceedings purchasing the disputed lands from the landlord during the pendency of proceedings and inducting B as tenant — Revenue Board deciding in favour of defendants 1 to 3 and holding that they cannot be evicted by the landlord or A or B—Though B was not a party to proceedings he was bound by doctrine of lis pendens being a privy of A.)

4. 1945 Mad 219 (221) [AIR V 32].

Section 52 — Note 37

1. See the illustrations.
[*See also* 1917 Oudh 1 (7) [AIR V 4].

2. 1928 All 3 (5, 9) [AIR V 15] : 50 All 290 (SB). (Transferee is bound by the decree so far as it goes against his transferor.)

shoes of *Y*, the transferor, and could not invoke the doctrine of *lis pendens* as against *Z*.(3)

(3) A conveyed certain property to *B* by a Kobala. By a separate agreement *B* agreed to reconvey the property to *A*. *A* filed suit against *B* to enforce the agreement of reconveyance. During the pendency of that suit, *A's* right, title and interest under the agreement of reconveyance was attached and sold in execution of money decree and purchased by *B*. It was held that the purchase by *B* was not hit by rule of *lis pendens* in S. 52.(3a)

In the undermentioned case,(4) the Court *auction-purchaser* in execution of a mortgage decree was held to be a party to an order which might be made in the suit and could therefore impeach a transfer made by the mortgagor pending suit on the ground of *lis pendens*.

The doctrine cannot be applied between parties to a suit who are arrayed on the same side and between whom there is no dispute to be adjudicated.(4a)

Does the doctrine of *lis pendens* apply to *co-defendants* in the same suit? In other words, can one defendant question the alienation made *pendente lite* by another defendant in the suit? The answer will depend upon, whether the former can be said to be "*any other party* to the decree or order" which may be made in the suit.

In *Bellamy* v. *Sabine*(5) Lord Justice Turner stated that an alienee from a co-defendant pending a suit in which 'no decree could be made between the co-defendants' was exactly in the position of an alienee from a stranger to the suit and was not affected by *lis pendens*. He observed :

"Generally speaking between co-defendants: there can be no decree—is it to be said that there is a *lis pendens* between them ? . . . . Leaving out of consideration the cases in which decrees can be made between co-defendants (which are rare, and for the most part go no further than where it is necessary for the purpose of the plaintiff to adjudicate between the defendants) upon what ground is the case of a co-defendant to stand in a different position from that of a stranger ?"

But in *Tyler* v. *Thomas*(6) it was held that in certain cases the doctrine of *lis pendens* would apply even though the plaintiff may have no interest at all and the contest is between co-defendants only such as *interpleader* suits and *administration* suits. An alienation made by a defendant pending such a suit would be bound by the decree made against him in favour of the other defendant in the suit. In a suit instituted by creditors for the administration of a testator's estate the deficiency of the personal estate for the payment of the debts was payable out of two real estates devised separately to *A* and *B*. In 1846, the debts were ordered to be paid out of *A's* estate alone, without prejudice to his right of contribution against *B's* estate. In 1852 the suit was registrered as a *lis pendens*,(7) and two months afterwards *B* mortgaged his estate to *C*, who had no notice of *A's* rights. It was held that there was a *lis pendens* as regards *A's* rights, and that *C's* mortgage must be postponed to *A's* claims.

It is, however, necessary that there should be *an issue to be decided* between the co-defendants even though the decision of such issue may not be necessary to give relief to the plaintiff in the suit.(8) Where there is no such issue, one defendant cannot

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3. 1941 Mad 208 (214) [AIR V 28] (DB).

3a. I L R (1957) 3 Cal 642 (645)

4. ('98) 20 All 349 (351). (Lease.)

4a. ('50) 1950 Trav-Co L R 23 (28) (DB).
1953 Pat 58 (59) [AIR V 40 C 18] : 31 Pat 722 (DB).
('58) 37 Pat 176 (193) (DB).

5. (1857) 44 E R 842 (850) : 26 L J Ch 797.

6. (1858) 53 E R 553 (556) : 19 R R 325.

7. For the understanding of the procedure of registration of a suit as a lis pendens, see Note 43.

8. ('50) 1950 Trav-Co L R 23 (28) (DB).
†1918 Mad 578 (579, 580) [AIR V 5] : 41 Mad 458 (SB).
1938 Pat 487 (493) [AIR 25] (DB). (Obiter.)

invoke the doctrine of *lis pendens* as against the acts of another. Where therefore *M* sued *X* and *Y* for declarations that a sale-deed executed by *M* in favour of *X* and a subsequent mortgage executed by *X* of that property in favour of *Y* were not binding on him and, pending that suit, *Z*, in execution of a decree obtained by him against *X* purchased the property, it was held in a suit by *Y* upon his mortgage against *X* and *Z* that *Z* was not precluded from questioning the validity of the mortgage by the doctrine of *lis pendens*. In the suit by *M* against *X* and *Y* there was no contest between *X* and *Y* as to the validity of the mortgage at all, and the result of *M's* suit simply upheld the title of *X* to the property and his right to mortgage it to *Y*.(9)

Legal representatives of the same deceased person: — Where a person is suing in his capacity as the legal representative of a deceased person, he is not "any other party" *vis a vis* a person who is another legal representative of the same deceased person. Thus, suppose, a decree is passed against *A* as representing the estate of a deceased person. *B*, another legal representative of the same deceased person and claiming to represent the same estate sues to have the decree passed against *A* set aside. Pending this suit, a certain property belonging to the estate is sold in execution of the decree against *A*. The sale is not affected by the provisions of this section as *B* cannot be said to be "any other party" within the meaning of this section.(10)

38. "Any decree or order."—These words will include a decree or order made on a compromise between the parties to the suit, provided that such compromise is not tainted by fraud or collusion.(1) The decree will be binding on the transferee.(2)

[*See also* ('50) 55 Mys H C R 174 (184) (DB). (The words "other party" are to be understood not as applying to a party other than or apart from or besides the transferor but a party between whom and the transferor there is a contest which would be affected by the alienation—It is not any party to a suit under any decree passed in his favour who can invoke it.)

('45) 50 Mys H C R 113 (DB). (When one co-defendant claims contribution from another in respect of a payment which he has made to save the properties of himself and the other from a threatened sale in execution of a decree affecting all the properties, the party claiming contribution cannot rely on the doctrine of lis pendens to make the property of the other co-defendant liable for his claim to contribution.)]

9. 1918 Mad 578 (579, 580) [AIR V 5] : 41 Mad 458 (SB).

10. 1947 Sind 181 (184) [AIR V 34 C 64] (DB).

Section 52 — Note 38

1. 1948 P C 147 (149) [AIR V 35 C 29] : I L R (1949) 1 Cal 234 : 75 Ind App 165 (PC). (Though S. 52 may not contemplate a decree or order which is entirely alien to the issues raised between the parties, it applies to a compromise decree: AIR 1943 Cal 227, Affirmed.)

1928 All 3 (7) [AIR V 15] : 50 All 290 (SB).

† 1920 Mad 391 (394) [AIR V 7] : 43 Mad 37 (SB).

1955 Trav-Co 3 (5) [AIR V 42 C 3] : I L R (1954) Trav-Co 794 (DB).

1954 Mad 592 (593) [AIR V 41 C 218] : I L R (1955) Mad 519 (DB).

('50) 55 Mys H C R 174 (179) (DB).

1949 Bom 367 (372) [AIR V 36 C 96] : I L R (1949) Bom 480.

1943 Cal 227 (230) [AIR V 30] (DB). (It is immaterial how the decree is obtained in that suit, whether after contest or by compromise. It is immaterial whether the decree in that suit is right or wrong. It is beyond the competence of the Court invited to apply the doctrine of lis pendens to sit in judgment on the previous decree.)

† ('06) 28 Mad 426 (430, 433) (FB).

1946 Bom 462 (464) [AIR V 33 C 95] : I L R (1946) Bom 462.

1926 Mad 50 (50) [AIR V 13].

1924 Mad 359 (360) [AIR V 11]

1919 Low Bur 103 (103) [AIR V 6] : 10 Low Bur Rul 43 (DB).

[*See also* 1952 Trav-Co 309 (310) [AIR V 39] (DB). (Compromise entered into with a view to defraud stranger transferee — Compromise will not affect interests of transferee — Principle of lis pendens will not apply.)]

1944 Bom 191 (193) [AIR V 31] : I L R (1944) Bom 274 (DB). (Suit for maintenance—Compromise: decree creating charge over property — Transferee of property during pendency of suit held bound by the decree.)]

('10) 6 Ind Cas 168 (169) (DB) (All).

2. 1954 Mad 592 (593) [AIR V 41 C 218] : I L R (1955) Mad 519 (DB).

[*See* ('07) 31 Bom 393 (400) (Hardship to the purchaser cannot affect the decision of the case.)

See also Note 28.

He cannot question it on the ground that it was *wrongly* passed(3) though he can question it on the ground of *fraud*.(4)

The words "decree or order" will also include a decree or order passed *ex parte* in the absence of any fraud or collusion.(4a)

The words "under a decree or order therein" imply that the right to the property must be the outcome of the decree i. e., it should be the result of an affirmation or adjudication by the decree. In the case of an abandonment of the suit claim, the claim is withdrawn from adjudication. Where, therefore, a plaintiff abandons his claim, the result of the suits will not operate as *lis pendens* against any purchaser *pendente lite* of the suit property.(4b)

An award under Co-operative Societies Act for all practical purposes has the force and effect of a decree within the meaning of this section.(4c)

There is a difference of opinion as to whether the words "any decree or order" are limited to such decrees and orders as are appropriate to the suit, having regard to the nature of the property involved and the nature of the proceedings, or are wide enough to include any order whatsoever. The former view is taken in the undermentioned cases(5) and the latter in the cases noted below.(6)

39. Lease pendente lite. — There has been a difference of opinion on the question whether this section applies to *leases pendente lite* by a party to the suit. On the one hand, it has been held that a lease in the *ordinary course of management* cannot be said to "affect" the rights of the other party under any decree or order that may be passed in the suit and would therefore be binding on him.(1) On the other

3 ('53) 32 Pat 903 (918, 919) : AIR 1955 N U C 231.
('10) 13 Oudh Cas 50 (52) (DB).
[*See also* 1948 P C 147 (149) [AIR V 35 C 39] ILR (1949) 1 Cal 234 : 75 Ind App 165. (Applicability of Section cannot depend on matters of proof or strength or weakness of case on one side or other — Suit based on instrument requiring registration but not registered—Suit ending in compromise decree in favour of plaintiff — Transfer of property by defendant pending suit—Transferee is bound by decree—The non-registration of the instrument is no answer to plea of lis pendens.)]

4. 1954 Mad 592 (593) [AIR V 41 C 218] : I L R (1955) Mad 519 (DB).
1946 Bom 462 (464) [A I R V 33 C 95] : ILR (1946) Bom 462. (If the final decision in the pending litigation is brought about by fraud or collusion it cannot be said that lis pendens was fairly decided, and that decision cannot affect the rights of the transferee pendente lite.)
1919 Oudh 317 (319) [AIR V 6] : 22 Oudh Cas 171.

4a. 1949 Bom 367 (372) [AIR V 36 C 96] : ILR (1946) Bom 480 (DB).

4b. 1963 Mad 300 (302) [AIR V 50 C 108] : ILR (1963) Mad 592 (DB).

4c. 1945 Nag 281 (282) [AIR V 32] : ILR (1945) Nag 651.

5. ('50) 55 Mys H C R 174 (194) (DB).
† 1938 Cal 1 (5) [AIR V 25].
✠ ('90) 18 Cal 188 (195) (DB).
('81) 8 Cal 79 (85) (DB).
✠ ('71) 8 Beng L R 474 (489) (DB).
('01) 28 Cal 23 (26) (DB).

6. 1943 Cal 227 (230, 232) [A I R V 30] (DB). (Suit by A against B for specific performance of contract of sale or in the alternative for repayment of amount paid to B and for a decree declaring the decretal amount to be first charge on the property — During pendency of this suit B executing simple mortgage in favour of C—Compromise decree passed in the suit between A and B creating a charge in favour of A—A purchasing the property in execution of his decree—Suit on mortgage by C — Held relying on A I R 1922 Cal 358 that C's mortgage was affected by lis pendens and could not prevail against the rights of A).
1930 Cal 539 (543) [AIR V 17] (DB).
1922 Cal 358 (363) [AIR V 9] : 49 Cal 220 (DB).

Section 52 — Note 39

1. ('59) 1959 M P C 317 (319). (Sub-lease.)
1935 Mad 875 (878) [AIR V 22].
1930 All 289 (290) [AIR V 17].
1927 Nag 299 (300) [AIR V 14]. (Question whether lease was granted in the ordinary course of management not decided — Hence case remanded.)
1927 Nag 316 (318) [AIR V 14].
1927 Nag 295 (296) [AIR V 14].
1924 Nag 226 (227) [AIR V 11].
1917 Cal 222 (225) [AIR V 4].
1916 Mad 323 (324) [AIR V 3] : 39 Mad 283 (DB). (7 Mad 96 followed.)

hand it has been held that the question of ordinary management does not arise under this section and that a lease like any other transfer *pendente lite* would be .subject to the result of the suit or proceeding.(2) Where the lease cannot be said to be in the ordinary course of management it has been held that it cannot, of course, prevail in derogation of the rights of the other party under any decree or order passed in the

('84) 7 Mad 96 (99) (DB).
('42) 1942 Oudh W N (B R) 16 (17) (DB).
('38) 1938 All L Jour (Sep) 20 (21). (Leases for purposes of cultivation during the pendency of partition proceedings.)
[*See also* ('36) 1936 Mad W N 190 (190, 191). (Lease during pendency of execution proceedings — Court auction sale of lessor's right — Held, that the doctrine of lis pendens does not apply to leases since the sale confers upon the purchaser right to rent and not right to crops.)
('34) 18 R D 282 (283) (DB).]

2. 1961 Bom 288 (291) [A I R V 48 C 70] : I L R (1961) Bom 649. (Tenant pendente lite cannot set up rights under Bombay Rent Act.)
1961 Ker 335 (335, 336) [AIR V 48 C 114]. (Tenant inducted by party during pendency of partition suit is bound by decree.)
1961 Ker L T 639 (641). (Kerala Agrarian Relations Act (4 of 1961) does not override provisions of S. 52, T. P. Act.)
1959 Bom 19 (21) [AIR V 46 C 8] (DB).
1957 Bom 117 (119) [A I R V 44 C 42] (DB). (Lessees pendente lite must be treated as representative in interest under S. 52 and as such bound by the result of the suit.)
('50) 85 Cal L Jour 81 (88). (Tenant subletting pending suit for his ejectment—Sub-letting cannot prevail against decree for possession which the landlord may subsequently obtain.)
1957 Trav-Co 292 (293) [AIR V 44 C 118] : I L R (1956) Trav-Co 716.
† 1941 Pat 577 (580) [A I R V 28] : 20 Pat 346 (SB).
✠ 1917 Mad 128 (130, 131) [AIR V 4] (SB). (Per Seshagiri Aiyer, J.)
†1943 Cal 577 (585, 586) [A I R V 30]. (During pendency of the suit by puisne mortgagee, prior mortgagee caused the property to be sold in execution of his decree and purchased it — Puisne mortgagee was not made a party to suit by prior mortgagee — After purchase in execution, prior mortgagee granting lease of the property—Lease held was affected by lis pendens—The power given under S. 65A will not affect the doctrine of lis pendens.)
1936 All 661 (662) [AIR V 23] (DB).
1936 Mad 942 (942) [A I R V 23]. (Even under S. 65A applies the doctrine of lis pendens is not inapplicable.)
1936 Mad 887 (891) [A I R V 23] : ILR (1937) Mad 66 (DB). (Grant of permanent occupancy rights in a home-farm land i. e., land cultivated by the zamindar himself, held not binding being made during the pendency of partition suit.)
1935 Oudh 462 (464) [A I R V 22] : 11 Luck 283 (DB).
('33) 142 Ind Cas 188 (189) (Cochin) (DB). (Though, while a mortgage suit is pending the mortgagor may have power in the ordinary course of management of his property to grant leases, he cannot effect transfers by way of leases to enure beyond the time when the property passed by sale to his mortgagee.)
1931 Bom 539 (542) [AIR V 18]. (Lease must to some extent affect the rights of the other party.)
1927 All 657 (658) [AIR V 14] : 50 All 202 (DB). (Although a defendant mortgagor in a mortgage suit has power, so long as he retains his possession to grant leases in the ordinary course of management of his property, he cannot make transfers to ensure beyond the time when the property passes by sale to his mortgagees.)
1927 Oudh 602 (604) [AIR V 14] : 2 Luck 659.
1925 Cal 251 (252) [AIR V 12].
1924 Nag 211 (213) [AIR V 11].
1923 Oudh 1 (3) [AIR V 10].
1918 Nag 218 (219) [AIR V 5] : 14 Nag L R 133. (15 C P L R 6, followed.)
1915 Nag 89 (90) [AIR V 2] : 11 Nag L R 21.
✠('02) 15 C P L R 6 (7).
('98) 20 All 349 (351). (A lease, whatever its object cannot but have the effect of defeating to some extent the rights of the auction-purchaser under the decree.)
('94) 21 Cal 340 (343) (DB). (Tenant pendente lite is liable to be removed in restitution proceedings.)
('88) 1 C P L R 19 (23). (Lease granted after suit for foreclosure was dismissed but before appeal was filed—Lessee held bound by the foreclosure decree.)
('36) 19 Nag L Jour 316 (318). (Suit on mortgage — Lease by mortgagor *pendente lite* taking premium or nazrana.)
('31) 15 R D 589 (592).
(1862) 1862 Marsh 122 (123).
('12) 17 Ind Cas 1 (2) (DB) (Cal). (Lease pending a mortgage suit—Purchaser of property in execution of mortgage decree can eject lessee.)
('10) 6 Nag L R 140 (143).
[*See also* ('63) (1963) 4 Guj L R 681 (684) (DB). (Tenancy *pendente lite* can subsist subject to the result of suit — Tenant of mortgagee became tenant of mortgagor on redemption of mortgage under S. 4, Bombay Tenancy and Agricultural Lands Act (67 of 1948).)
1918 Cal 277 (278) [AIR V 5] (DB). (*A* filed a suit against *B* to recover khas possession of her ijara share in certain land—During the pendency of that suit *B* made settlement of those lands on rayats—Rayats held were liable to be ejected.)]

suit or proceeding.(3) It is submitted that the second of the views expressed above is correct. This view appears to have the support of Supreme Court decision in *Anand Nivas* v. *Anandji*(3a) where a decree passed in a suit for ejectment and arrears of rent against the statutory tenant was held binding on the sub-lessee who had taken the sub-lease pending the institution of the suit. Before suit, the owner of the property can certainly lease out his properties in the ordinary course of management. A *mortgagor* can, under S. 65A, lease out the mortgaged property in the ordinary course of management and such lease will, after the mortgage but before a suit on the mortgage is filed, be binding on the mortgagee. A mortgagee in possession may also under S. 76, cl. (a) lease out the mortgaged property in the ordinary course of management and such a lease, if made before any suit is filed for redemption, will be binding on the mortgagor. But where a *suit is filed*, no party to the suit can prejudice the rights of the other party to any extent by the execution of a lease or any other kind of transfer, even though he may have the power to make a lease of the property in the ordinary course of management and at a time when there is no suit pending. The question of ordinary management does not arise under S. 52(4) and it does not seem to be permissible to create exceptions to the applicability of the section which is very wide, by saying that a lease in the ordinary course of management cannot be said to affect the rights of the other party under any circumstances. Thus it has been held that in spite of the provisions of S. 65A, the mortgagor cannot lease out the mortgaged property during the pendency of the suit for redemption or a suit on the mortgage to the prejudice of the mortgagee's or auction-purchaser's right. The mortgagor cannot for the same reason accept any advance rent. If, the tenant makes any payment to the mortgagor during the pendency of the suit he does so at his own risk. He cannot claim protection under S. 50.(4a)

It is, however, only *to the extent* to which it prejudices the other party under the decree or order that the lease is bad. Where pending a suit for redemption of a usufructuary mortgage the mortgagee leased out the property, it was held in the undermentioned case,(5) that the lessee could go on cultivating the land under his lease till the mortgagee was actually redeemed, and if by the operation of S. 21 of the Bengal Tenancy Act, the lessee, obtained an occupancy right by reason of such possession, the mortgagor would be bound by the right of occupancy so acquired, though the lease, as a lease, would not have been binding upon him after redemption.

The principle of this section applies to agricultural leases also.(6)

40. Transferee pending suit is representative of transferor — Party within Section 47, Civil Procedure Code. — A transferee, *pendente lite* from a

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3. † 1937 All 9 (9, 10) [AIR V 24] (DB). (Mortgage decree pending execution — Permanent leases granted by mortgagor—Not binding.)

1932 All 480 (481) [AIR V 19] (DB). (Lease for 20 years.)

('84) 7 Mad 96 (99) (DB). (Permanent lease.)

('39) 1939 All W R (B R) 37 (38). (A permanent lease during the pendency of a mortgage suit is not in the ordinary course of management of zamindari property and hence is a nullity under S. 52 of the T. P. Act.)

3a. 1965 S C 414 (426, 427) [AIR V 52 C 68] : (1964) 4 S C R 892. (Per Majority, Sarkar J. contra: A sub-lessee from a statutory tenant under Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947) acquires no right of a tenant in the premises occupied by him.)

4. ('10) 6 Nag L R 140 (143).

4a. 1957 Trav-Co 292 (293) [AIR V 44 C 118] : ILR (1956) Trav-Co 716. (Suit on simple mortgage.)

1954 Sau 82 (84) [AIR V 41 C 35].

5. 1937 Cal 763 (764) [AIR V 24] : ILR (1937) 2 Cal 181 (DB).

6. ('55) ILR (1955) Madh B 416 (420) : AIR 1955 N U C 3706.

1949 All 257 (260) [AIR V 36 C 101] : ILR (1949) All 449.

party to a suit will be bound by the decree or order passed in the suit even if he is not made a party to the suit.(1) He must be regarded as a representative in interest of the party in the property in suit, for the purposes of S. 47 of the Code of Civil Procedure.(2) Thus, if the suit is for foreclosure of a mortgage and the purchaser *pendente lite* has obtained possession, and a final decree is passed for foreclosure in the suit, the mortgagee decree-holder can in *execution proceedings* recover the property from the purchaser.(3) Even an auction-purchaser of the property pending a

Section 52 — Note 40

1. 1958 S C 394 (398) [AIR V 45 C 61] : 1958 S C R 1287. (Where a purchaser *pendente lite* is vitally interested in the determination of substantial questions arising in the appeal, he should be brought on record as an additional appellant.)
1937 PC 260 (261) [A I R V 24] : 31 Sind L R 652.
('64) 66 Punj L R 625 (626).
('64) ILR (1964) 14 Raj 878 (886). (Plaintiffs relying upon doctrine of *lis pendens* not obliged to bring on record transferee pendente lite.)
1961 Bom 288 (291) [AIR V 48 C 70] : ILR (1961) Bom 649. (Tenant inducted *pendente lite* — Liable to be evicted in restitution proceedings.)
1960 Madh-Pra 193 (200) [AIR V 47 C 98].
1959 Ker 67 (72) [AIR V 46 C 28] : ILR (1958) Ker 1266 (FB).
1957 Bom 117 (119) [AIR V 44 C 42] (DB).
1956 Assam 116 (117) [AIR V 43 C 33] : ILR (1956) 8 Assam 137.
1956 Trav-Co 147 (151) [A I R V 43 C 55] : ILR (1955) Trav-Co 823 (FB).
1949 Bom 367 (371) [AIR V 36 C 96] : ILR (1949) Bom 480 (DB).
1930 Cal 15 (16) [AIR V 17] : 56 Cal 1130 (DB).
1923 Cal 252 (256) [AIR V 10] (DB).
1915 Oudh 200 (203) [AIR V 2] (DB).
('09) 36 Cal 675 (689) (DB).
('08) 30 All 231 (234) (DB).
('01) 23 All 331 (335, 336) (DB). (Transferee not made party to appeal — Result of appeal is binding on him.)
('01) 28 Cal 23 (26) (DB).
('94) 21 Cal 340 (343) (DB). (Tenant *pendente lite* can be removed in restitution proceeding.)
('84) 6 All 506 (509) (DB).
('75) 24 Suth W R 359 (361) (DB).
('75) 23 Suth W R 329 (330) (DB).
('68) 10 Suth W R 469 (473) (DB).
('67) 7 Suth W R 225 (226) (DB).
('67) 7 Suth W R 103 (103) (DB).
('12) 13 Ind Cas 641 (641, 642) (All).
(1862-63) 1 Hyd 160 (167).
[*See also* 1953 Trav-Co 364 (366) [AIR V 40 C 140] (DB).
1921 Cal 801 (803) [AIR V 8] (DB). (A prior mortgagee is in no way bound or affected either by the attachment of the subsequent encumbrance created *pendente lite*.)]
[But see 31 Cal 658 (662) (DB).]

2. † 1937 P C 260 (261) [A I R V 24] : 31 Sind L R 652.
1946 Lah 142 (146) [AIR V 33 C 31] : ILR (1946) Lah 467 (FB).
1962 Bom 191 (196) [AIR V 49 C 41] : ILR (1961) Bom 977.
('62) 1962-2 Mad L Jour 336 (337).
1959 Ker 133 (136) [AIR V 46 C 44] : ILR (1958) Ker 480 (DB). (Sale in execution of money decree pending mortgage suit — Execution of mortgage decree — Purchaser given symbolical possession — Suit for recovery of property from purchaser pendente lite, in execution of money decree is not barred.)
1958 Ker 309 (310) [AIR V 45 C 109] (DB).
1957 Bom 117 (119) [AIR V 44 C 42] (DB).
1956 Trav-Co 147 (151) [A I R V 43 C 55] : I L R (1955) Trav-Co 823 (FB).
1953 Nag 236 (236) [AIR V 40 C 94] : ILR (1952) Nag 150. (Remedy of plaintiff who has, in execution of his decree against defendant, purchased property is to proceed against purchaser under S. 47, Civil P. C. and not by separate suit.)
1951 Orissa 306 (310) [A I R V 38 C 75] : I L R (1949) 1 Cut 336 (DB).
1951 Trav-Co 187 (188) [AIR V 38 C 73] (DB).
1949 Mad 207 (208) [AIR V 36 C 90].
1945 Nag 86 (88) [A I R V 32] : I L R (1944) Nag 852 (DB).
('43) 1943 Trav L R 133.
1949 Mad 207 (208) [AIR V 36 C 90].
1947 Lah 175 (176) [AIR V 34 C 32].
1936 All 479 (480) [AIR V 23] (DB). (Subsequent mortgagee taking mortgage during pendency of suit on first mortgage is a representative of mortgagor.)
† 1931 Bom 280 (283) [AIR V 18] (DB).
1927 Bom 93 (95) [AIR V 14] : 51 Bom 37 (DB).
('04) 26 All 447 (458, 463) (FB).
('01) 28 Cal 492 (497) (DB).
(1900) 22 All 243 (246) (DB). (Subsequent mortgagee who takes a mortgage during the pendency of suit on the prior mortgage is a representative of the mortgagor.)
('94) 16 All 286 (291) (DB).
('97) 19 All 332 (333) (DB).
[*See also* 1914 Cal 828 (829) [AIR V 1] : 41 Cal 418 (DB).]
[But see 1921 Mad 559 (561) [A I R V 8]. (In view of the Privy Council decision in A I R 1937 P C 260 this view is no longer good law.)
1928 Bom 65 (66) [A I R V 15] : 52 Bom 208 (DB). (Do.)]

3. 1937 P C 260 (261) [AIR V 24] : 31 Sind L R 652.
1956 Orissa 165 (171) [A I R V 43 C 48] (DB).

suit in respect of the property is a representative of the judgment-debtor in the latter suit within the meaning of S. 47 of the Civil Procedure Code.(4)

The consequence of the view that the purchaser *pendente lite* is the representative in interest of the party from whom he obtained the transfer is that where the property has been decreed to be given possession to the plaintiff or the property is sold in execution of the decree, the transferee *pendente lite* cannot resist delivery of possession to the decree-holder or the auction-purchaser as the case may be.(5) This is recognised in O. 21, R. 102 of the Code of Civil Procedure.

Further, pending the suit the transferee is not entitled as of right to be made a party to the suit, though the Court has a discretion to make him a party.(6) See O. 22, R. 10 of the Civil Procedure Code.

Where the transferee *pendente lite* is made a party to the pending litigation, he is entitled to be heard on the merits of the case.(7) He can also prefer an appeal against the decree or order passed in the pending proceeding, even if his transferor does not appeal.(8) But he cannot take any plea which was not open to his assignor.(9) Nor can he plead that the suit is barred by limitation on the ground that the suit must be deemed to have been instituted against him on the date on which he was impleaded as a party.(10)

See also the undermentioned cases.(11)

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4. ('04) 26 All 447 (460) (FB).
1936 All 479 (481) [AIR V 23] (DB).
('96) 24 Cal 62 (76) (FB). (Overruling 16 Cal 355.)

5. ('64) ILR (1964) 14 Raj 1120 (1121).
1959 Bom 269 (271) [A I R V 46 C 83] : I L R (1959) Bom 256.
1952 Assam 111 (114) [AIR V 39] : I L R (1952) 4 Assam 247.
1952 Trav-Co 102 (103) [A I R V 39] : 1950 Trav-Co L R 665 (DB).
1925 Cal 1243 (1244) [AIR V 12].
('11) 39 Cal 220 (225, 226) (DB).

6. 1958 S C 394 (398) [A I R V 45 C 61] : 1958 S C R 1287. (Application to be brought on record in appeal.)
('64) I L R (1964) 14 Raj 873 (883). (Permission to be heard in appeal.)
1962 Orissa 71 (72) [AIR V 49 C 28].
1959 Ker 67 (74) [AIR V 46 C 28] : I L R (1958) Ker 1266 (FB). (Decree for redemption of Kanom property against Karnavan — Delivery taken — Partition during pendency of suit — Plaintiff not bound to implead sharers in execution of decree.)
1956 Assam 116 (117) [A I R V 43 C 33] : I L R (1956) 8 Assam 137.
1956 Trav-Co 147 (152) [A I R V 43 C 55] : ILR (1955) Trav-Co 823 (FB). (Right of decree-holder to proceed against person with his legal representatives on record after his death will not be affected by transfer pendente lite.)
1948 Nag 97 (99) [AIR V 35 C 37] : I L R (1947) Nag 719.
1939 Nag 128 (129) [AIR V 26].
† 1937 Bom 244 (253) [AIR V 24] (DB). (Notice of suit to purchaser pendente lite is immaterial.)
('98) 21 All 149 (151) (DB). (Mortgagee during the pendency of a suit on a prior mortgage need not be joined as a party.)
('89) 1889 All W N 91 (92). (Do.)
('84) 8 Bom 323 (337). (It is the practice in this country as well as in England to admit assignees pendente lite as parties to the suit.)
1924 Cal 188 (189) [A I R V 11] (DB). (But discretion must be judicially exercised.)

7. 1920 Mad 391 (395, 396) [AIR V 7] : 43 Mad 37 (SB). (But he cannot raise a defence not open to his transferor.)

8. 1935 Lah 640 (640) [AIR V 22] (DB).

9. ('01) 23 All 331 (336) (DB).

10. 1930 All 597 (599) [AIR V 17] (DB).

11. 1967 Andh Pra 277 (279) [A I R V 54 C 75] (DB).
1964 All 300 (301) [A I R V 51 C 85]. (Suit dismissed for default under O. 9, R. 3 — Fresh suit for same relief not barred — Transferee pendente lite from plaintiff also entitled to bring fresh suit.)
1952 Orissa 64 (68, 72) [AIR V 39] : I L R (1952) Cut 277 (DB). (Tenancy holding subject to Orissa Tenancy Act sold at rent sale — Purchaser is not within the meaning of S. 47, Civil P. C., the representative of tenant whose holding it was but takes it free of all encumbrances by reason of S. 220 of Act — Consequently lis pendens does not apply to sale.)

41. Injunction on party to suit not to transfer. — In *Turner* v. *Wright*(1) it was held that since a transferee *pendente lite* from a party would be bound by the result of the suit, no injunction will be granted against a party that he should not make any alienation of the property in suit.

In *Hadley* v. *London Bank*,(2) however, it was held that where there is a clear valid contract for sale and the suit is for specific performance of that contract, the Court will issue an injunction not to transfer *pendente lite*, but that where the result of the suit is open to serious doubt the Court will not grant an injunction. In this country it has been held that the fact that a party is protected by *lis pendens* is no ground why he should not also be further protected by an injunction restraining the other party from alienating the property.(3) A party is, however, not bound to apply for an injunction, nor, even if he applies, is the Court bound to grant it.(4) Where the party applying for issue of an ad interim injunction was not prepared to furnish security to compensate the opposite party in case the latter was restrained from selling the property during the pendency of the suit and sustained loss, the Court refused to issue the ad interim injunction.(5)

42. Subsequent reversal or modification of decree or order, how far affects sale in execution of such decree, or the assignment of such decree.— It has been held that the doctrine of *lis pendens* has no application to cases where a property has been sold in execution of a money decree, but subsequently the decree is varied or reversed on appeal or otherwise.(1) A *bona fide* purchaser at such a sale will get a good title to the property notwithstanding the subsequent variation or reversal of the decree and the person in whose favour the variation or reversal is made can only claim restitution from the other party to the suit.(2)

It has been held in the undermentioned case(3) that where a decree is assigned to a third party and appeal is thereafter filed against it, the assignment is affected by the doctrine of *lis pendens*. This, it is submitted, is not correct. The final appellate decree is no doubt binding on the assignee but it is not so on the ground of the doctrine of *lis pendens*. The *decree* cannot be said to be the subject-matter of the litigation.

43. Registration of lis pendens.—As has been seen in Note 1, the doctrine of *lis pendens* does not depend upon any doctrine of *notice* to the transferee. In England the difficulty arising out of the rule was removed by the Judgments Act, 1839, providing for the *registration* of every *lis pendens* and providing that no *lis pendens* should bind a purchaser or mortgagee without express notice thereof unless and until it was duly registered. The provisions have now been re-enacted in Ss. 1, 2 and 3 of the Land Charges Act, 1925 (15 Geo. V, Ch. 22).

Section 52 — Note 41

1. (1841) 49 E R 252 (252) : 55 R R 9.

2. (1865) 46 E R 562 (565) : 142 R R 26 (30, 31).

3. ('09) 2 Ind Cas 266 (267) (DB) (Cal).
✠('12) 16 Ind Cas 359 (361) (DB) (Cal).

4. (1900) 23 All 60 (65) (DB).

5. 1950 Ajmer 29 (29) [AIR V 37 C 38].

Section 52 — Note 42

1. ('05) 29 Bom 435 (448) (FB).

2. 1916 All 159(160) [AIR V 3]: 38 All 240(DB).
✠('87) 10 All 166 (172) : 15 Ind App 12 (PC).
† ('13) 16 Oudh Cas 225 (231) (DB). (Provided the Court executing the decree had jurisdiction to sell the property.)
('86) 9 Mad 130 (133) (DB). (Order.)
[But see ('73) 19 Suth W R 197 (198) (DB).]

3. 1916 Mad 745(745) [A I R V 3]:38 Mad 36(DB).

There is no general provision for registration of *lis pendens* in this country. But, by Bombay Act XIV of 1939, provision has been made in the Registration Act for the registration of notices pending suits and proceedings and S. 52 has been amended by providing that a transfer will be affected by *lis pendens* only, if it is made after the registration of the notice of the suit or proceeding.(1)

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[a][53. (1) Every transfer of immoveable property made with intent to defeat or delay the creditors of the transferor shall be voidable at the option of any creditor so defeated or delayed.

Fraudulent transfer.

Nothing in this sub-section shall impair the rights of a transferee in good faith and for consideration.

Nothing in this sub-section shall affect any law for the time being in force relating to insolvency.

A suit instituted by a creditor (which term includes a decree-holder whether he has or has not applied for execution of his decree) to avoid a transfer on the ground that it has been made with intent to defeat or delay the creditors of the transferor, shall be instituted on behalf of, or for the benefit of, all the creditors.

(2) Every transfer of immoveable property made without consideration with intent to defraud a subsequent transferee shall be voidable at the option of such transferee.

For the purposes of this sub-section, no transfer made without consideration shall be deemed to have been made with intent to defraud by reason only that a subsequent transfer for consideration was made.]

a. *Substituted* for the original section by the Transfer of Property (Amendment) Act, 1929 (20 of 1929), S. 15.

Synopsis

1. History of the section.
2. Scope of the section.
2a. This section and S. 23, Contract Act.
3. Section applies only to transfers of immovable property.
4. Hindu and Muhammadan law
5. "Transfer of property."
6. Intent to defeat or delay creditors.
7. Benami transactions not necessarily fraudulent.
8. Transfer is valid until avoided.
9. Who can avoid a fraudulent transfer.
10. "Creditor", meaning of.
10a. "Of the transferor."
11. Subsequent creditors.
12. Creditor need not obtain judgment on his debt before being entitled to impeach fraudulent transfer.
13. "At his option."
14. Plea in defence.
15. Avoidance of transfer in part.
16. Transfer taken in good faith and for consideration.
17. Consideration.
18. Transfer for dower.
19. Good faith.
20. Preference of one creditor over others.
21. Transferee from a transferee.
22. Questions of intent and good faith are questions of fact.
23. Frame of suit under the section.
24. Suit must be a representative one.
25. Leave of Court.
26. Defence need not be in representative capacity.

Section 52 — Note 43

1. 1965 S C 414 (426, 427) [AIR V 52 C 68]: (1964) 4 SCR 892.

27. Suit under this section is a "suit for land'.' within the meaning of the Letters Patent.
28. Transferor insolvent—Suit by creditor under this section.
29. Receiver in insolvency, if can avoid fraudulent transfer under S. 4 of the Provincial Insolvency Act.
30. Distinction between this section and Ss. 53 and 54 of the Provincial Insolvency Act.
31. Sub-section (2)—Transfer in fraud of subsequent transferee.
32. Auction-purchaser, whether is a subsequent transferee.
33. Plea of fraudulent transfer.
34. Onus of proof.
35. Limitation for suit to avoid document under this section.

1. History of the section. — The general principle is that a man can do what he likes with his own property. Limitations on this right were introduced from motives of equity by various statutes in England.(1) By 13 Eliz., Chap. 5 it was provided that conveyances of *any* kind of property, whether land or goods, with intent to defraud *creditors* were voidable at the instance of the person thereby prejudiced, except where the transferee had taken the property for good consideration and without notice of the intent to defraud.(2) By 27 Eliz. Chap. 4 it was provided that conveyances of *lands* (not goods) with intent to defraud subsequent *purchasers* were void against such purchasers for value, except where the prior transferee had taken the property for good consideration and *bona fide*.(3)

Section 53 — Note 1

1. 1938 Lah 156 (157) [AIR V 25] (DB).

2. The material sections of (1571) 13 Elizabeth, Chapter 5 run as follows:

Fraudulent conveyances, etc., made to defeat creditors to be void, etc., against them.

Section 1. Be it therefore declared, ordained and enacted, that all and every feoffment, gift, grant, alienation, bargain, and conveyance of lands, tenements, hereditaments, goods and chattels, or of any of them, or of any lease, rent, common, or other profit or charge out of the same lands, tenements, hereditaments, goods and chattels, or any of them, by writing or otherwise, and all and every bond, suit, judgment and execution at any time had or made since the beginning of the Queen's Majesty's reign that now is, or at any time hereafter to be had or made, to or for any intent or purpose before declared and expressed, shall be from henceforth deemed and taken (only as against that person or persons, his or their heirs, successors, executors, administrators and assigns, and every of them, whose actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries, and reliefs by such guileful, covinous, or fraudulent devices and practices as is aforesaid, are, shall or might be in any wise disturbed, hindered, delayed or defrauded) to be clearly and utterly void, frustrate, and of none effect: any pretence, colour, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding.

Saving for estates & interest made, etc., upon good consideration and bona fide to parties without notice of fraud.

Section 5. Provided also, and be it enacted, that this Act, or anything therein contained shall not extend to any estate or interest in lands, tenements, hereditaments, leases, rents, commons, profits, goods or chattels, had, made, conveyed or assured, or hereafter to be had, made, conveyed or assured, which estate or interest is or shall be upon good consideration and bona fide lawfully conveyed or assured to any person or persons, or bodies politic or corporate, not having at the time of such conveyance or assurance to them made any manner of notice or knowledge of such covin, fraud, or collusion as is aforesaid; anything before mentioned to the contrary hereof notwithstanding.

3. The material sections of (1584) 27 Elizabeth, Chapter 4 run as follows:

Fraudulent conveyances, etc., made to defraud and deceive subsequent purchasers to be void as against them.

Section 2. For remedy of which inconveniences, and for the avoiding of such fraudulent, feigned, and covinous conveyances, gifts, grants, charges, uses and estates, and for the maintenance of upright and just dealing in the purchasing of lands, tenements and hereditaments; Be it enacted, that all and every conveyance, grant, charge, lease, estate, incumbrance and limitation of use or uses of, in, or out of any lands, tenements or other hereditaments whatsoever had or made at any time heretofore, since the beginning of the Queen's Majesty's reign that now is, or at any time hereafter to be had or made, for the intent and of purpose to defraud and deceive such person or persons, bodies politic or corporate, as have purchased or shall afterwards purchase, in fee-simple, fee-tail, for life, lives, or years, the same lands, tenements and hereditaments, or any part or parcel thereof, so formerly conveyed, granted, leased, charged, incumbered, or limited in use, or to defraud or deceive such as have, or shall purchase any rent, profit or commodity in or out of the same, or any part thereof, shall be deemed and taken only as against that person and persons, bodies politic and corporate, his

Before the Transfer of Property Act was passed the said two statutes were applicable to the Presidency Towns of India. The principles underlying them were also applied in the mofussil in India as being in conformity with justice, equity and good conscience.(4) In S. 53 of this Act the Legislature introduced with some modifications the above-mentioned provisions of the two statutes(5) and thus codified what had been recognised as the law in this country.(6) The two statutes were repealed by this Act.

In the interpretation of this section there was, however, a difference of opinion in this country based on English decisions which interpreted 27 Eliz., Chap. 4 as meaning that a *voluntary* conveyance was void if the grantor subsequently conveyed the same property for value, no matter whether the subsequent purchaser took the property with *notice* of the prior conveyance or not.(7) It was held in some cases in this country following the above interpretation, that in every case of voluntary conveyance the fraudulent intent "*shall* be presumed" and that such conveyance was void against the subsequent purchaser even though he had notice of the prior purchase.(8) Even in England the law was altered in 1893 by the Voluntary Conveyances Act, 1893 (56 & 57 Vict. C. 21, S. 2), whereby a voluntary conveyance could not be made void under that Act *unless it was made with fraudulent intent.* Section 172 of the Law of Property Act, 1925 (15 Geo. V. Chap. 20), re-enacted the provisions of 13 Eliz., Chap. 5 and S. 173 re-enacted the provisions of 27 Eliz., Chap. 4 as modified by the Voluntary Conveyances Act, 1893.(9)

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and their heirs, successors, executors, administrators and assigns, and against all and every other person and persons lawfully having or claiming by, from or under them, or any of them, which have purchased or shall hereafter so purchase for money, or other good consideration, the same lands, tenements or hereditaments, or any part or parcel thereof, or any rent, profit, or commodity in or out of the same, to be utterly void, frustrate and of none effect, any pretence, colour, feigned consideration, or expressing of any use or uses to the contrary notwithstanding.

Act not to impeach conveyances made bona fide for good consideration.

Section 4. Provided also, that this Act or anything therein contained shall not extend or be construed to impeach, defeat, make void, or frustrate any conveyance, assignment of lease, assurance, grant, charge, lease, estate, interest, or limitation, of use or uses, of, in, to or out of any lands, tenements, or hereditaments heretofore at any time had or made, or hereafter to be had or made upon, or for good consideration, and bona fide to any person or persons, bodies politic or corporate, anything before mentioned to the contrary hereof notwithstanding.

Saving for mortgages made bona fide for good consideration.

Section 6. Provided nevertheless, that no lawful mortgage made or to be made bona fide and without fraud or covin, upon good consideration, shall be impeached or impaired by force of this Act, but shall stand in the like force and effect as the same would have done if this Act had never been had or made: anything in this Act to the contrary in any wise notwithstanding.

4. ('84) 10 Cal 616 (624) : 11 I A 10 (PC).
('01) 25 Bom 202 (208, 209) (DB). (The said two statutes and the authorities based thereon may be accepted as unmistakable guides to the law in India on the subject prior to T. P. Act.)
('87) 11 Bom 666 (675) (DB).
('68) 4 Mad H C R 84 (87).
(1865) 1 Agra H C R 41 (43, 44) (DB).
[*See also* ('66) 6 Suth W R 90 (91) (DB).]

5. 1960 Mad 536 (536) [AIR V 47 C 178].
1918 Mad 225 (226) [AIR V 5] : 22 Mad L T 474 (DB).
1917 Pat 448 (449) [A I R V 4] (DB). (In re Le Moroney (1887) 21 Irish 27 is referred to as containing a most clear and able exposition of the law of England and Ireland relative to the fraudulent transfers of property.)
1916 Sind 22 (24) [AIR V 3] : 9 Sind L R 108.
('07) 34 Cal 999 (1009) (DB). (The third paragraph of S. 53 is based on Statute 13 Eliz, c. 5.)
('03) 27 Bom 146 (149) (DB). (Section 53 is partly based on Statute 13 Eliz, c. 5.)
('03) 27 Bom 322 (327) (DB).
('01) 1901 Pun Re No. 6 page 18 (23).
†('88) 1 C P L R 63 (64).
('88) 1 C P L R 59 (59).

6 1960 Mad 536 (536) [AIR V 47 C 178].
†('04) 17 C P L R 24 (26).
(1900) 13 C P L R 180 (182).

7. See Note 31.

8. See Note 31.

9. Sections 172 & 173 of the Law of Property Act, 1925, are as follows :

In view of these changes in England and in view of the conflict of opionion above referred to, this section was altered by the amendment of 1929 on the lines of Ss. 172 and 173 of the Law of Property Act, 1925.(10) Sub-section (1) reproduces S. 172 of the Law of Property Act, 1925, which reproduced 13 Eliz., Chap. 5(11) and sub-s. (2) reproduces S. 173 of the Law of Property Act, 1925, which reproduced 27 Eliz., Chap. 4 as modified by the Voluntary Conveyances Act, 1893.

2. Scope of the section. — Sub-section (1) of the section deals with transfers in fraud of *creditors* and sub-s. (2) deals with transfers in fraud of subsequent *transferees*. It is the right of creditors *as a whole* that all the property of the debtor should be applied in payment of demands of them or some of them without any portion of it being parted with, without consideration, or reserved or retained by the debtor to their prejudice.(1) As was observed by the Lord Keeper in *Partridge* v. *Gopp*(2)

> "no man has so absolute a power over his own property as that he can alienate the same, when such alienation directly tends to delay, hinder or defraud his creditors unless it is made upon good consideration and *bona fide*."

Where, therefore, a debtor transfers his property with intent to defeat or delay the exercise of this right of the creditors, it is just and equitable that the transfer should be voidable at the option of any creditor so defeated or delayed. This is the principle on which 13 Eliz., Chap. 5 was based and on which the first sub-section of this section rests. The second paragraph of the section is also based on equity.

The principles of the section, based thus on the principles of equity which are of universal application, will apply even in places to which this Act is not directly applicable.(3) It will also apply to transfers to which the section is not, in terms,

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Section 172. (1) Save as provided in this section, every conveyance of property, made whether before or after the commencement of this Act, with intent to defraud creditors, shall be voidable, at the instance of any person thereby prejudiced.

Voluntary conveyances to defraud creditors voidable.

(2) This section does not affect the operation of disentailing assurance or the law of bankruptcy for the time being in force.

(3) This section does not extend to any estate or interest in property conveyed for valuable consideration and in good faith or upon good consideration and in good faith to any person not having, at the time of the conveyance, notice of the intent to defraud creditors.

Section 173. (1) Every voluntary disposition of land made with intent to defraud a subsequent purchaser is voidable at the instance of that purchaser.

Voluntary disposition of land how far voidable as against purchasers.

(2) For the purposes of this section, no voluntary disposition, whenever made, shall be deemed to have been made with intent to defraud by reason only that a subsequent conveyance for valuable consideration was made, if such subsequent conveyance was made after the twenty-eighth day of June, eighteen hundred and ninety-three.

10. See the Report of the Special Committee.

11. 1938 Cal 818 (821) [AIR V 25] (DB).

Section 53 — Note 2

1. See 1915 P C 115 (116) [AIR V 2] : 43 Cal 521 : 43 I A 104.

2. (1758) 28 E R 647 (648) : 1 Eden 163.

3. 1961 Punj 398 (399) [AIR V 48 C 117] : I L R (1962) 2 Punj 378 (DB). (Technical and procedural rules not followed.)
1960 Punj 417 (418) [AIR V 47 C 149] : 62 Pun L R 224 (DB).
('49) 1 Pepsu L R 198 (211) (DB). (But the courts in the Union are not bound to follow the mere rules of procedure prescribed by the last para of sub-s. (1).)
1923 Lah 478 (479) [AIR V 10]. (The Punjab.)
('37) 171 Ind Cas 735 (735) (Lah). (Do.)
('36) 164 Ind Cas 933 (934) (DB) (Lah). (Do.)
('12) 1912 Pun Re No. 74 (DB). (Do.)
1921 Lah 97 (99) [AIR V 8] (DB). (Do.)
1938 Lah 156 (157) [AIR V 25] (DB). (Do.)
1924 Lah 707 (707) [AIR V 11] (DB). (Do).
1927 Lah 420 (420) [AIR V 14] : 8 Lah 544 (DB). (Do.)
1930 Lah 136 (137) [AIR V 17]. (Do.)
1934 Lah 161 (162) [AIR V 21]. (Do.)
†('01) 1901 Pun Re No. 6, p. 18 (23). (Do.)
('08) 1908 Pun Re No. 81, p. 381 (387) (DB). (Do.)
('13) 78 Ind Cas 519 (519) (Lah). (Do.)
('92-96) 2 Upp Bur Rul 315 (316). (Burma Before 1924.)
('11) 10 Ind Cas 922 (923) (Low Bur). (Do.)

directly applicable such as transfers of goods(4) and transfers by operation of law.(5)

The section cannot be correctly understood and applied without reference to English cases on which the section is really founded.(6) In fact English decisions on the Statutes 13 Eliz. and 27 Eliz. are generally referred to in this country as guides for the construction of this section.(7) In matters of *procedure*, however, the English law cannot be a guidance in this country.(8)

2a. **This section and Section 23, Contract Act.** — The following illustrations will bring out the distinction between this section and S. 23, Contract Act:

1. *A* is heavily indebted. He has some immovable property which he is anxious to save from his creditors. With this view, he consults *B*. *B* agrees to help him to put the property beyond the reach of his creditors. With this object, they enter into an arrangement. Under this arrangement, *A* transfers the property to *B* for a consideration which *A* is to dispose of secretly so as to put it out of the reach of his creditors. Such a transaction will come under S. 23, Contract Act. The reason is that in such a case, the transfer is based on an agreement the object of which is fraudulent and is therefore unlawful within the meaning of S. 23, Contract Act. In such a case, the transfer will be wholly void and not merely voidable at the option of the creditors of the transferor. In other words, the transaction will not be binding even as between the parties to it.(1) As for the transferor's creditors they can ignore the transaction altogether and proceed against the property as if it had not been attempted to be transferred at all. It may also be noted here that under S. 6 (h) of this Act, no transfer can be made for an unlawful object or consideration within the meaning of S. 23, Contract Act. This section does not apply to such cases.

2. *A* transfers to *B* for consideration a certain immovable property with the intention of defeating his creditors. *B* knows *A*'s intention and takes the transfer with such knowledge. But *A* has not communicated his object to *B* and such object has not become part of the subject-matter of the agreement between the parties which is purely confined to the transaction of transfer. In such a case, S. 23, Contract Act, will not apply because, the section will only apply where the *agreement* between the parties includes an unlawful object.(2) The mere fact that one of the parties to the agreement is actuated by an unlawful intention and that the other party is aware of this will not make the object of the *agreement* an unlawful one.

In such a case, this section will apply. Under this section it is not necessary that the parties must have *agreed* as to the unlawful object. It is enough if the transfer is made with the intention of defeating or delaying creditors and the transferee is not acting in good faith. If he is aware that the transfer is being made with the intention of defrauding creditors, he cannot be said to be acting in good faith.

('13) 6 Low Bur Rul 170 (171) (Do.)
[*See also* 1916 Low Bur 89 (89) [AIR V 3]. (Burma before 1924).]

4. See Note 3.
1960 Punj 417 (418) [AIR V 47 C 149]: 62 Pun L R 224 (DB).

5. See Note 5.
1960 Punj 417 (418) [AIR V 47 C 149]: 62 Pun L R 224 (DB).

6. ('97) 20 Mad 465 (467).

7. †1921 All 298 (300, 301) [AIR V 8] (DB).
1918 Mad 225 (226) [AIR V 5]: 22 Mad L T 474 (DB).
†1917 Mad 519 (520) [AIR V 4].
(1900) 25 Bom 202 (209) (DB).
('89) 13 Bom 297 (300) (DB).

8. 1921 All 298 (301) [AIR V 8] (DB).

Section 53 — Note 2a

1. 1943 Nag 129 (134) [AIR V 30]: ILR (1944) Nag 42 (DB). (Transferee cannot sue transferor for possession.)

2. 1943 Nag 129 (134) [AIR V 30]: ILR (1943) Nag 42 (DB). (No agreement can be unlawful and thus void under S. 23, unless both sides are concurring parties to the matter which renders it unlawful.)

Such a transaction, however, will not be *void* under this section. It will be binding as between the parties to it.(3) It will be only *voidable* at the option of the *creditors* of the transferor.

3. **Section applies only to transfers of immovable property.**—The English Statute 13 Eliz., Chap. 5 on which this section is based applied to transfers not only of *lands*, but also of *goods and chattels*.(1) This section is, however, limited in its application to transfers of *immovable property*.(2) Thus, the section will not apply to the transfer of a *decree* by the decree-holder in fraud of his creditors.(3) Such cases must be decided according to justice, equity and good conscience.(4) The principles underlying the section are, however, in accordance with justice, equity and good conscience, and will, consequently, be applied to transfers of movable property.(5) According to these principles a deed is void against creditors when the debtor is in a state of insolvency and when the effect of the deed is to leave the debtor without the means of paying his present debts, unless the transfer has been made upon valuable consideration and in good faith.(6)

4. **Hindu and Muhammadan law.**—Section 2, as it stood before the amendment, provided that nothing in Chap. II (which includes this section) should affect any rule of Hindu or Muhammadan law. There is, however, no rule of Hindu law(1) or Muhammadan law(2) inconsistent with the provisions of this section. Under both

3. 1943 Nag 129 (132) [AIR V 30] : I L R (1943) 42 (DB). (Transferee can sue transferor for possession of the property.)
1936 Nag 207 (209) [AIR V 23] : ILR 1936 Nag 182.
1927 Nag 205 (205) [AIR V 14]. (Sale of movable property.)
('01) 1901 Pun Re No. 6. p. 18 (23).
[*See also* ('12) 15 Ind Cas 193 (194) (Mad). (Assignment of debt in fraud of creditors—Creditors can impeach it.)]

6. † 1914 P C 137 (139) [AIR V 1] : 37 Mad 227.
('87) 11 Bom 666 (676) (DB).
[*See also* 1942 Mad 714 (715) [AIR V 29]. (Assignment of decree to defraud creditors — Creditor of assignor can attach decree and claim that assignment is fictitious and is not binding on him.)]

Section 53 — Note 3

1. (1788) 100 E R 249 (251) : 2 T R 462.

2. † 1914 P C 137 (139) [AIR V 1] : 37 Mad 227. (Assignment of rights under decree—S. 53 does not directly apply as subject-matter of assignment is not immovable property. 30 Mad 6 affirmed.)
1960 Punj 417 (418) [AIR V 47 C 149) (DB). (It is doubtful whether a dissolution of partnership amounts to such a transfer.)
('11) 7 Nag L R 72 (77).

3. 1914 P C 137 (139) [AIR V 1] : 37 Mad 927. (30 Mad 6 affirmed.)
[*See* ('12) 17 Ind Cas 323 (324) (DB) (Mad).]

4. 1914 P C 137 (139) [AIR V 1] : 37 Mad 227. (30 Mad 6 affirmed.)
[*See also* 1959 Mad 141 (142) [AIR V 46 C 44] (DB). (Collusive and fraudulent decree and execution — Suit by other creditors to get decree and the execution proceedings upto sale and the possession were null and void — This Section though in terms will not apply, suit is maintainable.)]

5. 1960 Punj 417 (418) [AIR V 47 C 149] : 62 Pun L R 224 (DB).
1955 Bhopal 22 (24) [AIR V 43 C 15]. (Sale of a she-buffalo.)
1938 Nag 249 (250, 251) [AIR V 25] : ILR (1940) Nag 316.
† 1932 Rang 13(13) [AIR V 19]: 9 Rang 614 (DB).
1929 Rang 110 (111) [AIR V 16]. (Sale of standing crops.)

Section 53 — Note 4

1. 1960 Mad 536 (536) [AIR V 47 C 178].
1918 Mad 225 (228) [AIR V 5] : 22 Mad L T 474 (DB).
1917 Mad 519 (522) [AIR V 4] (DB). (11 Bom 666, followed.)

2. 1960 Mad 536 (536) [AIR V 47 C 178].
1955 Pat 270 (276) : A I R V 42 C 66 : 1955 B L J R 346 : 34 Pat 133 (DB). (A wakf by Shia Muhammadan cannot be excluded from the provisions of the section which are general in terms.)
1930 All 462 (465) [AIR V 17] : 52 All 710 (DB). (There is no rule of Muhammadan law which allows an indebted person to make a wakf of his property with intent to defraud his creditors.)
1929 All 277 (278) [AIR V 16] (DB).
1917 Mad 841 (844) [AIR V 4] (DB). (Even if the transfer was to a charity.)
[*See also* 1943 All 2 (5) [AIR V 30] (DB). (Deed of wakf impeached as being fraudulent—Held that there was nothing to show that this section did not apply.)

systems of law a transfer is bad if made to defraud creditors. This section will therefore apply to transfers by Hindus or Muhammadans. The amendment of S. 2 by deleting the word "Hindu" makes the position, so far as transfers by Hindus are concerned, still more clear.

5. "Transfer of property."—As has been seen in the Notes on S. 5, a transaction is not a "transfer of property" unless it involves a *conveyance* of rights in property by one person to another. This section applies only where there has been a "transfer of property" as defined in S. 5 involving a conveyance of rights in property by one person to another. In this respect it differs from the Statute 13 Eliz., Chap. 5 which applied even to colourable transactions.(1) But the word "transfer" in this section is comprehensive enough to embrace within its purview all kinds of transfers whether with or without consideration.(1a) The section is intended to cover cases of transfers which are capable of being set up and defended and not barred transfers.(1b)

Sham transactions.

The section does not apply to *nominal, sham or simulated* transactions in the form of transfers of property but which are really not transfers of property at all in the proper sense of the expression, there being, in such cases, no *animus transferendi* and no conveyance of any rights in property.(2) The transaction is inoperative even as

1940 All 55 (56) [AIR V 27] : ILR (1939) All 962 (DB). (Wakf by Muhammadan financially embarrassed is not void but voidable.)]
Also see S. 2, Note 9.

Section 53 — Note 5

1. 1964 All L Jour 1079 (1081.)
1952 All 83 (84) [AIR V 39] (DB).
(1770) 98 E R 384 (385) : 5 Burr 2631, Martyn v. Podger. (Fraudulent bill of sale.)

1a. 1941 Oudh 205 (208) [AIR V 28] (DB).
[*See also* 1960 Mad 536 (536) [AIR V 47 C 178]. (Marriage settlement made before marriage with intent to defeat creditors of settlor—Voidable.)]

1b. 1955 Mad 446 (448) [AIR V 42 C 120] : 1955 Mad W N 283.

2. 1957 S C 49 (66) [A I R V 44 C 9] : 31 ITR 28 : 1957 S C J 1 : 1956 S C R 691 : 1957-1 Mad L J (SC) 1 : 1956 S C A 1139 : 1957-1 Andh W R 1 (SC). (Distinction between a transfer which can be correctly described as 'benami' and a sham transaction which is also occasionally described as a benami transaction pointed out.)
1944 Nag 44 (52) [AIR V 31] : ILR (1944) Nag 342 (FB).
ILR (1964) 2 Mad 483 (487).
1964 All L Jour 1079 (1080). (It neither extinguishes an existing interest in the property nor creates a new one.)
1963 Mys 257 (260) [AIR V 50 C 62] : 1963 Mys L J (Supp) 266.
1962 Andh-Pra 25 (27, 28) [AIR V 49 C 9]. (Suit under this section is unsustainable in the case of such transactions.)
1961 Pat 158 (160) [AIR V 48 C 42] (DB).
1958 Cal 143 (146) [AIR V 45 C 29]. (Apparent transfer fraudulently made to defeat the provisions of statute viz. W. B. Estates Acquisition Act.)
1958 Pat 568 (570) [AIR V 45 C 186].
('57) 1957 M P L Jour 107 (108).
1955 Madh-B 159 (160) [AIR V 42 C 49] : ILR (1955) Madh-B 297 (DB).
1955 Pat 270 (275) [AIR V 42 C 66] : 1955 B L J R 346 : 34 Pat 133 (DB).
1953 Mad 545 (547) [AIR V 40 C 206] : 1953-1 Mad L J 123.
1953 Cal 251 (252) [AIR V 40 C 92] : 56 Cal W N 740 (DB).
1953 Mys 22 (24) [AIR V 40 C 10] : ILR (1953) Mys 152 : 32 Mys L J 123.
1952 All 83 (84) [AIR V 39] (DB).
1951 All 443 (445) [AIR V 38 C 93] (DB).
1951 Mys 103 (105) [AIR V 38 C 36] : 30 Mys L J 64 : ILR (1951) Mys 407 (DB).
1950 Ker L T 502 (504) (DB). (Benami or fictitious transfers are not intended to exist — Fraudulent transfers contemplated by this section are intended to exist though their object was to defeat third parties.)
1946 Sind 78 (79) [AIR V 33 C 24] : ILR (1946) Kar 98 (DB).
1924 Oudh 314 (316) [AIR V 31] : 20 Luck 226 (DB). (In order to bring a suit within the purview of S. 53 it is necessary to accept the genuineness of the transfer as an initial fact and then to prove that the transfer was made with a view to defeat or delay the general body of the creditors : AIR 1941 Oudh 457, Foll.)
1944 All 214 (215) [AIR V 31] : ILR (1944) All 325. (The law draws a clear distinction between a fictitious and a fraudulent transaction—If a transaction is fictitious, it was never intended to exist—If it is fraudulent, it was intended to exist, though its object was to defeat the legal rights of other people.)
1943 Nag 129 (132) [AIR V 30] : ILR (1943) Nag 42 (DB). (It is necessary for a creditor to avoid

between the parties thereto. If such a transaction is brought about, as is often the case, for the purpose of defeating or defrauding creditors, the latter are not affected by it.(3) It is not required to be set aside by a suit(4) and can be challenged otherwise than under the provisions of this section.(5) The question whether a transaction is a real transfer of property or a sham or simulated transaction must be decided on the facts and circumstances of the particular case.(6) The mere fact that the transaction is with-

the transaction under S. 53 of the Transfer of Property Act, it must in the eye of the law have had and have legal and valid existence until avoided.)
1943 Nag 113 (113, 114) [AIR V 30].
1942 All 344 (345) [AIR V 29] : ILR (1942) All 848 (DB). (Fictitious and fraudulent transfers — Distinction between, pointed out.)
1941 Oudh 95 (98) [A I R V 28]. (Section presupposes real transfer—Plaintiff's case not that transfer is fraudulent but that it is fictitious — Section 53 does not apply.)
1941 Oudh 457 (464) [A I R V 28] : 16 Luck 832 (DB). (In a suit under S. 53 the plaintiff has to accept the genuineness of the deed as an initial fact.)
(1940) 42 Punj L R 3 (6) (DB). (Transfer not intended to be acted upon and not acted upon.)
1936 Nag 207 (208, 209) (AIR V 23] : ILR (1936) Nag 183.
1927 Mad 1104 (1104) [A I R V 14] : 38 M L T 105. (A colourable transaction is void.)
1923 Pat 561 (567) [AIR V 10] (DB).
1919 Pat 345 (350) [AIR V 6] (DB).
('08) 30 All 297 (308). (Fictitious mortgage.)
[*See also* 1944 Nag 133 (134) [A I R V 31] : ILR (1944) Nag 125. (A fraudulent transaction is not a sham transaction.)
('01) 26 Bom 577 (584).
1939 Pat 5 (6) [AIR V 26) (DB).
1915 Bom 89 (90) [AIR V 2] : 39 Bom 507 (DB).
1938 Nag 249 (249) [A I R V 25] : ILR (1940) Nag 316.
1920 Nag 80 (83) [AIR V 7] : 16 Nag L R 3.
1941 Pat 394 (394) [AIR V 28] (DB).]
[See however 1965 Ker 288 (292) [A I R V 52 C 104] : 1965 Ker L J 111 : 1965 Ker LT 341 : (1965) 1 Ker L R 505. (AIR 1945 Mad 59 and AIR 1962 Andh Pra 25, Dissented from.)]
[But see 1925 Bom 287 (287, 288) [AIR V 12] (DB). (Submitted wrong.)]

3. 1964 All L Jour 1079 (1080).
1954 Manipur 1 (3) [AIR V 41 C 1].
1944 Mad 381 (383) [AIR V 31] : ILR (1945) Mad 138 (DB). (Colourable partition—Creditor can enforce his remedies as if parties continued to be joint.)
†1943 Nag 129 (136) [AIR V 30] : ILR (1943) Nag 42 (DB). (Colourable transaction — Creditors can proceed in same way as if the transaction had not been affected.)
1928 Oudh 414 (416) [A I R V 15] (DB). (Judgment-debtor making a gift to his son while decree was being executed—Possession not passing to donee nor mutation of names effected—Donor refusing to present the deed for registration—Gift was held to be not real and effective.)
1921 All 298 (299) [AIR V 8] (DB). (Joint family property — Transfer by one member to another member.)
('11) 10 Ind Cas 906 (907) (DB) (All). (Father's transfer to son.)
[*See also* 1926 All 470 (472) [AIR V 13] : 48 All 414 (DB). (Application by Receiver of an insolvent—Case under Insolvency Act, S. 53.)
('96) 22 Bom 255 (258) (DB).]
1930 P C 255 (256, 258) [A I R V 17]. (False document not intended to be given effect to but intended to defeat creditor held not to be binding on creditor.)
('84) 10 Cal 616 (624) : 11 Ind App 10 (PC). (Hibba made in favour of son — Gift not followed or completed by change of ownership or management — Transferor applying whole of income of gifted property to his own use—Transaction held benami for transferor.)
('90) 1890 All W N 15 (17) (SB). (Defendant in executing a decree against immovable property of the plaintiff's husband was met by plaintiff with an objection that subsequent to the decree the property had been transferred to her under an arbitration award, which was made a decree of Court. In discharge of her dower debt—Held that the award being the result of fraudulent and collusive arrangements to defeat the creditors, the fact that the parties in perfecting the fraud obtained a decree, would not afford an answer to the creditor's claim.)

4. ('08) 35 Cal 551 (560) : 35 Ind App 98 (PC).
†1944 Nag 44 (52) [A I R V 31] : ILR (1944) Nag 342 (FB).
1962 Andh Pra 25 (27, 28) [AIR V 49 C 9].
1962 Madh Pra 363 (364) [AIR V 49 C 103] : 1962 Jab L J 604 : 1962 M P L J 596 : 1962 M P C 310 (DB).
1955 Madh Bha 159 (160) [AIR V 42 C 49] : ILR (1955) Madh B 297 (DB).
1952 All 83 (84) [AIR V 39] (DB).
1951 All 443 (445) [AIR V 38 C 93] (DB).
1943 Nag 129 (132, 136] [AIR V 30] : ILR (1943) Nag 42 (DB).
1940 All 407 (409) [A I R V 27] : ILR (1940) All 542 (DB). (Sham and bogus sale deed.)
1927 Mad 805 (812) [A I R V 14]. (35 Cal 551 (PC), followed.)
1920 Mad 88 (88) [AIR V 7] (DB).
[*See* ('13) 18 Ind Cas 332 (335) (DB) (Mad). (A sham and colourable transaction is inoperative as between the parties to it and it is different from an alienation that is voidable by the creditors on the ground of fraud.)]

5. 1920 Nag 80 (83) [AIR V 7] : 16 Nag L R 3.

6. 1928 P C 139 (143) [AIR V 15] : 51 Mad 349 : 55 Ind App 256.

out consideration(6a) or that the consideration mentioned is grossly inadequate does not necessarily show that the transaction is unreal.(7)

Benami transactions.

A *benami* transaction is not necessarily a *sham* transaction not intended to be given effect to. A may make a *real transfer* to *C*, but in the name of *B*. *B* is a *benamidar* for *C*.(8) It has been held in some cases that a *benami* transaction properly so called is of this nature.(9) Such transactions are "transfers of property" within the meaning of this section.(9aa) But the word *benami* is very often used to describe a simulated transfer by *A* in favour of *B*, neither party intending that title should pass from *A* to *B*.(9a) Such transactions are, as has been seen above, not "transfers of

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1961 Pat 158 (160) [AIR V 48 C 42] (DB).

1960 M P L Jour 1029 (1030) (DB). (No evidence on record to show payment of consideration — Vender admittedly continuing to be in possession of property—*Held* the sale was sham.)

[*See also* 1958 Raj 280 (281) [AIR V 45 C 92] : 1958 Raj L W 231. (Oral evidence to prove that transaction evidenced by written instrument is fictitious or benami is not barred by Cl. 9, Proviso 1 of S. 92, Evidence Act.)]

1954 Manipur 1 (3) [AIR V 41 C 1].

1953 Mad 545 (547) [AIR V 40 C 206] : 1953-1 Mad L J 123. (Question depends on animus transferendi which parties had at the time of transfer — All transfers intended to defraud creditors cannot be presumed sham.)

1953 Mys 22 (24) [AIR V 40 C 10] : ILR (1953) Mys 152 : 32 Mys L J 123.

1952 Nag 106 (111) [AIR V 39] : ILR (1953) Nag 684. (Transfer of few fields in lieu of dower—Wife being pardanashin lady of high class family husband continuing to manage property —Failure to record property in the name of wife—Neither of the facts held sufficient for holding transfer a nominal transaction.)

1951 All 443 (445) [AIR V 38 C 93] (DB).

('09) 31 All 170 (172) (DB).

('09) 32 Mad 325 (329) (DB). (Sale deed by widow to prevent property from going to reversioner of husband — Deed though retained by the widow duly communicated — Tenant in possession also attorning to the vendee—*Held* fact that no consideration was paid did not prevent title passing to vendee and the transaction was not a sham one.)

('04) 28 Bom 364 (369) (DB).

('02) 26 Bom 577 (584).

('93-1900) 1893-1900 Low Bur Rul 201 (201).

[*See also* 1953 Hyd 77 (78) [AIR V 40 C 35] : ILR (1953) Hyd 165. (Question whether transaction is real or sham—Slight evidence is sufficient to show it as sham—Subsequent conduct not a safe test as invariably such conduct is adjusted to fit in to correspond with the benami nature.)

1937 Oudh 443 (443) [AIR V 24] : 13 Luck 455. (Question of genuineness of transaction — Suspicion cannot be substituted for evidence.)]

6a. ILR (1964) Cut 719 (724).

1957 Mad 630 (631) [AIR V 44 C 191] : 1957 Mad W N 483 : (1957) 2 Mad L J 414.

1944 Nag 133 (134) [AIR V 31] : ILR (1944) Nag 125.

('09) 32 Mad 325 (327, 329).

[*See also* 1958 Mad 580 (582) [AIR V 45 C 203]. (Coupled with other facts it may show the deed to be a sham one.)]

7. 1936 Nag 207 (208) [AIR V 23] : ILR (1936) Nag 183.

[*See also* 1957 Mad 630 (631) [AIR V 44 C 191]: 1957 Mad W N 483 : (1957) 2 Mad L J 414. (Evidence of real worth of property not available — Application of doctrine of inadequate consideration proving fraud, by shocking conscience of the Court, is inadvisable — In such cases careful scrutiny of circumstances is necessary to determine whether purchaser is a 'lucky purchaser' or 'fraudulent purchaser.')]

8. 1957 SC 49 (66) [AIR V 44 C 9] : 1956 S C R 691.

1944 Nag 44 (54) [AIR V 31] : ILR (1944) Nag 342 (FB). (Distinction between sham and benami transactions pointed out.)

ILR (1964) 2 Mad 483 (487). (In benami transactions title of property passes till it is questioned by the real party.)

1958 Pat 568 (570) [AIR V 45 C 186].

('56) 60 Cal W N 886 (890). (Property purchased by husband in name of wife will be regarded as benami transaction until the contrary is established.)

1952 Vind Pra 69 (73) [AIR V 39].

1920 Mad 26 (39) [AIR V 7] (DB).

9. 1957 S C 49 (66) [AIR V 44 C 9] : (1957) 31 ITR 28 : 1957 S C J 1 : 1957-1 M L J (SC) 1 : 1956 S C A 1139 : 1957-1 Andh W R 1 : 1956 S C R 691.

1934 Mad 587 (590) [AIR V 21]. (A sham transaction is one in which no title passes — In a benami transaction title passes for certain reasons to the name of a third party who could bring a suit, give a discharge etc., on his title.)

1925 Mad 1005 (1007) [AIR V 12] (DB).

9aa. 1957 S C 49 (66) [AIR V 44 C 9] : (1957) 31 I T R 28 : 1957 S C J 1 : 1957-1 M L J (SC) 1 : 1956 S C A 1139 : 1957-1 Andh W R 1 (SC) : 1956 S C R 691. (In such cases there is an operative transfer vesting the title in transferee.)

9a. 1957 SC 49 (66) [AIR V 44 C 9] : (1957) 31 ITR 28 : 1957 S C J 1 : 1957.1 Mad L J (SC) 1 : 1956 S C A 1139 : 1957-1 Andh W R (SC) 1 : 1956 S C R 691.

property" at all within the meaning of this section.

See also the undermentioned cases.(9b)

1960 M P L Jour 1029 (1030) (DB).
1958 Pat 568 (570) [AIR V 45 C 186].
1950 Ker L T 502 (504) (DB). (Fictitious or benami transfers, as distinguished from fraudulent transfers contemplated under this section. are never intended to exist.)
[*See* 1945 Mad 35 (54) [AIR V 32] : ILR (1945) Mad 412 (DB). (Suit by creditor for declaration that certain transfers made by debtor to his wife and daughter are benami and fictitious—S. 53 does not apply.)
1943 Nag 129 (136) [AIR V 30] : ILR (1943) Nag 42 (DB).
[*See also* 1953 Hyd 77 (78) [AIR V 40 C 35] : ILR (1953) Hyd 165 (DB). (Very slight evidence is necessary to show that the benami transaction is a sham transaction.)]

9b. 1966 Pat 110 (119) [AIR V 53 C 22] : 1965 B L J R 800. (Burden of proof lies on person alleging transaction to be benami.)
1962 Pat 160 (165) [AIR V 49 C 37] (DB). (Benami transaction—Tests usually taken into consideration are passing of consideration, custody of title deed, possession of property, motive and relationship — Failure of plaintiff claiming transaction to be benami on first four tests — Mere relationship is not sufficient to establish benami.)
1962 Orissa 74 (77) [AIR V 49 C 29] : ILR (1962) Cut 625. (Essentials of benami nature—Consideration of motive, relationships between parties and source of consideration necessary.)
1960 Pat 420 (421) [AIR V 47 C 145] : 1960 B L J R 148 (DB). (Benami is a question of fact and not a mixed question of law and fact.)
1960 Punj 575 (578) [AIR V 47 C 205] (DB). (Benami nature of transaction — Question of fact—Cannot be raised in second appeal.)
1960 Andh Pra 70 (74) [AIR V 47 C 23] : 1959 Andh L T 661 : (1959) 2 Andh W R 140 (DB). (Purchase of property benami—Question is one of fact.)
1959 Andh Pra 407 (412) [AIR V 46 C 116] : ILR (1959) Andh Pra 208 (DB). (Plea of benami must be strictly made out—Apparent title must prevail in absence of evidence—Onus of proof is on person alleging benami.)
1959 Cal L Jour 1 (5) (DB). (Person named as consignee in railway receipt — Presumption arises that he is the owner of the goods—Onus is on person claiming the named consignee to be his benamidar to prove that purchase money came from him.)
1958 Pat 434 (436) [AIR V 45 C 139] : 1958 Pat L R 143 : 1958 B L J R 383 : 37 Pat 658 (DB). (Question of benami — Motive for transaction, relationship of parties, payment of consideration, custody of the document and possession over property are main tests—Decision on these points is a decision of fact.)
1958 Cal 733 (734) [AIR V 45 C 185] : ILR (1959) 1 Cal 121 (DB). (Burden of proof lies on person assailing transaction as benami to prove his allegation.)
1958 Pat 537 (538) [AIR V 45 C 172] : 1957 Pat L R 448 : 1958 B L J R 103. (Question of benami is a question of fact.)
1957 Mad 483 (491) [AIR 44 C 149] (DB). (Burden lies on him who raises the plea of benami or sham to prove that what is apparent is not real.)
1957 Ker 121 (123) [AIR V 44 C 70] (DB). (Plaintiff setting up benami — Burden of proof is heavily on him—He must adduce the best evidence — Court must not rest its decision on suspicion.)
1957 Hyd 37 (39) [AIR V 44 C 19] : ILR (1956) Hyd 733 (DB). (Benami is not a matter of mere presumption—It has to be pleaded and proved by evidence.)
1957 Cal 177 (179) [AIR V 44 C 56] : 61 Cal W N 154 (DB). (Finding of benami based on cogent materials placed before Court—Absence of evidence of motive does not vitiate the finding.)
('55) ILR (1955) 1 Cal 207 (212, 213) (DB). (Question of benami—Initial presumption is in favour of the ostensible or apparent owner — —It is not a pure question of onus or burden of proof but of rebutting the initial presumption — Disregard of presumption on the view that where evidence has been led on both sides question of onus is not important is a serious mistake.)
1955 Him Pra 2 (3) [AIR V 42 C 2]. (Burden of proof lies on person who alleges the transaction to be benami.)
('55) 1955 NUC (Cal) 2867 [AIR V 42]. (Person alleging a transfer to be sham must prove the facts relied on by him.)
1955 Madh Bha 148 (155) [AIR V 42 C 48] : ILR (1955) Madh Bha 239 (DB). (Property purchased in name of wife, husband paying purchase money — Presumption of wife being benami arises—Burden lies on her to rebut it by showing that the husband purchased it by way of gift to her or advancement.)
('54) 1954-26 ITR 249 (254) (DB). (Person alleging benami must prove the allegation by direct or circumstantial evidence.)
('54) ILR (1954) 1 Cal 220 (227) (DB). (Finding as to nature of transaction alleged as benami must rest on evidence and not on suspicion.)
1952 Nag 246 (247) [AIR V 39] : ILR (1951) Nag 334 : 1952 Nag L J 160. (Onus of proving benami nature of transaction is on the person alleging it so—Person in whose name transfer stands providing purchase money—No motive for entering into benami transaction — Mere continuous possession of the person who claims to be the real owner not sufficient to establish benami.)
1951 Trav-Co 237 (238) [AIR V 38 C 95] : ILR (1951) Trav Co 294 and 788 (DB). (Transaction in fraud of creditors is not a sham transaction.)

Partition of joint property.

There is a difference of judicial opinion(10) as to whether a partition of joint property is a transfer of property. But it has been held that a partition made in fraud of creditors, can be avoided under the provisions of this section.(11) Thus, where in a partition between a Hindu father and his sons, the father was allotted a smaller share than that to which he was entitled under the law, with intent to defeat his creditors, it was held that the partition could be avoided under this section.(11a) In the undermentioned cases(11b) it was held that apart from the question whether a partition is a transfer of property within the meaning of this section, the principle of the section is applicable to partitions.

Deed of appointment.

A deed of appointment made in accordance with a power reserved in deed of trust is a "transfer of property" within the meaning of this section.(12)

Relinquishment and surrender.

A mere relinquishment of rights by a person does not operate as a transfer of property.(13) This section does not in terms apply to such cases.(14) Similarly, a *surrender* to the next reversioner which is merely an effacement of the surrenderor of his or her interest is not a "transfer of property".(15) It has been held in the undermentioned cases(16) that where the transaction is not a mere effacement of the interest of the alleged transferor, but is *intended to convey* rights to the next reversioner, it would amount to a transfer of property within the meaning of this section.

1946 Mar L R 26 (27). (Question whether transaction is benami or not — Test — Source of purchase money is the best test.)

1937 Cal 203 (206, 207) [AIR V 24] (DB). (Transaction alleged as benami — Court's decision must not rest on suspicion—Fraudulent intention can be inferred only upon tangible facts proved in the case.)

10. See Note 4 on Section 5.

11. 1956 Punj 46 (48) [AIR V 43 C 22]. (Partition between husband and wife under which all tangible properties are given to the wife and the husband retains only property of a very flimsy character.)

1950 Bom 278 (284, 285) [AIR V 37 C 80] : I L R (1950) Bom 114 (DB). (Partition made without making provision for payment of debts due to creditors of the joint family.)

1950 Bom 247 (249) [AIR V 37 C 68] (DB).

1936 Bom 10 (12) [AIR V 23] : 60 Bom 34 (DB).

†1923 Mad 577 (577) [AIR V 10](DB). (AIR 1920 Mad 20 not followed.)

('26) 97 Ind Cas 70 (70) (Mad). (AIR 1923 Mad 577, followed.)

[*See also* 1928 Mad 735 (742) [AIR V 15] : 51 Mad 417 (FB). (Partition not providing for debts is not bona fide.)]

11a. 1950 Bom 247 (249) [AIR V 37 C 68](DB).

1947 Mad 203 (204) [AIR V 34 C 104]. (Partition between father and sons—No property allotted to father—All property given to sons—Sons undertaking to pay debts incurred by father — Effect of partition is to defraud creditors—Partition is fraudulent as the creditors not being parties to it cannot take advantage of it to enforce the arrangement against the sons—AIR 1944 Mad 381, Foll.)

1944 Mad 381 (382, 383) [AIR V 31] : ILR (1945) Mad 133 (DB). (Creditors can proceed against what would be the father's proper share, ignoring the actual partition, but they cannot proceed against the sons' shares because the division in status brought about by the partition cannot be affected by its fraudulent nature — Where partition is fair and in accordance with the proper shares of the parties, it is not liable to be impeached under this section although entered into with a view to prevent attachment of the sons' shares in execution of decree against the father obtained after partition and in that sense mala fide. AIR 1937 Mad 424, Relied on.)

11b. 1944 Nag 44 (52) [AIR V 31] : ILR (1944) Nag 342 (FB). (Properties assigned to *A*, a member of joint family in such way that *A's* creditors would be defeated — Held, that *A* retained a benefit to himself and so partition was voidable at the instance of *A's* creditors.)

1926 Nag 355 (356) [AIR V 13].

12. ('94) 22 Cal 185 (202). (The operation of the Transfer of Property Act is not intended to be confined to transfers by contract.)

Also see S. 5 Note 1.

13. See Note 4 on S. 5.

14. 1938 Oudh 65 (67) [AIR V 25](DB). (Relinquishment of his rights by one coparcener in favour of another coparcener.)

See also Note 6.

15. See Note 4 on S. 5.

16. 1965 Mad 337 (338) [AIR V 52 C 111] : ILR (1965) 1 Mad 691 : 77 Mad L W 683 : 1964 Mad W N 606. (Widow asking for maintenance

In the undermentioned case(17) it was held by the Madras High Court that where a judgment-creditor gave up his claim against his judgment-debtor and certified satisfaction of his decree, the transaction was not a transfer of property and that neither S. 53 nor the principle underlying it applied to the case so as to enable the creditors of the judgment-creditor to question the transaction. In a later case,(18) however, the same High Court has held that a mortgagee giving up his claim against the mortgagor must be considered to have made a 'gift' of his claim to the mortgagor and that the principle underlying this section can be applied to such transactions. It was argued that the giving up of the claim cannot amount to a reservation to the mortgagee of any benefit and that, consequently, it could not be considered a fraudulent transaction. Their Lordships rejected this contention and observed that it was not necessary under S. 53 that the transferor should reserve any benefit to himself. As to the correctness of this observation, see Note 6.

Waqf.

It has been held by the High Court of Allahabad that a deed of waqf is a "transfer of property" within the meaning of this section, and can be set aside if made in fraud of creditors.(19) See also the undermentioned Patna case to a similar effect.(19aa) In the undermentioned case(19a) of the Privy Council it was assumed that a wakfnama is a transfer within this section. See in this connection Note 3 on S. 5.

Transfer by operation of law.

It has been seen in Note 3 on S. 5 that a Court is not a "living person" and that a transfer in execution of a decree is not a "transfer of property" within the definition of that section. Section 2, cl. (d) specifically excludes transfers by operation of law or by, or in execution of, a decree of a Court from the operation of the Act. This section, therefore, will not in terms apply to such transfers.(20) But the principles embodied in the section are in accordance with the general principles of justice, equity and good conscience and, as such, would be applied in the case of such transfers.(21)

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and simultaneously surrendering her interest in the property—AIR 1946 All 267 and AIR 1939 Bom 496, Rel. on.)

1939 Bom 496 (500, 501) [AIR V 26]. (Surrender of estate in favour of daughters pending suit by husband's creditor for recovery of debt from estate in widow's hands.)

1936 Nag 166 (167) [AIR V 23] : ILR (1936) Nag 69. (Surrender by widow of her widow's interest.)

[*See also* 1946 All 267 (267) [AIR V 33 C 60] : ILR (1946) All 341 (DB). (Surrender by Hindu widow or other female with limited estate in favour of next reversioner is transfer within S. 7, U. P. Encumbered Estates Act, just as it is under S. 53, T. P. Act.)

('98) 23 Bom 1 (11). (Assignment in favour of son.)]

17. ('09) 2 Ind Cas 523 (DB) (Mad).

18. 1916 Mad 481 (482) [AIR V 3] (DB).

19. 1943 All 2 (5) [AIR V 30] (DB).

1930 All 462 (465) [AIR V 17] : 52 All 710 (DB).

† 1929 All 277 (278) [AIR V 16] (DB).

19aa. 1955 Pat 270 (275, 276) [AIR V 42 C 66]. 34 Pat 133 (DB).

19a. 1946 P C 177 (177) [AIR V 33 C 51] : ILR (1945) Kar (PC) 161 (Wakfnama alleged to have been made to defeat or delay creditors of settlor — Wakfnama is not revocable by settlor but is only voidable at option of creditors.)

20. 1942 Mad 632 (633) [AIR V 29]: ILR (1943) Mad 47 (DB).

1929 All 238 (239) [AIR V 16] : 51 All 595 (DB). (Transfer by decree of Court.)

('28) 110 Ind Cas 386 (386) (Lah).

21. 1960 Punj 417 (418) [AIR V 47 C 149] : 62 Pun L R 224 (DB).

1942 Mad 632 (633, 634) [AIR V 29] : ILR (1943) Mad 47 (DB). (Collusive decree and execution sale—Court can grant relief by applying principles of oommon law. 10 Cal 616 (PC) and 10 H L C 404, Rel. on; AIR 1918 Mad 557, Approved.)

†1929 All 238 (239) [AIR V 16]: 51 All 495 (DB) (Collusive award and decree.)

[*See also* 1934 Lah 460 (462) [AIR V 21] : 15 Lah 849 (DB). (Technical provision in S. 2 (d) is not binding on Punjab Court.)]

Also see S. 2, Note 6.

Acquiescence in mutation.

Where the owner allowed a third person to apply for mutation on the false allegation of an oral gift and acquiesced in the passing of an order for mutation by stating that he had no objection, it was held by the Chief Court of Oudh that it was a transfer of property within the meaning of this section.(22)

6. Intent to defeat or delay creditors. — A transfer with intent to defeat or delay the creditors of the transferor, is, as stated in the marginal note to the section, a "fraudulent transfer." The fraud, for the purpose of this section, consists therefore, in the *intention to defeat or delay the creditors* of the transferor. As has been seen in Note 2, the right of the creditors, taken as a whole, is that all the property of the debtor should be applied in payment of demands of them or some of them without any portion of it being parted with, *without consideration* or *reserved or retained* by the debtor to their prejudice. An intent to defeat or delay the creditors as a whole in the enforcement of this right is what is regarded a fraudulent intent under this section. The intention must be to defeat or delay the creditors *generally* and not merely *one creditor*.(1) But it has been held that the benefit of this section cannot be refused to the defeated and delayed creditor on the ground that at the time of the institution of suit by him the debtor has no other creditor in existence than himself.(1a) The primary object of sub-s. (1) is to make the assets of the transferor available to the general body of creditors.(2)

The *test*, therefore, to see whether a particular transfer is a fraudulent one or not within the meaning of this section, is whether the debtor *intended to prejudice the creditors as a whole* (a) by parting with his property *without consideration* or (b) by *securing or reserving a benefit to himself*. It follows that a transfer cannot be

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22. 1938 Oudh 165 (167) [AIR V 25] (DB).

Section 53 — Note 6

1. 1966 Mad 247 (252) [AIR V 53 C 75] : (1965) 1 Com L J 1.
1961 Mad 403 (404) [AIR V 48 C 129].
1958 Mad 580 (582) [AIR V 45 C 203]. (Benami transfer entered into with the motive of defeating an impending execution is not hit by S. 53.)
1955 Mad 446 (447) [A I R V 42 C 120] : 1955 Mad W N 283.
1947 Cal 154 (155) [AIR V 34 C 45] (DB).
1930 Mad 665 (668) [AIR V 17].
1917 Low Bur 124 (124) [AIR V 4] (DB).
1914 Low Bur 180 (181) [AIR V 1].
('05-06) 3 Low Bur Rul 188 (189).
('01) 25 Bom 202 (224) (DB).
('10) 8 Ind Cas 1205 (1206) (Low Bur).
[*See also* 1955 N U C (Ajmer) 774 [A I R V 42]. (Transfer made substantially for the benefit of creditors or some of them — Is not a transfer "to defeat or delay creditors" within the meaning of S. 6 (b), Provincial Insolvency Act.)]
1a. 1952 All 226 (227) [AIR V 39] (FB). (Sole creditor of judgment-debtor filing suit under O. 21, R. 63 Civil P. C. for declaration that the sale by the judgment-debtor is in fraud of creditors— Suit as brought is in representative capacity.)
1967 Ker 171 (172) [A I R V 54 C 69]. (Even if plaintiff is only creditor, he can maintain representative suit on behalf of creditors, if any.)
1967 Madh Pra 145 (146) [AIR V 54 C 43]. (AIR 1955 Mad 446 and AIR 1918 Mad 481 (FB), Dissented from.)
1965 Andh-Pra 68 (69) [A I R V 52 C 21] (DB). (Section does not contemplate the existence of plurarity of creditors for its application.)
(1963) 2 Andh L T 224 (226, 227). (There is no distinction between a case where a transferor had a single creditor and a case where he had several creditors.)
1961 Punj 361 (363) [AIR V 48 C 105] (DB).
1951 Trav- Co 237 (238) [AIR V 38 C 95] : I L R (1951) Trav-Co 294 and 788 (DB).
1939 Sind 97 (99) [AIR V 26] : I L R (1939) Kar 269 (DB).
1930 Mad 665 (668) [AIR V 17].
1917 Pat 448 (449, 450) [AIR V 4] : 2 Pat L Jour 546 (DB).
2. 1960 Punj 417 (418) [AIR V 47 C 149] : 62 Pun L R 224 (DB).
1921 Pat 53 (54) [AIR V 8]: 6 Pat L Jour 48 (DB).
[*See* (1873) 42 L J Ch 14 (16) : L R 14 Eq 184, Cornish v. Clark.
(1882) 51 L J Ch 521 (523) : 19 Ch D 588, Ex parte Russell ; In re Butterworth.]
[*See also* 1963 Mys 257 (260) [AIR V 50 C 62] : 1963 Mys L J (Sup) 266. (Relief given under section enures to the benefit of all the creditors though they are not parties to the suit.)]
Also see Note 24.

avoided under this section—

(A) where there is no such intention as aforesaid,(3) or

(B) where the transfer is for consideration and no benefit is secured or reserved to the debtor.

In some cases the test was held to be to see whether the transfer was executed as a *mere cloak*, the real intention of the parties being that the ostensible owner should retain the benefit for himself.(4) In the undermentioned cases,(5) however, it has been held that this is by no means an exhaustive test. For even if a transaction is not a cloak, if the object of transferor is to convert land into money and thus place it beyond the reach of the creditors, the fraudulent intention is made out. It is submitted that there is really no difference between the two tests. In each case, the debtor gets a benefit to himself and the transaction is to that extent a cloak.

(A) Intention.

The mere fact that a transfer by the debtor has the *effect* of defeating or delaying the creditors of the transferor is not by itself sufficient to render the transfer voidable as a fraudulent transfer, without proof of *intention* on the part of the transferor to *prejudice the creditors* by such transfer.(5a) As was observed by Fry J., in *Golden* v. *Gillam*,(6) a case arising under the statute 13 Eliz., Chap. 5, corresponding to this section, "the statute was not intended to set aside an honest dealing between man and man, which might, nevertheless have the effect of delaying the execution of a creditor."

The intention referred to is not the same thing as the *motive* in executing the transfer. If defeating or delaying the creditors is intended the *motive e.g.* of making a provision for the family of the transferor, is immaterial.(7) In the undermentioned case(8) it was observed that the intent is the *dominant motive or sole object* of the transaction and not a mere knowledge that the transfer is likely to prejudice the creditors.

In determining the question whether a transfer has been made with such intent it is essentially necessary that the facts should be considered in relation to each other and weighed as a whole.(9) The conduct of the parties, prior, contemporaneous and

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3. 1954 Trav-Co 404 (405) [AIR V 41 C 142] : 1954 Ker L T 234 (DB).
('06) 8 Bom L R 110 (114) (DB).
('04) 28 Bom 364 (369) (DB).

4. 1927 Cal 836 (839, 840) [AIR V 14] : 54 Cal 687 (DB).
('05) 29 Bom 428 (434) (DB).
('03) 27 Bom 322 (327) (DB).
('01) 1901 Pun Re No. 6, p. 18 (27). (Citing 24 Cal 825.)
(1900) 13 C P L R 180 (182, 183).
('97) 20 Mad 465 (466) (DB).

5. 1918 Cal 82 (85) [AIR V 5] (DB).
('07) 34 Cal 999 (1012) (DB).

5a. 1965 Mad 395 (398) [AIR V 52 C 135] : ILR (1965) 2 Mad 250 (DB). (Landed property disposed of in furtherance of vendor's intention to migrate to Pakistan — Income-tax department assessing him to tax on profits of sale after six years — At time of sale vendor having no debts at all and no facts also available to show an intention to defraud future creditors — Held sale cannot be struck down as fraudulent merely because the I. T. department, a future creditor, has been defeated.)
1958 Mad 580 (582) [AIR V 45 C 203].
1955 Pat 270 (276) [A I R V 42 C 66] : 34 Pat 133 (DB).

6. (1882) 51 L J Ch 154 (156) : 20 Ch D 389.

7. ('38) 42 Cal W N 34 (37).

8. ('01) 25 Bom 202 (226) (DB).

9. †1919 P C 6 (8) [AIR V 6] : 15 Nag L R 68.
1961 Punj 361 (363) [AIR V 48 C 105] (DB).
1958 Mad 580 (581) [AIR V 45 C 203].
1955 Pat 270 (276) [AIR V 42 C 66] : 34 Pat 133 (DB).
('54) 1954 All W R (H C) 565 (569). (Transfer of equity of redemption by mortgagor — Since it cannot affect the rights of mortgagee at all the mere fact that the transfer was made a day before the institution of suit by mortgagee would not make it a fraudulent transaction.)
1954 Nag 129 (134) [AIR V 41 C 51] : I L R (1953) Nag 937. (Transfer by sale in favour of father-in-law—Property worth much more than price stated—Consideration being payment of mortgage debt which had not become due —

subsequent will be relevant for this purpose.(10) Where once it is established that the transfer is made with intent to defeat or delay the creditors, its nature is not affected by the fact that subsequently some of the creditors have been fully

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No legal necessity for alienation—Subsequent payment towards mortgage made by transferor who continued in possession — *Held*, prima facie case of intention to defeat and defraud creditors was made out.)

('49) 1 Pepsu L R 198 (204) (DB).

1943 All 2 (5) [AIR V 30] (DB). (Where after executing a promissory note for a large sum the executant executes a wakf alad aulad covering the major portion of his property and applies under S. 4 of the U. P. Encumbered Estates Act and shows only two items of property not forming a part of the wakf as his which are not sufficient to meet his debts, these facts are sufficient to show that the intention of the executant of the wakf was to defeat or delay creditors.)

1943 Mad 531 (534) [AIR V 30] : I L R (1944) Mad 133 (DB). (Gift of bulk of the properties to daughter-in-law by a person who is indebted to a considerable extent and is apprehensive of further liabilities without making any provision for any of them—*Held*, fraudulent intent must be presumed.)

1941 Lah 228 (232) [AIR V 28] (DB). (Mortgagor being under pressure from earlier mortgagee raising money from another to redeem the mortgage—Property redeemed mortgaged to the lender of the money — No other creditor in existence at the time of the transaction — The latter mortgage cannot be regarded as effected merely to afford protection to the mortgagor or to defeat or delay any creditors — Case is merely substituting one mortgagee for another.)

1941 Oudh 205 (208) [AIR V 28] (DB). (Mere fact that transfer is executed without consideration as in case of gift or mere fact that transfer is made merely with intent to defeat anticipated execution is not sufficient to make it fraudulent transfer.)

1937 Rang 51 (52) [A I R V 24] (DB). (Property attached in execution—Daughter of judgment-debtor paying off decretal amount and getting sale deed of released property — Decree-holder subsequently obtaining another decree against same judgment-debtor—Previous sale could not be set aside as fraudulent and collusive under S. 53.)

1936 Pesh 216 (216) [AIR V 23]. (Judgment-debtor transferring property after issue of execution of decree to wife in consideration of dower. No previous attempt to pay dower — No circumstances showing necessity for transfer — Transfer must be deemed to have been made to delay judgment-creditor.)

1936 Nag 166 (168) [AIR V 23] : I L R (1936) Nag 69. (Judgment-debtors making gift of property as wahiwatdars of a Devasthanam—Registration of the deed after attachment — No evidence to show that the property was dedicated to the Devasthanam—Property described in the deed as judgment-debtor's property — *Held*, deed was made to defeat and delay creditors.)

1927 Nag 166 (167) [AIR V 14]. (Cumulative effect of all facts must be considered.)

1926 Sind 109 (111) [AIR V 13]. (AIR 1919 P C 6, followed.)

1923 Nag 103 (103) [AIR V 10].

('09) 4 Ind Cas 970 (972) (Lah).

(1902) 71 L J Ch 518 (521) : (1902) 2 Ch 360 (372), In re Holland; Gregg v. Holland.

See also the following cases:

1960 Punj 548 (549) [A I R V 47 C 196] (DB). (Partition amongst brothers to save joint family property from attachment and sale under decree against one of the brothers who was indebted—Inference of fraudulent intent cannot be made.)

1959 Ker 380 (381) [A I R V 46 C 132] (FB). (Determination of question of good faith —Does not depend on recitals and covenants in the deed alone. Circumstances surrounding transaction as well as the conduct of parties at the time of execution of the deed as well as after that should be taken into account—Facts should be considered in relation to each other and as a whole.)

1951 Trav-Co 55 (70) [A I R V 38 C 20] : 1950 T C L R 707 (DB). (Transfer otherwise appearing to be fraudulent—Mere fact that there was threat of legal proceedings to the transferor who was hopelessly involved cannot render transfer a bona fide transfer under S. 53, Provincial Insolvency Act.)

1938 Oudh 230 (231) [AIR V 25] (DB). (Oral gift to daughter after the creditor had obtained decree—Intention to defraud was presumed.)

1938 Lah 564 (566) [AIR V 25] (DB). (A decree-holder attaching land of judgment-debtor in execution — One T objecting to the attachment as holder of lease from judgment-debtor—Lease for twenty years and the annual rent to be paid, not to the judgment-debtor but to his creditors —Latter obtained no decree—No evidence that judgment-debtor gave possession to T or that T actually paid any rent to judgment debtor's creditor — *Held*, the deed was executed with intention to defeat and delay creditors.)

1937 Lah 819 (820) [AIR V 24] (DB). (Person indebted to B and other creditors making gift of property to third person — Subsequent to gift, person treating property as his own and few months after mortgaging property to B — Gift held either fictitious or intended to defeat or delay creditors.)

10. 1961 Punj 361 (363) [AIR V 48 C 105] (DB). (Subsequent conduct of vendee in not taking steps to get his name mutated in revenue papers.)

1958 Mad 580 (582) [AIR V 45 C 203].

†1938 Lah 136 (137) [AIR V 25].

satisfied.(10a)

Transfer having effect of defeating creditors.

The second paragraph of the old section provided that a transfer may be *presumed* to have been made with a fraudulent intent, where its *effect* was to defeat or delay the creditors of the transferor, *and* it was made gratuitously or for a grossly inadequate consideration.(11) This was merely an enactment of a rule of evidence.(12) It gave rise to a doubt whether a presumption of fraudulent intent can be made where the transfer was for proper consideration. This paragraph has now been deleted and the matter is left to be determined in each case by the ordinary rules of evidence. One of such rules is that a man must be taken to intend the natural consequences of his acts.(13) The Court may, therefore, presume a fraudulent intent not only where the transfer is made gratuitously or for a grossly inadequate consideration,(14) but it is conceived, even in cases where the transfer is made for proper consideration. The presumption will, however, be weaker in the latter case than in the former. The Court must, in each case, look to the whole of the circumstances surrounding the transaction and ask itself the question whether the transaction was, in fact, executed with intent to defeat or delay the creditors.(15) Where there are suspicious circum-

[See however 1941 Mad 188 (191) [AIR V 28] (DB). (Intention of parties cannot be judged by subsequent events.)]

10a. †1941 Rang 76 (77) [AIR V 28] : 1940 Rang L R 777 (DB).
1922 All 449 (454) [AIR V 9] : 44 All 748 (DB).

11. 1929 All 458 (458, 459) [AIR V 16]. (Transfer without consideration—Other property insufficient to pay the decree-holder — Intention to defeat presumed.)
1928 Pat 199 (200, 201) [AIR V 15] (DB).
1927 All 714 (715) [AIR V 14] : 50 All 137 (DB).
1927 Lah 420 (420) [AIR V 14]: 8 Lah 544 (DB).
1927 All 731 (733) [AIR V 14]. (Subsequent transferee defrauded — Original transfer gratuitous—Intent to defraud presumed.)
1922 Pat 572 (574) [AIR V 9] (DB).
1919 Pat 181 (183) [AIR V 6] (DB).
1914 Oudh 392 (396) [AIR V 1] : 17 Oudh Cas 173.
1914 Low Bur 262 (263) [AIR V 1] : 8 Low Bur Rul 233.
('09) 2 Ind Cas 813 (813) (DB) (Mad).
('04) 17 C P L R 24 (27).
('03) 5 Bom L R 255 (263).
('01) 25 Bom 202 (225) (DB).
('87) 11 Bom 666 (677, 678) (DB).
[*See also* 1919 Oudh 95 (97) [AIR V 6] (DB).
(1905) 7 Bom L R 267 (270) (DB). (Held the expression "may presume" in the second paragraph of the old S. 53 vested the Court with a discretion in the matter and did not impose an obligation to presume an intent to defraud.)]

12. ('03) 5 Bom L R 213 (214) (DB).
(1900) 13 C P L R 180 (181).
('23) 71 Ind Cas 20 (23) (Pesh).
[See (1904) 73 L J P 97 (103) : 1904 P 362 (376), Edmunds v. Edmunds.]

13. (1870) 39 L J Ch 689 (690, 691) : 5 Ch A 538, Freeman v. Pope.

14. 1958 Mad 580 (582) [AIR V 45 C 203].
(1870) 39 L J Ch 689 (690, 691) : 5 Ch A 538, Freeman v. Pope. (On appeal from (1870) 39 L J Ch 148.)
(1886) 55 L J Q B 558 (560, 561) : 17 Q B D 290, Ex parte Mercer, In re Wise.)
(1882) 52 L J Ch 343 (345, 346) : 22 Ch D 74 (80), In re Ridler, Ridler v. Ridler.
(1896) 66 L J Q B 111 (114) : 75 L T 166, Tetley, In re; Jeffrey Ex parte.
†('36) 40 Cal W N 561 (565) (DB).
[*See also* 1958 S C 1 (6) [AIR V 45 C 1] : 1958 S C R 257. (Case under Provincial Insolvency Act, S. 53 — Absence of good faith can be presumed when there is no consideration for transfer or it is very inadequate.)

15 1963 S C 1150 (1156) [AIR V 50 C 174] : (1963) Supp 2 S C R 55. (Transfer in favour of member of same community—Sale, though real and supported by consideration, effected at a juncture when the vendor was under great pressure from his creditors for payment and registered at a different place from where disputed property is situate—Sale deed containing no stipulation that the consideration is to be used for payment of creditors — Held that an inference as to the object of the sale being to defeat creditors is justified.)
1962 Andh Pra 94 (103) [AIR V 49 C 25] : ILR (1961) 1 Andh Pra 579 (DB). (Sale deed — Execution and registration at a different place from the one where all previous transactions were effected — Attestation also by persons of the place of registration — No schedule of property furnished and registration also entered in Book 4 thereby preventing others from getting information—Held all these facts indicated the motive of executing document was to delay or defeat creditors.)
1961 Punj 361 (363) [AIR V 48 C 105] (DB).
1950 Ajmer 41 (41) [AIR V 37 C 57].
†('36) 164 Ind Cas 933 (934) (DB) (Lah).

stances care must be taken by the Court to rest its decision only upon the legal ground established by legal testimony and not upon suspicion.(15a)

Voluntary or gratuitous transfer.

A "voluntary" conveyance under the English law is really a "gratuitous" transfer referred to in the second paragraph of the old section and denotes a transfer made without *valuable* consideration. A transfer in consideration of natural love and affection is a voluntary or gratuitous transfer.(16) A voluntary transfer cannot be said *ipso facto* to be a fraudulent transfer.(17) If it is made *bona fide* it will be valid against the creditors.(18) If it has the effect of defeating or delaying *existing* creditors, it may be presumed to have been made to defeat or delay them.(18a) As regards *subsequent* creditors, even the fact that the transfer resulted in defeating or delaying them is not sufficient to raise this presumption.(19) It is further necessary to show that the transferor, at the time of the transfer, was *indebted* to others and was unable to meet his liabilities.(20) or that he embarked, soon after the transfer, on some hazardous business, enterprise or speculation.(21) If that is shown the presumption will arise,(22) for ordinarily a voluntary conveyance cannot be *bona fide* when the transferor is largely indebted at the time.(23) Every man ought to be just before he is generous.(24) But when the debtor has no debts and is not in any embarrassed circumstances, the execution of a voluntary transfer in consideration of natural love and affection cannot be held to be in fraud of subsequent creditors.(25)

15a. 1961 Punj 361 (363) [AIR V 48 C 105] (DB).
1960 Punj 548 (549) [AIR V 47 C 196] (DB).
1950 Ajmer 41 (41) [AIR V 37 C 57].

16. 1919 Oudh 95 (97) [AIR V 6] (DB).
('12) 1912 Pun Re 74 : 14 Ind Cas 232 (234) (DB).

17. ILR (1962) 12 Raj 517 (521).
1950 Ajmer 41 (41) [AIR V 37 C 57].
†1941 Oudh 205 (208) [AIR V 28] (DB). (Deed of gift.)
(1816) 56 E R 152 (154) : 1 Mad 414, Holloway v. Millard.
(1748) 27 E R 934 (938) : 1 Ves Sen 127, Peacock v. Monk. (Voluntary transfer is void under 13 Eliz., Ch. 5 only if fraud is proved.)

18. 1965 Mad 395 (397) [AIR V 52 C 135] : ILR (1965) 2 Mad 250 (DB).
('68-69) 4 Mad H C R 84 (88) (DB).

18a. *See* 1965 Ker 288 (291) [AIR V 52 C 104] : 1965 Ker L J 111 : (1965) 1 Ker L R 505 : 1965 Ker L T 341. (Gift by father to sons of large portion of property — Part retained by donor very small and utterly inadequate to satisfy decree that would be passed in an impending suit—Finding that transfer was with intent to defeat or delay plaintiff and other creditors—No error of law.)

19. (1900) 69 L J Q B 722 (624) : (1900) 2 Q B 508, Lanc-Fcx, In re; Gimblett, Ex parte, (1864) 46 E R 649 (653) : 3 De G J & Sm 293 (302, 303), Spirett v. Willows.

20. †1933 Rang 252 (253) [AIR V 20].
1930 Lah 217 (218) [AIR V 17].
1927 Lah 420 (421) [AIR V 14] : 8 Lah 544 (DB). (Per Tek Chand J.)
1914 All 424 (426) [AIR V 1] (DB).
(1945) 26 E R 61 (61) : 1 Atk 94, Walker v. Burrows.
[*See also* 1941 Oudh 178 (179) [AIR V 28] (DB). (All creditors existing on date of deed paid off before suit by subsequent creditor — No borrowing for 3 years after the date of deed — These facts negative though not conclusively the inference of fraudulent intention.)]
[But see ('10) 33 Mad 205 (207) (DB). (Second paragraph was held to apply in favour of subsequent creditors also—No question of indebtedness was adverted to.)]

21. †1933 Rang 252 (253) [AIR V 20].

22. (1816) 56 E R 152 (154) : 1 Mad 414, Holloway v. Millard.
(1738) 26 E R 9 (11) : 1 Atk 13, Russel v. Hammond.

23. ('49) 1 Pepsu L R 198 (204) (DB).
(1919) 88 L J K B 679 (683) : (1919) 1 K B 583, Denny's Trustee v. Denny.
('92) 16 Bom 1 (14).
(1856) 69 E R 1043 (1046) : 3 K & J 110, Barrack v. Mc'Cullock.
(1840) 173 E R 991 (992) : 9 Car & P 640, Riches v. Evans.

24. (1870) 39 L J Ch 689 (690) : 5 Ch D 538, Freeman v. Pope. (Affirming the decision in (1870) 39 L J Ch 148.)
(1817) 56 E R 386 (393) : 17 R R 226, Copis v. Middleton.
(1758) 28 E R 647 (648) : Amb 596, Partridge v. Gopp.

25. 1965 Mad 395 (397) [AIR V 52 C 135] : ILR (1965) 2 Mad 250 (DB).
ILR (1962) 12 Raj 517 (521).

Transfer for inadequate consideration.

Under the second paragraph of the old section a transfer for *grossly* inadequate consideration was regarded as being one on the same footing as a gratuitous transfer. Where the consideration was not so inadequate as to be *gross* no presumption was raised against good faith.(26) In the undermentioned case,(27) Mitter, J., held that where the inadequacy of the price in a transaction is not so great as to shock the moral sense, such inadequacy, by itself, was no evidence of fraud, but that it was otherwise where the inadequacy was so great as to shock the conscience.

In cases of *mortgage* it cannot be said that consideration is inadequate or grossly inadequate, because a mortgage can be executed for any amount regardless of the value of the property. Consequently, the presumption referred to in the second paragraph of the old section was held not to arise in such cases.(28) As has been seen already, the deletion of the second paragraph of the old section will now enable the Court to apply the ordinary rules of evidence in all cases and inadequacy of consideration may, under circumstances, be considered as evidence of fraud.(29)

Transfer reserving benefit to transferor.

A transfer intended to reserve a *benefit* to the debtor to the *prejudice* of the creditors must be held to have been made with intent to defeat or delay the creditors.(30) Thus, where a trust was made for the benefit of all such creditors as

†1936 Lah 222 (224) [AIR V 23] (DB). (Gift to wife to provide for her future maintenance.)
1927 Lah 420 (421) [AIR V 14] : 8 Lah 544 (DB). (Voluntary settlement in favour of children for natural love and affection.)
('02) 26 Bom 577 (585).
(1750) 28 E R 1 (7) : 2-Ves 1, 10, Townshend Lord v. Windham.

26. 1924 Nag 124 (125) [AIR V 11].
('02) 26 Bom 543 (549, 550) (DB).
('01) 25 Bom 202 (225) (DB).
('12) 18 Ind Cas 691 (692) (DB) (Mad).
(1900) 13 C P L R 180 (185).
[*See also* 1957 Mad 630 (631) [AIR V 44 C 191]: 1957 Mad W N 483 : (1957) 2 Mad L J 414. (No evidence to show that consideration was shockingly low — Other evidence showing that at best the consideration was half the real value of the property and about one-fourth at the worst—Held, it was a case where the doctrine of lucky purchase applied.)]
('66) 6 Suth W R 30 (33) (DB).

27. ('36) 40 Cal W N 561 (565) (DB).

28. 1931 Lah 213 (215) [AIR V 18].
('10) 9 Ind Cas 1018 (1019) (Lah).

29. 1955 N U C (Mad) 3169 [AIR V 42].
1941 Oudh 457 (463) [AIR V 28] : 16 Luck 832 (DB).
('11) 10 Ind Cas 922 (924) (Burma). (Sale of property for inadequate consideration immediately after a decree was passed against—Fraudulent intention was inferred.)
[*See also* (1817) 56 E R 386 (392) : 17 R R 226, Copis v. Middleton.]

30. 1944 Nag 44 (52) [AIR V 31] : I L R (1944) Nag 342 (FB). (Partition between *A* and *B*, members of joint family—*A* assigned properties which *A*'s creditors would not be able to touch — *B* given his rightful share — Held, object of partition was not merely to give *B* his share but to effect the partition in such a way that *A* would be able to defeat and delay his creditors and keep the property to himself—*A* retained a benefit to himself and therefore partition was liable to be set aside at instance of *A*'s creditors.)
1966 Mad 247 (252) [AIR V 53 C 75] : (1965) 1 Com L J 1.
1961 Mad 403 (404) [AIR V 48 C 129] : 1961 Mad W N 179 : (1961) 1 Mad L J 235 : 74 Mad L W 400. (Agricultural debtor selling his only property pending execution of a money decree and retaining the balance after discharging a mortgage debt.)
1952 Nag 106 (110) [AIR V 39] : ILR (1953) Nag 684.
1927 Cal 836 (839) [AIR V 14] : 54 Cal 687 (DB).
(1854) 139 E R 169 (172) : 2 Car & Kir 452, Graham v. Furber.
(1903) 72 L J K B 237 (240) : (1903) 1 K B 671, Maskelyne v. Smith. (Transfer ostensibly in favour of creditors, but really intended to benefit the debtor.)
[*See also* 1943 Nag 129 (131) [AIR V 30] : I L R (1943) Nag 42 (DB). (Sale to one of the creditors with further agreement by the vendee, to reconvey on payment of whatever would be found due to him (creditor) after credit for the profits from the property had been given, provided the other creditors settled their claim —Arrangement is not illegal, although it might give other creditors the rights to avoid the transfer under S. 53, because it would be possible to argue that the debtor had retained a benefit for himself.)
('99) 23 Bom 1 (11). (Transfer to protect property from creditors.)]
[See however 1918 Mad 377 (378) [AIR V 5]

were willing to accept the terms of the debtor and the debtor retained a benefit for himself, it was held that the trust must be taken to have been made with intent to defeat or delay the creditors.(31) But when a transfer is not intended as a cloak or device for the protection of the transferor against the claims of creditors, it cannot be impeached as fraudulent.(32) Thus, where a person executes a trust deed of all his properties with the chief object of paying off all his creditors, the deed cannot be said to be fraudulent even though one of the objects with which the deed was executed is to avoid the Court of Wards taking over the estate.(32a) So also, where a person *bona fide* parts with all control over his property, it is not fraudulent, even though the deed contains a provision that if anything remains after the payment to existing creditors, it should be applied for the benefit of the transferor or his children.(33)

Again, a settlement for consideration with the object of protecting the property from the extravagant habits of the settlor cannot be said to be fraudulent.(34) In the undermentioned case(35) a family arrangement was come to by which some property was given to *A* and some cash to *B* in order to protect the property from the profligate habits of *B*. It was held by their Lordships of the Privy Council that the transaction was not a fraud upon subsequent creditors. The mere fact that the debtor retains some interest in the property transferred will not make the transaction fraudulent as a *matter of law*, but will be a piece of *evidence* showing a fraudulent intent.(36)

Indebtedness of transferor on date of transfer.

Evidence of indebtedness of the transferor subsisting on the date of the transfer is relevant to show an intention to defeat or delay the creditors.(37) It is a strong

(DB). (A transfer of immovable property which is not bona fide and is effected so as to defraud creditors is void though the transferor secures no benefit thereby.)]

31. (1878) 48 L J Q B 204 (206) : 4 Q B D 13, Spencer v. Slater.
[*See also* 1941 Cal 233 (236) [AIR V 28] (DB). (Trust deed intended to be a cloak for shielding property from creditors and benefiting the debtors.)]

32. 1938 Cal 818 (821) [AIR V 25] (DB). (A trust created by the debtor for the payment of his creditors.)
1916 Cal 404 (405) [AIR V 3] (DB).
[*See also* 1941 Mad 188 (191) [AIR V 28]. (Members of Christian family by agreement making arrangement for payment of creditors and incidentally making small provision for religious purposes—Dedication held real and not made to defeat or delay creditors.)]

32a. 1923 Oudh 80 (87) [AIR V 10] : 25 Oudh Cal 291 (DB).

33. (1857) 26 L J Ch 179 (182) : 3 Kay & J 90, Holmes v. Penney.
[*See also* ('04) 28 Bom 364 (369) (DB). (Substantial part of property assigned in trust for creditors—Rest was retained for benefit of debtor —Facts proved not showing that debtor even contemplated bankruptcy or wished to give undue preference to certain creditors over others —Composition binds old creditors including those who had not signed the deed as it is one for benefit of all of them — One of such creditors suing to avoid the deed is not doing so for and on behalf of all the creditors and cannot invoke S. 53 of this Act.)]

34. 1938 Oudh 65 (68) [AIR V 25] (DB). (Son profligate — Transfer to grandson to save property is not fraudulent.)
(1919) 88 L J K B 679 (683) : (1919) 1 K B 583, Denny's Trustees v. Denny. (Transfer of property to father by person of extravagant and dissolute habits to save himself from moral and financial ruin.)
(1896) 66 L J Q B 111 (114) : 75 L T 166, In re Tetley : Jeffery Ex parte.

35. ('84) 6 All 560 (572) : 11 Ind App 164 (PC).

36. 1958 Mad 580 (582) [AIR V 45 C 203].
(1902) 71 L J K B 476 (478) : (1902) 2 K B 158, Maskelyne v. Smith. (Spencer v. Slater, (1878) 48 L J Q B 204, dissented from.)
('11) 9 Ind Cas 623 (624) (Cal).

37. ILR (1966) 1 Mad 114 (119).
1965 Mad 395 (397) [AIR V 52 C 135] : 77 Mad L W 733 : (1965) 1 Mad L J 59 : 1964 Mad W N 656 : (1965) 1 I T J 71 : ILR (1965) 2 Mad 250 : (1967) 63 I T R 122 (DB). (Mala fides can be presumed in such cases. But not so in cases where there was no indebtedness at the time of transfer.)
1961 Punj 361 (363) [AIR V 48 C 105] (DB).
1958 Mad 580 (583) [AIR V 45 C 203].
1955 N U C (Mad) 3169 [AIR V 42].
(1860) 14 Moo P C 121 (136) : 15 E R 251, Corlett v. Radcliffe. (Deed by debtor in state of insolvency.)
1944 All 214 (216) [AIR V 31] : ILR (1944) All 325. (No transaction should be assumed ficti-

badge of fraud in the case o a voluntary settlement.(38) But such indebtedness would not *per se* establish a fraudulent intent.(39) The terms of sub-section (1) are satisfied even if the transfer does not defeat the creditors but only delays them. The fact, therefore, that the entire property of the debtor was not sold but only a part of it was sold cannot by itself negative the applicability of sub-section (1).(39a) Where, however, at the time of the transfer, the transferor has other property *sufficient to satisfy his*

tious or fraudulent—In the absence of evidence as to the extent of debts and also of property, it cannot be concluded that a transaction is fraudulent.)

1919 Cal 984 (2) (985) [AIR V 6] (DB).

1911 Pun L R No. 62 p. 263 (270) (DB). (But a settlement made in favour of mother of a very small portion when the son was not at the time seriously embarrassed cannot be said to be fraudulent.)

(1896) 1896 All W N 123 (123) (DB).

(1872) 41 L J Ch 539 (541) : 14 Eq 106, Mackay v. Douglas.

(1871) 40 L J Ch 480 (483) : 12 Eq 158, Crossley v. Elworthy. (Voluntary settlement by person involved in heavy speculations.)

(1867) 7 Suth W R 513 (513) (DB).

(1867) 15 W R (Eng) 919 (920) : 4 Eq 390, Smith v. Cherrill.

†(1864) 3 De G J & Sm 293 (302) : 46 E R 649 (653), Spirrett v. Willows. (The fact that the settlor retains money enough to pay debts but does not actually pay them does not make any difference.)

(1861) 70 E R 807 (811) : 1 J & H 410 (422), Acraman v. Corbett. (Marriage settlement when husband was heavily in debt and pressed by creditors—Held, there was intention to defeat or delay creditors.)

(1857) 26 L J Ch 179 (180) : 3 K & J 90, Holmes v. Penny.

(1856) 25 L J Ch 338 (339) : 3 Drew 419, Jenkyn v. Vaughan.

(1855) 25 L J Ch 612 (614) : 6 De G M & G 95, French v. French. (Transfer by trader in insolvent circumstances)

(1841) 174 E R 426 (429) : Car & M 97, Jackson v. Bowley.

(1840) 9 L J Ch 241 (243) : 50 R R 193, Townsend v. Westcott.

(1822) 37 E R 958 (960) : Jac 552, Richardson v. Smallwood.

[*See also* 1937 Rang 27 (28) [AIR V 24] : 14 Rang 748 (DB). (Insolvent heavily indebted and pressed by his creditors transferring substantial part of his property to his relative—False circulation by him of his inability to pay to creditors—Transfer is fraudulent and must be set aside.)

(1856) 52 E R 1078 (1080) : 22 Beav 184 (189), Dening v. Ware. (Voluntary settlement—Remaining assets not sufficient to pay debts—Held, on facts, there could be no inference that the settlement was made with intent to defeat or delay creditors.)]

38. 1965 Ker 288 (291) [AIR V 52 C 104] : 1965 Ker L J 111 : 1965 Ker L T 341 : (1965) 1 Ker L R 505. (Gift of large portion of property to sons—Donor retaining only a portion absolutely inadequate to satisfy a final decree which is about to be passed in a pending suit—Finding of intent to delay or defeat creditors is justified in law.)

1911 Pun L R No. 62 p. 263 (270) (DB).

(1877) 98 E R 1318 (1321), Doe d Watson v. Routledge.

[*See also* ('56) (1956) 2 All E R 537 (544). (Debtor on brink of bankruptcy making payment to one of his creditors voluntarily—Object of debtor to give an advantage to a friend of his and to some extent to himself—Held it was fraudulent and void against trustee in bankruptcy.)

('55) 1955-2 Mad L Jour 380 (381). (Insolvency case — Amount due to scheduled creditors Rs. 38000 — Assets available for unsecured creditors only about Rs. 400—Insolvent paying to one creditor an amount—Coupled with other facts in the case, it was held that the payment was fraudulent.)]

39. 1958 Mad 580 (583) [AIR V 45 C 203].

1950 Bom 247 (249) [AIR V 37 C 68] (DB). (Debt incurred by father for purpose binding on sons—Suit by creditor — Partition of joint family property cannot be regarded as fraudulent merely because it took place during the pendency of creditor's suit.)

1950 Pesh 11 (13) [AIR V 37 C 3]. (Donor indebted at the time of making gift—Mere indebtedness not sufficient to prove fraudulent intention—Person challenging must bring some more material on record to prove guilty intention of donor.)

1938 Lah 136 (137) [AIR V 25]. (It must be proved that at the time of transfer motive for the transaction was to defeat or delay the creditors.)

('99) 1899 Pun Re No. 38, p. 186 (189).

('92-96) 2 Upp Bur Rul 315 (317).

[*See also* 1941 Lah 228 (232) [AIR V 28] : 43 P L R 128 (DB). (Property under mortgage redeemed by obtaining money from another and mortgaging it to him—No other creditor in existence at the time of transaction—Mortgage cannot be regarded as one intended to afford protection to the mortgagor or to delay or defeat creditors.)

('12) 15 Ind Cas 509 (511) (Oudh). (Transfer made to defeat an anticipated attachment—Fact by itself is not sufficient to show fraudulent intent.)]

39a. 1963 S C 1150 (1156) [AIR V 50 C 174] : (1964) 1 S C J 168 : (1964) 1 M L J (SC) 49 : (1964) 1 An W R (SC) 49 : 1963 Supp 2 S C R 55.

creditors, the transaction cannot be said to be with intent to defeat or delay the creditors.(40) In the undermentioned case(41) it was held that even a presumption of fraudulent intent cannot be made from the indebtedness of the transferor. It is submitted that this view is not correct. If it is a relevant piece of evidence tending to show a fraudulent intent, it is not clear why a *presumption* however weak it may be, cannot be made against the transferor.

Transfer of all the properties of the transferor.

A transfer by a person, indebted at the time, of all his properties is evidence of an intention to defeat or delay his creditors,(42) though under particular circum-

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40. 1963 S C 1150 (1156) [A I R V 50 C 174] : 1963 Supp 2 S C R 55.
1966 Assam 36 (34) [AIR V 53 C 3] : ILR (1965) 17 Assam 291.
1965 Mad 395 (397) [AIR V 52 C 135] : ILR (1965) 2 Mad 250 (DB).
1952 Nag 106 (110) [AIR V 39] : ILR (1953) Nag 684.
1934 Rang 308 (309) [AIR V 21].
† 1928 All 476 (479) [A I R V 15] (DB). (Mortgaged property was sufficient to satisfy mortgage debt — Mortgagor gifted non-mortgaged property — Gift cannot be said to be with a view to defeat mortgagee.)
1923 Nag 334 (335, 336) [AIR V 10].
1919 Pat 236 (237) [AIR V 6] (DB).
1918 Cal 82 (87) [AIR V 5] (DB).
1914 Lah 108 (110) [AIR V 1].
† ('04) 17 C P L R 24 (29).
('96) 1896 All W N 123 (123) (DB).
('89) 13 Bom 297 (300, 301) (DB).
✠ ('80) 2 All 891 (895) (DB). (Fact that property reserved to the debtor for payment to the creditors is not within the jurisdiction in which the creditors reside is too insignificant to stamp the transfer with fraud.)
('69) 1 Suth W R 21 (21) (DB).
[*See also* 1965 Ker 288 (291) [AIR V 52 C 104]. (Gift of large portion of property when a final decree against donor is imminent in a pending suit — Property left with donor inadequate to satisfy decree — Finding of interest to defeat or delay creditor is justified.)
1936 Lah 593 (593) [A I R V 23]. (Gift of small portion by insolvent more than two years before adjudication — Property at date of gift considerable — Gift held was not fraudulent with object of defeating creditors.)]

41. ('37) 171 Ind Cas 735 (735) (Lah).

42. ILR (1966) 1 Mad 114 (119).
1961 Punj 361 (363) [AIR V 48 C 105] (DB).
1960 Mad 536 (537) [A I R V 47 C 178]. (Conveyance of all properties to wife under ante-marriage settlement is fraudulent.)
1958 Mad 580 (583) [AIR V 45 C 203].
1956 Andhra 225 (226) [AIR V 43 C 63] (DB).
1955 N U C (Mad) 2169 [AIR V 42].
('49) 1 Pepsu L R 198 (204) (DB).
(1940) 42 Punj L R 3 (6, 7) (DB). (Person in embarrassed circumstances transferring all properties excepting those that are immune from attachment and sale.)
† 1937 Lah 847 (848) [A I R V 24]. (Gift by debtor of his entire attachable and saleable property.)
1929 All 872 (873) [AIR V 16] (DB). (Transfer of all the property in favour of a relation after the creditor had obtained a decree — Transfer for half market-value — Intention to defeat the creditor presumed.)
1928 Rang 1 (3) [AIR V 15] : 5 Rang 588 (DB).
(1899) 68 L J Q B 287 (293) : (1899) 1 Q B 612, In re Hirth.
('79) 1879 Pun Re No. 86, p. 232 (233).
(1869) 17 W R (Eng) 601 (602) : 7 Eq 347, Reese River Silver Mining Co v. Atwell.
(1864) 1 Suth W R 41 (41) (DB).
(1856) 52 E R 957 (958, 959) : 21 Beav 511 (515, 516), Bott v. Smith. (Transfer in favour of son for inadequate consideration.)
[*See also* 1960 Mad 536 (537) [AIR V 47 C 178]. (Marriage settlement transferring all property of indebted settlor — Grantee charged with notice of fraud.)
1956 Punj 46 (48) [A I R V 43 C 22]. (Partition between husband and wife — Husband heavily indebted — All tangible property given to wife and husband retaining only property of flimsy character—Fraudulent intent inferred.)
1951 All 443 (447, 448) [A I R V 38 C 93] (DB). (Transfer by mortgagor of his other property when mortgaged property is not sufficient to satisfy mortgage debt can indicate an intention to delay or defeat creditors.)
1948 Nag 110 (115) [A I R V 35 C 40] : I L R (1947) Nag 510 (DB). (Partition by coparceners when family was heavily in debts —No provision for payment of debts — Notwithstanding such deed parties acting as members of joint family—Deed held fraudulent.)
1947 Mad 203 (204) [A I R V 34 C 104]. (Partition between father and sons — No property allotted to father who was indebted heavily —Sons undertaking to pay father's debts — Partition must be held to be fraudulent as creditors not being parties to it cannot enforce it against sons.)
1946 Sind 137 (140) [A I R V 33 C 42] : I L R (1946) Kar 14. (Joint Hindu family—Father A and son B partitioning joint family property — Subsequently, B who was heavily in debts selling his as well as his son C's share in part of property to A without legal necessity — A then devising property absolutely to C—Transfer by B held fraudulent.)

stances the transfer may not, even in such a case, be fraudulent. Thus, where a person indebted at the time, transferred all his properties in favour of the children of the first wife at the time of his second marriage and in consideration of being permitted to do so by the relations of the first wife, it was held that the transfer was not fraudulent.(43)

Relationship of parties.

The mere fact that the transferor and the transferee are relations does not necessarily show an intention on the part of the transferor to defeat or delay the creditors(44) or bad faith on the part of the transferee(45) though the fact may be material as *evidence* of bad faith.(46) Where a person sold the property to a member of the same community to which he belonged and well known to him at a time when the vendor was under pressure for payment from his creditors, it was held by the Supreme Court that the vendor might have chosen such a vendee in order to keep the transaction secret from the creditors.(46a)

Consideration, a barred debt.

The fact that the consideration for the transfer is a *barred* debt may be some evidence of a fraudulent intent but not strong evidence.(47)

1943 All 2 (5) [A I R V 30] (DB). (Where after executing a promissory note for a large sum the executant executes a wakf covering the major portion of his estate, it was held that these facts were sufficient to show that the intention of the executant of the wakf was to defeat or delay creditors.)
('12) 14 Ind Cas 40 (44) (DB) (Lah). (Fictitious transaction made in fraud of creditcrs.)]

43. 1917 Mad 484 (484) [AIR V 4] (DB).

44. 1958 Mad 580 (582) [AIR V 45 C 203].
1939 Lah 438 (439) [AIR V 26] (DB). (Transfer made to settle debt created by money advanced previously by transferee — Transfer cannot be said to be fraudulent merely because transferee is related to transferor.)
1938 Sind 215 (217) [AIR V 25] : ILR (1939) Kar 136 (DB).
1930 Rang 27 (29) [AIR V 17] : 7 Rang 477 (DB). (The fact that a debtor transfers at the time when he is heavily indebted, the whole of his property to his sister is not by itself a sufficient reason for avoiding the transfer if in fact the transfer is made bona fide and for valuable consideration.)
1925 Rang 227 (228) [AIR V 12] : 3 Rang 71.
†1914 Low Bur 180 (182) [AIR V 1]. (But it is a suspicious circumstance.)
(1818) 56 E R 386 (391, 392) : 17 R R 226, Copis v. Middleton. (Fraud cannot be imputed merely because a man has sold property to his nephew.)
†('11) 9 Ind Cas 1013 (1019) (Lah).
[*See also* 1935 Pesh 168 (170) [AIR V 22]. (A mere transfer of property in favour of a relation would not per se amount to an intention to defeat or delay creditors even if it affects a substantial portion of the debtor's estate in the absence of proof that the debtor owes a large sum of money and that he is financially embarrassed and is therefore likely to take the property out of the reach of his creditors.)]

45. 1950 Kutch 57 (58) [AIR V 37 C 45].
[*See* 1914 Lah 108 (110) [AIR V 1] (DB).]

46. 1961 Punj 361(363) [AIR V 48 C 105] (DB).
1958 Mad 580 (582) [AIR V 45 C 203].
1955 NUC (Mad) 3169 [AIR V 42].
1950 Kutch 57 (58) [AIR V 37 C 45]. (Transfer made to daughter — Facts of case showing the transfer to be without need — Transfer made in anticipation of decree in pending suit against transferor — Relationship of transferee to transferor becomes significant.)
('49) 1 Pepsu L R 198 (204) (DB). (Transfer by way of gift of entire property to close relations during pendency of creditor's suit — Fraud is apparent.)
1928 P C 139 (143) [AIR V 15] : 51 Mad 349.
1924 Mad 779 (780) [AIR V 11] (DB).
(1868) 10 Suth W R 445 (445) (DB).
21 Ind Cas 333 (334) (Burma).
[*See also* ('55) 1955-2 Mad L Jour 380 (381) : AIR 1955 NUC 5365. (Insolvency — Relationship of debtor with preferred creditor however distant it may be is not without significance when deciding whether the impugned payment amounted to fraudulent preference — Fact of absence of any compelling reason would stamp the payment as fraudulent.)]

46a. 1963 S C 1150 (1155) [AIR V 50 C 174] : 1963 Supp 2 S C R 55.

47. 1937 Rang 471 (471) [AIR V 24]. (Obiter.)
1930 Sind 284 (286) [AIR V 17] (DB).
('07) 17 Mad L Jour 11 (14) (DB).
[*See also* (1825) 25 L J Ch 232 (234) : 5 De G M & G 547, Goldsmith v. Russell. (Settlement in favour of wife and children expressed for consideration — Consideration found illusory and the transaction not bona fide — Held, it was void against creditors of the settlor under 13 Eliz. Ch. 5.)]

Value of property transferred.

In considering whether a deed was executed with a fraudulent intent, it is material to consider the relative value of the property sold to the amount of the creditors' demands at the time.(48)

Possession with transferor.

Where the property transferred continues in the possession of the transferor after the date of the transfer, the value of the inference to be drawn therefrom will vary according to the nature of the property and the deed,(49) and other circumstances of the case. In the case of *movables* such continuance was, in England, held to be a badge of fraud, where it was *inconsistent* with the transfer,(50) but not where it was *onsistent* with it.(51) In the undermentioned cases(52) such continuance of possession was, in the particular circumstances of the case, held not to raise any presumption of fraud.

(B) Transfer for consideration without reserving benefit to debtor.

Where a transfer is for *consideration* and there is no intent to reserve *any benefit* to the debtor, then the transfer cannot be attacked as fraudulent under this section. It is good against the creditors even though the transferor intended thereby to defeat an impending execution.(53) The reason is that the fraud contemplated by the section is an intent to defeat the creditors *generally* and not a particular creditor.

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48. (1805) 102 E R 1283 (1295) : 6 East 257, Dewey v. Boyntnn.

49. 1958 Mad 580 (581) [AIR V 45 C 203]. (Subsequent to sale possession remaining with vendor—Conveyance held to be fraudulent.)
†(1900) 13 C P L R 180 (185).
[*See also* 1958 Pat 434 (436) [AIR V 45 C 139] : 37 Pat 658 (DB). (Question of benami — Motive for transaction, relationship of parties, payment of consideration, custody of document and possession over property are main tests.)
1952 Nag 106 (111) [AIR V 39] : ILR (1953) Nag 684. (Transfer for dower — Property continued to be managed by husband as agent or manager of wife who was pardanashin lady of a high family — Transfer is not a sham or fraudulent transaction.)
1954 Nag 129 (134) [AIR V 41 C 51] : ILR (1953) Nag 937 (DB). (Transfer by sale in favour of father-in-law—Property worth much more than price stated — Consideration being payment of mortgage-debt which had not become due—No legal necessity for alienation—Subsequent payments towards mortgage made by transferors who continued in possession — Story of lease not believed—Held, that prima facie case of intention to defeat and defraud creditors was made out—Transfer held not in good faith or for consideration.)
1962 Pat 160 (165) [AIR V 49 C 37] (DB). (Benami transaction—Tests usually taken into consideration are custody of title deeds, possession of property, motive and relationship.)
1960 M P L Jour 1029 (1030) (DB). (No evidence on record to show payment of consideration — Vendor admittedly continuing to be in possession of property — Held sale was ham.)]

50. (1832) 110 E R 180 (183) : 3 B & Ad 498, Martindale v. Booth.
(1818) 106 E R 316 (317) : 2 B & Ald 134, Robinson v. M'Donnell.
(1817) 129 E R 609 (611) : 8 Taunt 838, Jezeph v. Ingram.
(1813) 128 E R 669 (671) : 5 Taunt 212, Read v. Blades.
(1795) 170 E R 329 (330) : 1 Esq 205, Paget v. Perchard.
(1808) 170 E R 976 (976) : 1 Camp 333, Werdall v. Smith.
(1788) 100 E R 315 (326) : 1 R R 548, Edwards v. Harben.
(1788) 100 E R 319 (320) : 2 T R 594n, Bamford v. Baron.
(1601) 76 E R 809 (812, 813, 814) : 1 S L C (10th Ed.) 1 (3), Twyne's Case.

51. (1832) 110 E R 180 (183) : 3 B & Ad 498, Martindale v. Booth.

52. (1817) 129 E R 609 (611) : 8 Taunt 838, Jezeph v. Ingram
(1813) 105 E R 94 (95) : 1 M & S 251, Leonard v. Baker.
(1813) 128 E R 555 (556) : 4 Taunt, 823, Watkins v. Birch.

53. 1934 Mad 587 (592) [AIR V 21].
†1930 Mad 655 (667, 668) [AIR V 17].
[*See* 1944 Mad 381 (383) [AIR V 31] : ILR (1945) Mad 138 (DB). (Where a partition between father and sons is fair and in accordance with the proper shares of the parties it, is not liable to be impeached under S. 53, although it was entered into with a view to prevent attachment of the sons' shares in execution of decrees obtained against the father after the partition and was in that sense mala fide.)]

7. Benami transactions not necessarily fraudulent.—Benami transactions are very familiar in Indian practice.(1) They are not necessarily *fraudulent.* A plea that a transfer is benami is not equivalent to a plea that the transfer is fraudulent.(2) See also the undermentioned cases.(3) (See also Note 5).

8. Transfer is valid until avoided. — A fraudulent transfer within this section is not *ipso facto* void, but is merely *voidable* at the option of the creditors or the subsequent transferee as the case may be. Until so avoided, the transaction is valid.(1) As between the *parties* to the transfer themselves, the transfer cannot be avoided by either of them.(2) It will be valid as between them even if it has been avoided as against creditors or a subsequent transferee.(3) As between them the transfer stands subject only to the right of the creditors to enforce their claim just as if the transfer had not been made.(4) As has been observed in Story's 'Equity

Section 53 – Note 7

1. 1960 S C 213 (219) [AIR V 47 C 38] : (1960) 1 S C R 861 : 39 Pat 186.
1921 P C 56 (57) [AIR V 8] : 48 Cal 260 : 47 Ind App 275.
✠1918 P C 137 (139) [AIR V 5].
✠('87) 15 Cal 20 (23) : 14 Ind App 127 (PC).
1958 Ker L T 902 (904). (System is prevalent both amongst Hindus and Mahomedans.)
1927 Cal 140 (144) [AIR V 14] (DB)
1924 Cal 467 (470) [AIR V 11] (DB).
1923 Cal 228 (230) [AIR V 10] (DB).
('77) 1 All 403 (410) (DB). (Ismfarzi transactions.)
('71) 7 Beng L R 720 (727) (DB).
('67) 7 Suth W R 138 (140) (DB). (Benami transaction is a custom of the country.)

2. 1949 Cal 204 (206) [AIR V 36 C 52] (Real intention of parties should be examined to declare a benami document as fraudulent.)
✠1916 P C 238 (240) [AIR V 3] : 44 Cal 662 : 44 Ind App 72.
('66) 6 Suth W R 283 (285) (DB). (Taking a lease benami, unaccompanied by any other circumstances of suspicion, does not in itself constitute fraud.)

3. 1960 Punj 417 (418) [AIR V 47 C 149] (DB). (Benami transfer per se may not come within the mischief of the section. To hold that it does come within its scope the facts and circumstances of the transfer have to be taken into account.)
1958 Mad 580 (582) [AIR V 45 C 203]. (Benami transfer — Motive for transaction the defeat of impending execution—Not a fraudulent transfer within the meaning of S. 53.)
1955 N U C 3926 [A I R V 42]. (Benami transactions are not per se illegal transactions.)

Section 53 — Note 8

1. 1946 P C 177 (177) [AIR V 33 C 51] : ILR (1945) Kar (PC) 161. (Wakf name.)
1962 Madh Pra 363 (364) [AIR V 49 C 103] (DB).
1960 M P L Jour 1029 (1030) (DB).
1955 Pat 270 (275) [A I R V 42 C 66] : 34 Pat 133 (DB).
1952 All 83 (84) [AIR V 39] (DB).
1944 Nag 133 (134) [AIR V 31] : ILR (1944) Nag 125. (Until avoided the transferee has title.)
✠1943 Nag 129 (131, 135, 136) [AIR V 30] : ILR (1943) Nag 42 (DB).
1936 Nag 207 (208, 209) [AIR V 23] : ILR (1936) Nag 183.
1935 All 771 (773) [AIR V 22].
1933 Cal 812 (813) [AIR V 20].
1930 All 438 (439) [AIR V 17].
1926 All 470 (471) [AIR V 13] : 48 All 414 (DB).
1918 Mad 225 (227) [AIR V 5] (DB).
('12) 17 Ind Cas 342 (343) (Mad).
[*See also* 1963 Mad 450 (452) [AIR V 50 C 152]. (Mortgage to which presumption under S. 6, Madras Indebted Agriculturists (Temporary Relief) Act, i.e., presumption that it had been made with intent to delay or defeat creditors applies—Mortgage will be valid until avoided under this section.)]

2. 1946 P C 177 (177) [AIR V 33 C 51] : ILR (1945) Kar (PC) 161. (Wakfnama cannot be revoked by settlor.)
1960 M P L Jour 1029 (1030) (DB).
1952 Trav-Co 105 (110) [AIR V 39] (DB). (Bar extends also to persons claiming the properties through the parties and to those under such persons.)
1951 All 443 (448) [AIR V 38 C 93] (DB).
✠1943 Nag 129 (131, 132, 135) [AIR V 30] : ILR (1943) Nag 42 (DB). (It cannot be set aside by the immediate parties to the transfer or their successors.)
1936 Nag 207 (209) [AIR V 23] : ILR (1936) Nag 183.
('87) 1 C P L R 165 (168).

3. 1963 Mys 257 (260) [AIR V 50 C 62]. (Avoiding transfer has merely the effect of wiping out the fraud without affecting validity of the transaction.)
1961 Punj 423 (424) [AIR V 48 C 124] : ILR (1960) 2 Punj 551.
1954 Mad 173 (174) [AIR V 41 C 68].
1954 Nag 129 (134) [AIR V 41 C 51] : ILR (1953) Nag 937 (DB).
1952 Vind Pra 69 (72) [AIR V 39].
1936 Nag 207 (209) [AIR V 23] : ILR (1936) Nag 183.
1921 Lah 333 (335) [AIR V 8] (DB).

4. 1961 Punj 423 (424) [AIR V 48 C 124] : ILR (1960) 2 Punj 551.
('57) 1957 M P L Jour 107 (108).

Jurisprudence'(5):

"Although voluntary conveyances are or may be void as to existing creditors, they are perfect and effectual as between the parties, and cannot be set aside by the grantor, if he should become dissatisfied with the transaction. It is his own folly to have made such a conveyance. They are not only valid as to the grantor, but also as to his heirs and all other persons claiming under him in privity of estate with notice of the fraud. A conveyance of this sort (it has been said with great truth and force) is void only as against creditors, and then only to the extent in which it may be necessary to deal with the conveyed estate for their satisfaction. To this extent and to this only, it is treated as if it had not been made. To every other purpose it is good; satisfy the creditor and the conveyance stands."

It has been held in the undermentioned case(6) that where a transfer is set aside at the instance of a creditor under this section, the case is governed by S. 65 of the Contract Act and that the transferor is bound to restore to the transferee the price he had received. It is not clear how, if, as conceded in the judgment itself, the transfer is *valid* as between the transferor and the transferee, S. 65 of the Contract Act, which applies to a contract which is *void as between the parties* can have any application.

Where a creditor or the subsequent transferee once *affirms* the transfer, he cannot afterwards avoid it.(7) Thus, where a creditor sued both the transferor and the transferee for recovery of his debt, but claimed merely a *money decree* against them, it was held that he impliedly affirmed the transfer and could not raise the question of avoidance of the transfer, in the appellate Court.(8)

9. Who can avoid a fraudulent transfer.— Ordinarily a transfer cannot be avoided or questioned by a third party when the transferor admits it. It is, however, otherwise, where such transfer is intended to defraud the third party.(1) In such a case the third party has a right to question it. This is the principle enacted in this section.

Under the statute 13 Eliz., Chap. 5 not only creditors but *all others* who were hindered or delayed by the transfer could avoid the transfer.(1a) The old S. 53, also provided that a transfer intended to defraud,

(a) a prior transferee,
(b) a subsequent transferee,
(c) the creditors of the transferor,
(d) co-owners of the property transferred, or
(e) other persons having an interest in the property transferred,(2)

was voidable at the option of such persons. The reference to prior transferees, co-owners and other persons interested in the property has been omitted in the present section, as in the opinion of the Special Committee(3) it was difficult to see how such persons could be defrauded by a transfer by the transferor.

1954 Mad 173 (174) [AIR V 41 C 68].
1952 Vind Pra 69 (72) [AIR V 39].
1939 Mad 894 (896) [AIR V 26] : ILR (1940) Mad 73.
[*See also* 1927 All 538 (539) [AIR V 14] : 49 All 640. (Collusive decree — Judgment-debtor cannot challenge validity of decree though it can be impeached by a creditor of his.)]

5. Story, Equity Jurisprudence, Section 371.

6. 1936 Nag 268 (269) [AIR V 23] : ILR (1937) Nag 94.

7. †1928 All 234 (235) [AIR V 15] (DB).

8. 1934 All 948 (949, 950) [AIR V 21].

Section 53 — Note 9

1. 1964 Andh W R 79 (81).
('10) 7 Ind Cas 957 (958) (DB) (Bom).

1a. (1601) 76 E R 809 (816) : 1 Sm L C 1, Twyne's case.

2. 1921 Mad 657 (658) [AIR V 8] (DB).

3. See the Report of the Special Committee printed on page 85 (101).

A fraudulent transfer can, under this section, be avoided *only* by the person at whose instance the transfer has been declared in this section to be voidable(4) namely the creditor who is defeated or delayed or the subsequent transferee as the case may be. If they have not questioned it, an objection on that ground cannot be taken by anybody else.

It has been seen in Note 8 that the fact that a transfer is intended to defraud creditors or a subsequent transferee does not invalidate the transfer *as between the parties* to the deed and that such deed is *valid and operative* between them. It follows that a *party* to a transfer cannot claim to avoid the transfer on the ground that it was executed in fraud of third persons for, *ex hypothesi*, such fraud does not invalidate the transfer as between the parties themselves.(4a) Thus, if *A* executes a transfer in favour of *B* in order to defraud the creditors of *A*, and *B* subsequently sues *A* for reliefs in accordance with the transfer, such as possession of the property transferred, *A* cannot validly set up the plea that the transfer was intended to defraud his creditors inasmuch as such a plea even if established, will not render the transfer invalid as between *A* and *B*.(5) On the same principle *A* cannot sue *B* for reliefs inconsistent with the validity of the transfer.(5a)

The principles underlying the maxims *in pari delicto potior est conditio defendentis* (in equal fault, the condition of the defendant is more favourable), *nemo allegans suam turpitudinem audiendus est* (no one alleging his own baseness ought to be heard) and *ex dolo malo non oritur actio* (a right of action cannot arise out of fraud) do not apply to such cases(6) but are limited in their application to fraudulent

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4. 1946 P C 177 (177) [A I R V 33 C 51] : I L R (1945) Kar (PC) 161. (Wakfnama—It remains valid and binding on the settlor and his heirs until it is so avoided.)

1950 Trav-Co 60 (61) [A I R V 37 C 30] (FB). (Where A, a co-sharer, transfers his share to his wife B who sues for partition thereof, other co-sharer defendants cannot raise the plea that the transfer was a sham transaction intended to defraud A's creditors).

1951 Trav-Co 237 (238) [A I R V 38 C 95] : I L R (1941) Trav-Co 294 and 788 (DB).

1943 Nag 129 (132, 134) [AIR V 30] : ILR (1943) Nag 42 (DB).

1942 Mad 714 (715) [AIR V 29]. (Assignment by decree-holder to defraud creditors—Creditor of decree-holder can attach decree and claim that assignment is not binding on him—It may not be open to the assignor himself to object to the assignment.)

1936 Nag 207 (208) [AIR V 23] : ILR (1936) Nag 183.

1928 Lah 9 (16) [AIR V 15] (DB). (Creditor.)

1923 Nag 195 (196) [AIR V 10]. (Creditor.)

1915 Bom 89 (90) [AIR V 2] : 39 Bom 507 (DB). (Person acquiring title at court sale is not subsequent transferee or a person having interest.)

[*See also* 1953 Trav-Co 321 (322) [AIR V 40 C 119] : ILR (1953) Trav-Co 326 (DB). (Non-prized or unpaid prized subscribers although have no proprietary interest in or a charge upon the 'Kuri vaippu' (assets of the Kuri) would be entitled to avoid any transfer of such assets when it has been made in such a manner as to defeat or delay their claims.)]

4a. 1952 Trav-Co 105 (110) [A I R V 39] (DB). (Persons claiming through the parties as well as those under such persons are barred.)

1951 All 443 (448) [AIR V 38 C 93] (DB).

('13) 17 Cal L Jour 209 (215).

[*See* 1942 Mad 714 (715) [A I R V 29]. (Case of transfer of a decree — If an assignment of a decree is made by a decree-holder to defraud his own creditors, it may not be open to him (decree-holder) to object to the assignment during his life-time. AIR 1927 Mad 903, Rel. on.)]

5. 1943 Nag 129 (135) [AIR V 30] : ILR (1943) Nag 42 (DB).

1936 Nag 207 (209) [AIR V 23] : I L R (1936) Nag 183. (The principle of in pari delicto and ex dolo malo are not applicable to such cases.)

1936 Nag 268 (269) [AIR V 23] : ILR (1937) Nag 94.

('08) 31 Mad 206 (211) (DB). (Mortgagor cannot object that mortgage was to defeat and delay creditors.)

('71) 15 Suth W R 273 (274) (DB).

(1866) 3 Mad H C R 231 (236) (DB). (Party cannot question his own transfer for consideration when creditors do not do so.)

(1864) 1864 Suth W R 265 (265) (DB).

5a. (1834) 172 E R 1210 (1210) : 6 Car & P 207, Sims v. Tuffs.

6. 1943 Nag 129 (133) [A I R V 30] : ILR (1943) Nag 42 (DB). (Observations in 35 Cal 551 (PC) regarding fraud being carried out etc., apply only to unreal and fictitious transactions.)

† 1936 Nag 207 (209) [A I R V 23] : ILR (1936) Nag 183.

transactions under which no valid interest has passed from one party to the other. Thus, they apply to fraudulent transactions when the fraud is of such a nature as to render the transaction void even as between the parties on grounds of public policy, and to cases of sham, nominal and collusive transfers *not intended to pass any title* from one party to the other, but brought about merely to defraud a third party. In other words, they apply only when the giving effect to a transaction in accordance with its apparent tender, at the instance of a party thereto, would be to help him to take advantage of his own fraud and to which he was not otherwise entitled. The limits of the applicability of the said maxims to such cases may be briefly stated.—

(1) Where the fraud intended to be effected by the transaction has been *carried out* substantially, the general rule is that the Court will not allow any party to it to allege his own fraud in order to avoid his own deed.(7) Thus, if *A* transfers property to *B* nominally in order to defraud a third party, and the fraud is carried out, *A* will not be allowed to allege his own fraud and claim relief on the basis that the transfer is not operative.(8) This is the application of the maxim *nemo allegans*

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7. 1935 All 529 (534) [A I R V 22] : 58 All 1 (FB).
1960 Andh Pra 222 (226) [A I R V 47 C 73] : ILR (1959) Andh Pra 951 (DB).
1956 Andhra 225 (228) [A I R V 43 C 63] (DB). (Sole coparcener or all coparceners transferring property benami to save it from creditors — Device of benami adopted for several years — Transferor possessing no other property — It must be held that fraudulent purpose has been achieved and they should not be allowed to recover it especially when the property is in the hands of transferee from benamidar.)
1953 Pat 199 (200, 201) [A I R V 40 C 68] : 31 Pat 787.
1952 Vind-Pra 69 (73) [AIR V 39].
1949 Cal 204 (206) [AIR V 36 C 52].
1930 Mad 298 (300) [AIR V 17] (DB).
1925 Oudh 120 (123) [A I R V 12] : 27 Oudh Cas 175 (DB).
1923 Cal 90 (92) [AIR V 10] (DB).
1923 All 411 (412) [AIR V 10].
('20) 2 Lah L Jour 439 (442) (DB).
1919 Nag 43 (44) [AIR V 6] : 16 Nag L R 129.
1919 Pat 539 (540) [AIR V 6].
1916 Sind 22 (23, 26) [AIR V 3]: 9 Sind L R 108. ('Carried out' means substantially carried out.)
1915 Mad 519 (526) [AIR V 2] (DB).
('13) 17 Cal L Jour 209 (215).
†('31) 1931 Mad W N 470 (473).
†('06) 29 Mad 72 (74) (DB). (The rule that a person in pari delicto cannot recover is applicable not only where the unlawful agreement has been fully carried out but also where there has been part performance of a substantial character.)
('05-06) 3 Low Bur Rul 245 (247, 248). (The property was purchased benami in the name of mother of plaintiff who sued to recover it back on the ground that he was the real purchaser and the deed was executed benami because of fear of his creditors.)
✠('97) 20 Mad 326 (331) (DB). (20 Mad 323, approved.)
('73) 19 Suth W R 270 (271) (DB).
('66) 6 Suth W R 287 (287) (DB).
(1865) 3 Suth W R 30 (30) (DB). (Heir of A held also bound by A's fraud.)
(1865) 3 Suth W R 92 (92) (DB). (Heirs and representatives of fraudulent parties are equally bound.)
(1865) 4 Suth W R 11 (12) (DB). (Representatives are bound.)
[*See also* 1921 All 140 (141) [AIR V 8]. (Fraudulent admission of payment by one creditor in order to defeat other creditors.)
1919 Pat 447 (451) [A I R V 6] (DB). (Fraudulent transfer—Transferor however continuing in possession for more than twelve years Party entitled to confirmation of possession—On subsequent dispossession he is entitled to recover possession.)
1940 Pat 379 (380) [A I R V 27] (DB). (Person assigning his decree to another to avoid its attachment by his creditor cannot subsequently ask Court to declare that assignment was benami.)]

8. ✠('08) 35 Cal 551 (558, 559) : 35 Ind App 98 (PC).
1933 Oudh 6 (8) [AIR V 20] (DB). (Purpose of fraud not carried out — Mere intention to defraud does not deprive true owner of right to recover his property.)
1926 Cal 850 (853) [AIR V 13] (DB).
†1924 Oudh 321 (323) [AIR V 11] (DB).
1923 Cal 90 (91) [AIR V 10] (DB).
1921 Low Bur 63 (66) [AIR V 8] : 11 Low Bur Rul 83 (DB).
1921 Low Bur 58 (59) [AIR V 8] : 11 Low Bur Rul 89 (DB).
1919 Nag 43 (43) [AIR V 6] : 16 Nag L R 129.
†1917 Mad 297 (299) [AIR V 4] (DB).
1916 Sind 22 (24) [AIR V 3] : 9 Sind L R 108. (It is sufficient if the illegal purpose has been carried into effect in a material part e. g., by delaying the creditors for a long time.)
1915 Oudh 160 (161) [A I R V 2] : 18 Oudh Cas 131. (Parties to fraud cannot, whether as plaintiffs or defendants, plead fraud.)
† 1915 Lah 264 (265) [AIR V 2].

suam turpitudinem audiendus est. Some exceptions are recognized to this rule. One of these is that where a party to a fraudulent transaction seeks, as plaintiff, to *enforce the transaction* against the other party and thereby get an advantage to himself to which he is not really entitled, the defendant will be allowed to show his own turpitude in order to defeat the plaintiff.(9) The exception is allowed not for the sake of the wrongdoer but on the principle that the Court ought not to assist the plaintiff in reaping the benefit of his fraud. This is the application of the maxim *in pari delicto potior est conditio defendentis.* The contrary view taken in the undermentioned cases(10), namely, that if the fraud is *carried out* a party cannot, even by way of defence, set up his own fraud in order to defeat the plaintiff, must be held to be no longer good law in view of the Supreme Court decision in *Immani Appa Rao* v. *Ramalinga Murthi.*(10a)

(2) Where the intended fraud is *not carried out* a party to the transaction may allege his own fraud whether as a plaintiff(11) or as a

('09) 5 Nag L R 146 (150).
†('01) 28 Cal 370 (380) (DB).
('01) 23 Cal 962 (966) (DB).
('01) 23 Cal 962*n* (966*n*) (DB).
(1900) 27 Cal 231 (233) (DB).
('97) 20 Mad 333 (338) (DB).
('92) 1892 Pun Re No. 38 Page 149 (150).
('92) 1892 Bom P J 284 (DB).
†('87) 11 Bom 708 (713) (DB).
('67) 7 Suth W R 118 (118) (DB).
(1865) 3 Suth W R 221 (222) (DB). (Suit by representative of transferor.)
('32) 135 Ind Cas 244 (245) (All).
('14) 22 Ind Cas 86 (88) (DB) (Cal).
('12) 17 Ind Cas 918 (918) (Low Bur). (Obiter.)
('12) 16 Ind Cas 811 (815) (DB) (Cal).
[*See also* ('93) 7 C P L R 50 (52). (Defendant pleading his own fraud is a defence to suit for possession.)
1936 All 401 (403) [AIR V 23] : 58 All 842 (DB). (Affirming the decision in A I R 1935 All 799. The fact that the party claiming advantage of fraud is original party's representative makes no difference.)]
[See however 1927 Rang 86 (87) [AIR V 14] : 4 Rang 429 (DB). (Transfer with intention to defraud — Fraud effected — Transferor continuing in possession even after transfer — His possession will not be disturbed.)
1936 Rang 405 (406) [AIR V 23]. (AIR 1927 Rang 86, followed.)]

9. 1962 S C 370 (376) [AIR V 49 C 58] : (1962) 3 S C R 739.
1963 Ker 79 (80) [AIR V 50 C 24] : ILR (1962) 2 Ker 681.
1932 Lah 503 (512) [AIR V 19]: 13 Lah 713 (FB). (Case law reviewed.)
1943 Nag 129 (136) [AIR V 30] : ILR (1943) Nag 42 (DB). (When a debtor executes a colourable sale deed, not intending to pass title, with the intention of defeating or delaying his creditors and the transferee shares the intention and the fraud on the creditors has been carried out, then as between the parties to the transaction, the estate must lie where it falls — Transferor can resist transferee's suit for possession.)
1943 Nag 113 (114) [AIR V 30].
1941 Cal 233 (236) [AIR V 28] (DB).
1927 Nag 365 (366) [AIR V 14].
†1923 Cal 90 (94) [AIR V 10] (DB).
1923 All 504 (505, 507) [AIR V 10] : 45 All 396 (DB). (A was allowed to plead joint fraud of A and B and B's suit was dismissed.)
1921 Low Bur 63 (66) [AIR V 8] : 11 Low Bur Rul 83 (DB).
1916 Lah 130 (131) [AIR V 3] : 1916 Pun Re No. 21 (DB).
('09) 5 Nag L R 146 (149, 150).
('09) 32 Mad 323 (325) (DB). (20 Mad 326, Followed.)
('04) 8 Cal W N 620 (621) (DB).
('97) 20 Mad 326 (329, 330) (DB).
†('94) 18 Bom 372 (374) (DB).
('28) 107 Ind Cas 110 (112) (Lah). (Case law discussed.)
('12) 17 Ind Cas 918 (918) (Low Bur).
[*See also* 1924 Mad 189 (191) [AIR V 11] (DB).]

10. 1937 Pat 453 (453, 454) [AIR V 24].
1934 Mad 252 (254) [AIR V 21].
1933 Mad 457 (459) [AIR V 20] : 56 Mad 646 (DB). (AIR 1918 Mad 365, Foll. AIR 1932 Lah 503 (FB), dissented from.)
('08) 31 Mad 485 (487, 488) (DB).
('07) 31 Bom 405 (411, 412) (DB).

10a. 1962 S C 370 (376) [AIR V 49 C 58]: 1962-3 S C R 739. (I L R 31 Bom 405 : 9 Bom L R 542 & I L R 56 Mad 646 : AIR 1933 Mad 457 : 145 Ind Cas 308 and I L R 59 Mad 289 : AIR 1936 Mad 88 : 159 Ind Cas 729 and 32 Mad L J 484 : AIR 1918 Mad 365 : 43 Ind Cas 352, Overruled; S. A. No. 1656 of 1947, D/- 16-11-1951 (Mad), Reversed.)

11. 1960 S C 213 (219) [AIR V 47 C 38] : 1960 1 S C R 861 : 39 Pat 186.
('08) 35 Cal 551 (558, 559) : 35 Ind App 98 (PC).
1960 Andh Pra 222 (226) [AIR V 47 C 73] : ILR (1959) Andh Pra 951 (DB).
1956 Andhra 225 (227) [AIR V 43 C 63] (DB). (Device of benami adopted to cheat the creditors for a period of 35 years — No other properties available excepting th se involved in the

defendant(12) and the Court may grant relief in accordance with the true nature of the transaction. This principle is also found enacted in S. 84 of the Trusts Act, 1882. It has been held in the undermentioned case(13) by the Madras High Court that the deed of transfer being voidable and not void in such cases, the transferor cannot recover the property transferred, without getting the sale deed set aside, on a mere declaration of his title.

10. "Creditor," meaning of.—In order that *A* may be a creditor of *B*, it is necessary that *B*'s liability to *A* constitutes a "debt." As to the meaning of the word "debt," see Note 22 on S. 3.

A who was an agent of *B* for purchasing supplies and who was remunerated by a commission on the price of supplies was given advances from time to time from which to purchase supplies. It was held by the Chief Court of Oudh that, in respect of the balance of the advance in the hands of *A*, *B* could not be said to be a creditor.(1)

A 'mortgagee' from a person of his property is a creditor of that person within the meaning of this section.(2)

A person entitled to *pre.emption* is not a creditor of the transferor of the property.(3) Nor is an *auction purchaser* of the property transferred, a creditor of

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transactions—Only reasonable inference is that the fraudulent purpose has been achieved.)
1953 Mad 545 (547) [AIR V 40 C 206]. (It is unnecessary to consider whether the intended fraud was frustrated by his own penitence or by other causes.)
1952 Vind Pra 69 (73) [AIR V 39].
1949 Cal 204 (206) [AIR V 36 C 52].
1943 Nag 129 (136) [AIR V 30] : I L R (1943) Nag 42 (DB). (Alleged transferor can recover his property from the alleged transferee.)
1929 Pat 127 (129) [AIR V 16] (DB). (Symes v. Hughes, (1870) 39 L J Ch 304, followed.)
1926 Cal 850 (853) [AIR V 13] (DB).
1924 Nag 200 (203) [AIR V 11].
1923 Cal 154 (155) [AIR V 10] (DB). (Distinction between fraud merely intended and fraudulent purpose actually accomplished is recognised in S. 84 of the Trusts Act.)
1923 Cal 90 (90) [AIR V 10] (DB).
1921 Low Bur 58 (59) [AIR V 8]: 11 Low Bur Rul 89 (DB).
1919 Pat 313 (316) [AIR V 6] (DB).
1918 Mad 148 (149) [AIR V 5] (DB). (35 Cal 551 (PC), Followed.)
†1916 Cal 532 (537, 538) [AIR V 3] (DB). (The principle applies even if the party suffers a decree to be passed against him in a fictitious and collusive suit which is only a part of the fraudulent scheme.)
1915 Lah 264 (265) [AIR V 2].
1915 Cal 492 (494) [AIR V 2] (DB).
1914 Low Bur Rul 135 (136) [AIR V 1]. (The burden lay on plaintiff to prove that the intended fraud was not carried out.)
('13) 17 Cal L Jour 209 (215).
('08) 1908 Upp Bur Rul 3rd Qr., Benami Transaction 1 (3).
†('06) 33 Cal 967 (969) (DB).
('01) 28 Cal 370 (379) (DB).
('96) 23 Cal 460 (475, 476) (DB). (13 Suth W R 87, not followed.)
('87) 1 C P L R 165 (172, 173).
(1870) 39 L J Ch 304 (306) : 9 Eq 475, Symes v. Hughes.
('12) 16 Ind Cas 811 (815) (DB) (Cal).
[*See also* 1929 Bom 147 (151) [AIR V 16] : 53 Bom 321 (DB). (Party perpetrating fraud can retract from it at any time.)
('08) 4 Nag L R 26 (27). (Burden is on the plaintiff to prove that the fraud never went beyond the stage of intention.)]

12. *1936 Mad 717 (718) [AIR V 23] : 59 Mad 998 (FB). (AIR 1918 Mad 365; AIR 1926 Mad 1196, AIR 1924 Mad 604 and AIR 1917 Mad 297, Overruled.)
1963 Ker 79 (80) [AIR V 50 C 24] : I L R (1962) 2 Ker 681.
1936 Mad 88 (89) [AIR V 23] : 59 Mad 289 (DB). (Overruled on another point in AIR 1962 S C 370.)
1935 Mad 947 (952) [AIR V 22].
†1934 Mad 252 (255) [AIR V 21] (DB).
1929 Mad 807 (810, 811) [AIR V 16].
1923 All 164 (165) [AIR V 10].
1915 Mad 1164 (1164) [AIR V 2] (DB).
1914 Bom 283 (283, 284) [AIR V 1] : 38 Bom 10 (DB). (31 Bom 405, Distinguished.)
1914 Mad 696 (697) [AIR V 1] (DB).
('08) 31 Mad 97 (99) (DB).

13. 1953 Mad 545 (548) [AIR V 40 C 206].

Section 53 — Note 10

1. 1927 Oudh 162 (169) [AIR V 14] (DB).

2. 1916 Mad 494 (494) [AIR V 3] (DB). (A simple mortgagee who has obtained decree for sale and whose right to personal decree is not barred is creditor of the mortgagor.)
('97) 1897 Bom P J 461 (DB).
[*See also* 1951 All 443 (448) [AIR V 38 C 93] (DB).]

3. 1925 All 358 (359) [AIR V 12] : 47 All 424 (DB).

the judgment-debtor.(4) But a creditor, who has, in execution of his decree, purchased the property transferred will be a *creditor* notwithstanding his purchase, and can sue to avoid the transfer under this section.(5)

It has been held by the High Court of Madras in the undermentioned case(6) that the liability, under Hindu law, of a husband to pay for the maintenance of his wife, during the years he had deserted her is a "debt" and that the wife is, in that respect a "creditor" of the husband within the meaning of this section. But in the absence of desertion or separation, a wife cannot, according to the Chief Court of Oudh, be considered to be a "creditor" of the husband merely by reason of the fact that she is entitled to be maintained by the husband.(7)

Dower due to a Mahomedan wife ranks as a debt.(8)

10a. "Of the transferor."—It is only a creditor of the *transferor* that can avoid a transfer under this section. In *Bibee Tokai Sherob* v. *Beglar*,(1) *A* made a fraudulent transfer in favour of his mistress *B* for the purpose of defeating or delaying creditors. *A* left a will subsequently under which he appointed *G*, his illegitimate son as his executor. *X* obtained a decree *personally* against *G* got his right, title and interest sold and then filed a suit against *G* and *B* for possession of the properties that were in the possession of *B*, on the ground that the transfer by *A* to *B* was fraudulent. It was held by their Lordships of the Privy Council that the suit could not succeed, that *G's* creditors might well dispute any fraudulent transfer which *G* might have made but that they could not dispute a transfer by *A* to *B* as fraudulent.

Where *X* made a gift of joint family property to his daughters at a time when his son *Y* was heavily indebted, it was held by the High Court of Madras that the creditors of *Y* could not avoid the transfer under S. 53, as no transfer had been made by *Y*, the debtor.(2)

Where *A purchases* property in the name of *B* with a view to keep the property out of reach of his creditors, it cannot be said that *A* 'transferred' the property to *B* so as to enable the creditors of *A* to apply this section and attach the property.(3)

Where *A* gifted certain property to *B's* wife upon a request made by *B* that *A* should transfer the property to his wife instead of himself so as to protect it from his creditors, it was held that *C* a creditor of *B* who was a stranger to the transaction could not avoid the transaction and proceed against the property in execution of his decree.(4) It could not be said in such a case that *C* was a creditor of the transferor or that *B* had transferred the property to defeat or delay his creditors.

11. Subsequent creditors.— In England it has been held that even a *subsequent* creditor can impeach a fraudulent transfer by the debtor.(1) The reason of

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4. 1954 Mad 173 (175) [AIR V 41 C 68].
1951 Mys 103 (105) [AIR V 38 C 36] : I L R (1951) Mys 407 (DB).
1915 Bom 89 (90) [AIR V 2] : 39 Bom 507 (DB). (He is also not a subsequent transferee or a person having an interest in the property within the meaning of S. 53.)
5. 1951 All 443 (448) [AIR V 38 C 93] (DB). (1939 Bom 508 [AIR V 26], Foll.)
† 1939 Bom 508 (512) [AIR V 26].
6. 1927 Mad 657 (658) [AIR V 14].
7. 1932 Oudh 40 (42) [AIR V 19] : 7 Luck 411 (DB).
8. 1926 Pat 404 (404) [AIR V 13] (DB).

Section 53 — Note 10a

1. (1857) 6 Moo Ind App 510 (524): 4 Suth W R P C 87 (PC).
2. 1936 Mad 825 (826) [AIR V 23].
3. 1936 Bom 160 (161) [AIR V 23]: 60 Bom 226.
4. 1944 Nag 133 (134) [AIR V 31] : ILR (1944) Nag 125.

Section 53 — Note 11

1. (1911) 81 L J K B 334 (338) : 105 L T 897, Glegg v. Bromley. (Revised on another point in (1912) 81 L J K B 1081.)

the rule was stated by Sir Thomas Plumer, M. R., in *Richardson* v. *Smallwood*,(2) as follows :

> "Suppose a person indebted to execute a conveyance, such that if those who were creditors at the time complained, it would be void as against them: then, if they are paid off and a new set of creditors stand in their places, does that make any difference? Does it not hinder and delay these creditors and is it not void as against them? If it be not so, it would be easy to evade the statute: the party may pay off those to whom he is then indebted by borrowing of others and he may then say to them, 'I did not make the settlement to defraud you, but to defraud the other persons who were my creditors'."

The general trend of opinion in this country also is that not only an existing(3) but also a *subsequent* creditor(4) can impeach an alienation by the debtor. A contrary view has been, however, expressed in the undermentioned cases.(5) In *Vaikuntarama* v. *Athimoolam*,(6) Wallis, J., in expressing the latter view distinguished the English cases on the ground that the statute 13 Eliz., Chap. 5 used the words "creditors and *others*" while this section used the word "creditor" only. It is submitted that the

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(1822) 37 E R 958 (960) : Jac 552, Richardson v. Smallwood.
(1882) 51 L J Ch 521 (523) : 19 Ch D 588 (600, 601), Ex parte Russell; In re Butterworth.
(1872) 41 L J Ch 539 (542): L R 14 Eq 106 (122), Mackay v. Douglas.
(1871) 40 L J Ch 480 (484): L R 12 Eq 158 (168), Crossley v. Elworty.
(1870) 39 L J Ch 148 (151), Freeman v. Pope. (Affirmed in (1870) 5 Ch App 538.)
(1860) 54 E R 689 (690) : 29 Beav 417, Barling v. Bishopp.
(1856) 61 E R 963 (965) : 25 L J Ch 338, Jenkyn v. Vaughan. (Where there are certain debts at the time of execution of the deed, and some of those debts still remain unpaid, a subsequent creditor can sue to set aside the deed.)
(1856) 26 L J Ch 179 (182) : 3 Kay & J 90, Holmes v. Penny.
(1800) 31 E R 642 (643) : 5 Ves 384, Lush v. Wilkinson.
(1743) 26 E R 758 (759) : 2 Atk 800, Taylor v. Jones.
[*See* (1854) 139 E R 169 (172) : 14 C B 410, Graham v. Furber. (Quaere.)]
[*See also* (1742) 26 E R 688 (690) : 2 Atk 477, Amb 13, Stileman v. Ashdown]
[But see (1806) 33 E R 53 (60) : 12 Ves 136 (156), Kidney v. Coussmakar. (A settlement is fraudulent only as against such creditors as were creditors at the time.)]
(1699) 24 E R 51 (51) : 1 Eq Abr 149, Lewkner v. Freeman.
(1843) 63 E R 76 (78) : 2 Y & C Ch Cas 172, Ede v. Knowles. (A deed can only be set aside as fraudulent against creditors at the instance of a person who was a creditor at the time though when it shall have been set aside, subsequent creditors may be let in.)

2. (1822) 37 E R 958 (960) : Jac 552.

3. 1966 Mad 247 (252) [AIR V 53 C 75].
1954 Mad 173 (176) [AIR V 41 C 68].
† ('84) 10 Cal 616 (623, 624) : 11 Ind App 10 (PC).
(1864) 1 Suth W R 319 (319) (FB). (Case before T. P. Act.)

4. ILR (1966) 1 Mad 114 (119).
1966 Mad 247 (252) [AIR V 53 C 75].
1965 Mad 395 (397) [AIR V 52 C 135] : ILR (1965) 2 Mad 250 (DB).
1955 Madh B 159 (160) [AIR V 42 C 49] : I L R (1955) Madh B 297 (DB).
1954 Mad 173 (176) [AIR V 41 C 68].
1954 Trav-Co 404 (405) [AIR V 41 C 142] (DB).
('49) 1 Pepsu LR 198 (200) (DB). (Per Teja Singh C. J., in his judgment referring the case to a Division Bench.)
1948 Bom 265 (269) [AIR V 35 C 72]: ILR (1947) Bom 807 (DB).
1947 All 383 (387) [AIR V 34 C 144] : ILR (1947) All 624 (DB). (But the word 'creditor' as used in Provincial Insolvency Act will not include a person who becomes creditor after date of transfer or other act of insolvency.)
1946 Sind 137 (140) [AIR V 33 C 42]: ILR (1946) Kar 14.
1934 Rang 302 (303) [AIR V 21] : 12 Rang 666. (The term 'creditor' includes subsequent creditor.)
1931 Oudh 333 (338) [AIR V 18] : 7 Luck 131 (DB).
1931 Oudh 134 (135) [AIR V 18] : 6 Luck 397 (DB).
1930 Lah 217 (218) [AIR V 17].
1930 All 610 (611) [AIR V 17] (DB).
1927 Lah 420 (421) [AIR V 14] : 8 Lah 544 (DB). (Per Tek Chand, J.)
1927 Mad 657 (658) [AIR V 14].
1924 Mad 779 (780) [AIR V 11] (DB).
1921 All 298 (300) [A I R V 8] (DB). (Per Stuart, J.)
† ('03) 5 Bom L R 255 (256, 257).
('03) 16 C P L R 164 (167, 168).
† ('10) 33 Mad 205 (206) (DB)
[*See also* 1914 Cal 503 (504, 505) [AIR V 1] (DB).]

5. 1940 Oudh 200 (201) [AIR V 27]: 15 Luck 503.
1930 Nag 51 (53) [AIR V 17].
[*See also* 1927 Lah 420 (420) [AIR V 14] : 8 Lah 544 (DB). (Per Campbell, J.)]

6. 1914 Mad 641 (643) [AIR V 1] : 38 Mad 1071 (DB).

contrary view referred to above is not correct. The English decisions do not rest on the use of the words "and others" in the statute, but on general principles of justice which are equally applicable in this country.

12. Creditor need not obtain judgment on his debt before being entitled to impeach fraudulent transfer.—In England it is not necessary that in order to maintain a suit to avoid fraudulent conveyance, the creditor should obtain a judgment on his debt, or a lien on the property.(1) The same view has been held in this country, and it is, therefore, not necessary to enable a creditor to impeach a fraudulent transfer under this section that he should have obtained a decree on his debt.(2) The contrary view expressed in the undermentioned cases(3) is opposed to the general trend of opinion and is not correct.

13. "At his option."—The avoidance of a transfer under this section need not necessarily be by way of a *suit* instituted for the purpose. An open and unequivocal declaration of intention to avoid the transfer expressed by a creditor is sufficient in law to enable him to treat it as void and take steps on that footing to enforce his rights as a creditor.(1) Thus, where *B* took a subsequent transfer, in discharge of his own debt, from *C* of one item of certain properties which had been sold by *C* fraudulently in favour of *A*, it was held that *B's* conduct in taking the transfer with notice of the sale in favour of *A* constituted a declaration of intention to avoid the sale in favour of *A*. But in such a case it was further held, that the avoidance was only in respect of *that* item.(2) Where *A* who had obtained a decree against *B*, attached certain properties as belonging to *B* and repudiated, in the attachment proceedings, the sale of such properties by *B* in favour of *C*, it was held that *A* had made an unequivocal declaration avoiding the transfer and that the auction-purchaser in execution of *A's*

Section 53 — Note 12

1. (1869) 17 W R (Eng) 601 (602) : L R 7 Eq 347 (351) : 20 L T 163, Reese River Silver Mining Co. v. Atwell.

2. ILR (1966) 1 Mad 114 (119).
1948 Bom 265 (269) [AIR V 35 C 72] : ILR (1947) Bom 807 (DB).
†1927 Mad 657 (658) [AIR V 14]. (Claim for maintenance not merged in decree.)
1926 Nag 494 (494) [AIR V 13].
1923 Nag 334 (335) [AIR V 10].
1923 Lah 478 (479, 480) [AIR V 10] (DB).
('04) 17 C P L R 24 (28).
('03) 16 C P L R 164 (166).
✠('02) 27 Bom 146 (149) (DB). (Absence of decree is not fatal.)
[*See also* 1927 Nag 295 (296) [AIR V 14]. (Lease, while the suit on mortgage was pending, set aside as fraudulent.)]

3. 1918 Mad 225 (227) [AIR V 5] (DB). (Mere obtaining a judgment for the debt is not sufficient — Creditor must in addition attach the property to enable him to utilize this section.)
('82) 1882 Pun Re No. 10 page 36 (39).
('67) 2 Agra 411 (411).

Section 53 — Note 13

1. 1956 Mad 682 (684) [AIR V 43 C 218]. (Para 4 is merely intended to prescribe the form of the suit if the creditor chooses to institute one. It does not lay down the only way in which to plead fraud under the section.)
1955 Pat 270 (276) : [AIR V 42 C 66] : 34 Pat 133 (DB). (A creditor may manifest his intention to avoid the transfer otherwise than by filing a suit, as, for instance, by attaching the property.)
1954 Mad 173 (174) [AIR V 41 C 68]. (The right of the creditor does not depend on his ability to establish fraud in a Court of law though without it, the practical worth of that right will be nothing.)
1953 Cal 251 (257) [AIR V 40 C 92] (DB).
1951 Trav-Co 237 (238) [AIR V 38 C 95] : ILR (1951) Trav-Co 294 and 788 (DB). (Where a decree-holder attaches property which is the subject-matter of transfer, in execution of his decree, it constitutes an unequivocal repudiation of the transfer.)
1944 Nag 44 (51) [AIR V 31] : ILR (1944) Nag 342 (FB). (For example, by an application under S. 4, Insolvency Act, (1920) 5 Nag L R 146, Relied on. Note. See in this connection Note 29.)
1920 Mad 748 (751) [AIR V 7] : 43 Mad 760 (FB). (AIR 1918 Mad 421, Overruled.)
1946 Sind 137 (140, 141) [AIR V 33 C 42] : ILR (1946) Kar 14. (Question of fraudulent transfer can be raised in execution proceedings.)

2. 1954 Mad 173 (175) [AIR V 41 C 68].
1921 Mad 657 (659) [AIR V 8] (DB).

decree obtained a good title to it as against *C*.(3) The following decisions(4) taking the view that the transaction can be avoided only by a suit must be held to be no longer good law in view of the Supreme Court decision in *Abdul Shukoor Saheb* v. *Arji Papa Rao*.(5)

14. Plea in defence.—The institution of a *suit* to avoid a transfer would be the most unequivocal way of avoiding a fraudulent transfer. But that is not the only mode of avoiding it. It may be made by way of *defence* in a suit brought to enforce the transfer.(1) Thus, in a suit under O. 21, R. 63, Civil Procedure Code, by a defeated claimant on the basis of a transfer made to him by the debtor, the creditor who has attached the property in execution of his decree may plead in defence that the transfer was fraudulent under S. 53.(2)

In the undermentioned cases(3) where a claim to attached property was made

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3. 1955 Pat 270 (276) [AIR V 42 C 66] : 34 Pat 133 (DB).
1951 Trav-Co 237 (239) [AIR V 38 C 95] : ILR (1951) Trav-Co 294 and 788 (DB).
1936 Mad 408 (410) [AIR V 23].

4. 1963 Mad 450 (452) [AIR V 50 C 152]. (Mortgage executed in contravention of S. 6, Madras Indebted Agriculturists (Temporary Relief) Act —Execution of decree obtained on mortgage — Plea that the mortgage in view of presumption arising under that section is one which was executed with intent to delay or defeat creditors cannot be raised in the execution proceedings.)
1955 Mad 446 (447) [A I R V 42 C 120]. (Section will come into operation only when a suit is instituted to avoid the transfer and not when only an execution petition is filed.)
1944 Nag 133 (134) [AIR V 31] : ILR (1944) Nag 125.

5. 1963 S C 1150 (1160) [AIR V 50 C 174] : 1963 Supp 2 S C R 55.

Section 53 — Note 14

1. 1963 S C 1150 (1160) [AIR V 50 C 174] : 1963 Supp 2 SCR 55. (1918 Mad 225 [AIR V 5] being a contrary view must be held to be no longer good law.)
1934 All 155 (159) [AIR V 21] : 56 All 624 (FB). (The amendment of the section does not alter the law in this respect.)
1959 Andh Pra 280 (287) [AIR V 46 C 85] (DB). (AIR 1917 Mad 519 : 30 M L J 565; AIR 1918 Mad 421 : 33 M L J 705 (FB), Held, overruled in AIR 1920 Mad 748 : 39 M L J 350 (FB).)
1956 Mad 682 (684) [AIR V 43 C 218].
1954 Manipur 1 (3) [AIR V 41 C 1].
1951 All 443 (445) [AIR V 38 C 93] (DB).
1942 Mad 714 (715) [AIR V 29]. (Fraudulent assignment of decree — Creditors of assignor impeaching same as fraudulent by raising plea in defence.)
1939 Sind 97 (98, 99) [AIR V 26] : ILR (1939) Kar 269 (DB).
1927 Cal 836 (838) [AIR V 14] : 54 Cal 687 (DB). (Suit to enforce mortgage — Defence of fraudulent transfer assumed to be maintainable.)
('08) 35 Cal 1051 (1056, 1057) (DB). (Fraudulent transfer by way of mortgage—Suit on mortgage — Defence of fraudulent transfer was assumed to be maintainable.)
(1900) 5 Cal W N 403 (404) (DB). (Assumed.)
('97) 24 Cal 825 (828) (DB). (Plea in defence assumed to be maintainable.)
[*See* 1943 All 2 (5) [AIR V 30] (DB). (Application by debtor under S. 4, U. P. Encumbered Estates Act—Creditors challenging wakf, executed before Chapter 1 of the Act came into force, as being executed with object of delaying and defeating creditors — Held, S. 12 of the Act did not apply but it was assumed creditors could rely on S. 53, T. P. Act.)]
[*See also* 1936 All 663 (665) [AIR V 23] (DB).]

2. 1963 S C 1150 (1160) [AIR V 50 C 174] : 1963 Supp 2 S C R 55. (AIR 1920 Mad 748 (FB), Approved.)
1920 Mad 748 (754) [AIR V 7] : 43 Mad 760 (FB). (AIR 1918 Mad 421 and AIR 1917 Mad 519, Overruled; AIR 1919 Mad 87 is also no longer good law in view of this decision.)
1954 Manipur 1 (3) [AIR V 41 C 1].
1955 Cal 251 (257) [AIR V 42 C 92] (DB). (Creditor does not become disentitled from setting up defence under S. 53 in a declaratory suit under O. 21, R. 63, Civil P. C., by debtor or his assignee because of the fact that such a suit is not a representative suit.)
1921 All 298 (301) [AIR V 8] (DB). (AIR 1917 Mad 519, Dissented from; 14 Ind Cas 715. Followed.)
1920 Nag 83 (85) [AIR V 7].
1920 Bom 10 (10) [AIR V 7] (DB).
1920 Nag 80 (81, 83) [AIR V 7] : 16 Nag L R 3.
('12) 14 Ind Cas 715 (716) (DB) (Cal).

3. 1955 Pat 270 (276) [AIR V 42 C 66] : 34 Pat 133 (DB).
1946 Sind 137 (141) [AIR V 33 C 42] : ILR (1946) Kar 14. (Same principle applies to plea raised by attaching creditor in execution proceedings in answer to defence of the judgment debtor that the property in his hands is separate property and not liable in execution owing to a transfer made by his father and himself.)
1938 Lah 136 (138) [AIR V 25].
1938 Nag 166 (168) [AIR V 23] : ILR (1936) Nag 69. (Objection to attachment by transferee—

by a party to the suit under S. 47 of the Civil Procedure Code on the basis of a transfer from the judgment-debtor, it was held that the attaching creditor was entitled by way of defence to plead that the transfer was fraudulent. A plea that the transfer sought to be enforced is fraudulent must be raised in the written statement. It cannot be raised at the time of arguments if it would take the plaintiff unawares.(4)

15. Avoidance of transfer in part. — A fraudulent transfer was, under the statute 13 Eliz., Chap. 5, declared to be "clearly and utterly void, frustrate and of none effect" against any persons defeated or delayed thereby. In *Tareeny Churn Bonnerjee* v. *Maitland*,(1) a case before this Act, *A* executed a deed of trust, by which he charged real property to secure his certain alleged debts. It was found that this deed was executed for the purpose of defeating and delaying the creditors of *A*. It was held by their Lordships of the Privy Council that the deed could not be maintained even to the extent to which it may be supported by valid consideration. They observed as follows :

> "If the deed was executed with a view to defraud and delay creditors . . . . it appears to their Lordships to be utterly impossible for any party to that deed, or any person claiming under those who were parties to that deed to maintain the deed *for any purpose whatever*. The deed is one which, in that view of the case, is not executed to secure the Rs. 13,873 (i.e. the valid portion of the consideration paid), but it is a deed executed to defeat and to delay creditors; the deed, therefore, utterly falls to the ground and cannot be maintained, as their Lordships think, as a *security for any sum whatever*."

In cases arising under this section, there has, however, been a difference of opinion. The *general trend* of opinion is that if a transfer offends this section as being in fraud of creditors, it cannot be upheld even to the extent to which it may be found to be supported by consideration, whether such consideration is paid at the time of the transfer(2) or in the discharge of prior debts due to the transferee himself(3) or to a third party(4). But the following views also have been expressed :

(1) Where a transfer is really supported by consideration to the extent of debts due already to the transferee, the transfer *to that extent* is not fraudulent at all, but is fraudulent only as regards the other portion.

Decree-holder can rely on S. 53 without instituting suit to set aside transfer.)

4. 1941 Oudh 457 (464) [AIR V 28] : 16 Luck 832 (DB).

Section 53 — Note 15

1. ('66-67) 11 Moo Ind App 317 (343, 344) (PC).

2. 1954 Nag 129 (134) [AIR V 41 C 51] : ILR (1953) Nag 937 (DB).
†1939 Mad 745 (749) [AIR V 26] (DB). (Distinguishing AIR 1924 Mad 450.)
1938 Nag 249 (250) [AIR V 25].
('38) 40 Punj L R 613 (615).
1935 Lah 404 (405) [AIR V 22]: 16 Lah 680 (DB).
1931 Lah 430 (431) [AIR V 18] (DB).
1928 Mad 20 (20) [AIR V 15] (DB).
1927 Mad 278 (279) [AIR V 14] (DB).
1923 Lah 423 (424) [AIR V 10] : 4 Lah 211 (DB). (Substantial portion of consideration was fraudulent — Whole transfer treated as fraudulent. 30 Mad 6, Followed.)
1918 Mad 377 (378) [AIR V 5] (DB).
1915 Mad 82 (82) [AIR V 2].
('13) 24 Mad L Jour 266 (269) (DB).
('09) 4 Ind Cas 1140 (1140) (Mad). (30 Mad 6, Followed.)
('30) 1930 Mad W N 1145 (1148) (DB).
†('10) 33 Mad 334 (339) (DB). (30 Mad 6, Distinguished.)

3. ('44) 1944 Mar L R (Civ) 38 (DB). (Mortgage for a consideration which is partly fictitious and partly made up of a true money debt due to the creditor—Transaction should be set aside as a whole.)
†1941 Cal 378 (383) [AIR V 28]: ILR (1941) 1 Cal 536.
1941 Mad 690 (693) [AIR V 28].
1939 Bom 508 (513) [AIR V 26].
1930 Lah 1027 (1029) [AIR V 17] : 12 Lah 194 (DB).
1919 Bom 99 (100) [AIR V 6] : 43 Bom 707 (DB).
('13) 18 Ind Cas 768 (769) (DB) (Mad).
('12) 17 Ind Cas 602 (603) (DB) (Mad).

4. 1932 Lah 174 (176) [AIR V 19] : 12 Lah 763 (DB).
1931 Mad 513 (519) [AIR V 18]. (Transferee gets mortgage-money only and not money debts of transferor discharged by him.)
1920 Nag 83 (86) [AIR V 7].

The transaction must, therefore, be upheld to that extent.(5)

(2) Where a transfer is supported partly by consideration to the extent of unsecured debts due to the transferee, a *charge* may be declared on the property transferred for such amount, although the transfer itself is set aside as fraudulent.(6)

(3) If part of the consideration consists in the discharge, by the transferee, of a prior *incumbrance* on the property transferred, the transferee can be given a charge thereon for such amount.(7)

The first of these three views has not been followed and, it is submitted, is not correct. As has been pointed out in *Sama Rao* v. *Doraisami Chettiar*,(8) if a deed of transfer is intended to defeat or delay the creditors of the transferor, it cannot be separated into parts one of which is honest and the other fraudulent.

The second view does not also seem to be correct. A transferee who has no charge for a debt due to him cannot be allowed to get an advantage by taking a fraudulent transfer and claiming a *charge* for an amount for which he had no charge before.

The third view is, however, unexceptionable. The declaration of the charge under such circumstances is merely giving effect to the principle of subrogation under which a person paying off an incumbrance on property stands in the shoes of the person whose incumbrance was discharged.

16. Transfer taken in good faith and for consideration.— The second paragraph of the section, corresponding to the last paragraph of the old section, merely reproduces in substance the English law. It saves from the operation of the first paragraph transfers taken in good faith and for consideration.(1) In other words a mere fraudulent intent on the part of the *transferor* to defeat or delay the creditors will not avoid the deed if the transferee has acted *bona fide* and paid consideration for the transfer.(2)

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5. ('08) 35 Cal 1051 (1057) (DB).
[*See* 1943 Nag 129 (136) [AIR V 30]: ILR (1943) Nag 42 (DB).

6. 1936 Pesh 216 (216) [AIR V 23].

7. 1941 Mad 690 (691) [AIR V 28].
1934 Mad 587 (592) [AIR V 21].
1933 Rang 191 (193) [AIR V 20]. (Payment by transferee of revenue and encumbrances.)
1931 Mad 513 (519) [AIR V 18].
1927 Mad 278 (279) [AIR V 14] (DB).
1916 Mad 649 (650) [AIR V 3] (DB).
†('30) 1930 Mad W N 1145 (1148) (DB).
('10) 33 Mad 334 (339) (DB).
[*See* 1942 Mad 751 (753) [AIR V 29] (DB). (Part of consideration for the transfer attacked as fraudulent consisting in the discharge by the transferee of prior charge—Although the Court has granted equitable relief to such a person whose hands have not been altogether clean, yet the Court will not grant to the transferee who has been the prime mover in the committal of fraud on another's creditors. 33 Mad 334, Referred.)]
[*See also* 1939 Mad 745 (749) [AIR V 26] (DB).]

8. ('13) 18 Ind Cas 768 (769) (DB) (Mad). (Per Sadasiva Aiyar J.)

Section 53 — Note 16

1. 1928 Pat 199 (200) [AIR V 15] (DB). (It is no part of the duty of the purchaser to see what is done with the purchase-money.)
('03) 5 Bom L R 255 (257).
(1919) 88 L J K B 679 (683): (1919) 1 K B 583 (591), Denny's Trustee v. Denny.
(1881) 51 L J Ch 154 (157): 20 Ch D 389 (396), Golden v. Gillam; In re Johnson.
(1877) 46 L J Ch 729 (734): 6 Ch D 29 (39, 40), Kevan v. Crawford.
(1861) 158 E R 333 (335): 30 L J Ex 355, Darvill v. Terry.
(1845) 115 E R 724 (725): 7 Q B 892, Wood v. Dixie.
(1840) 173 E R 991 (992): 9 Car & P 640, Riches v. Evans.
(1817) 56 E R 386 (393): 2 Mad 410, Copis v. Middleton.
(1601) 76 E R 809 (814): 1 Sm L C 1, Twyne's case.

2. 1959 Andh Pra 280 (288) [AIR V 46 C 85] (DB).
('55) 1955 Raj L W 316 (317): A I R 1955 N U C 2545.

But the existence both of *good faith* and payment of *consideration* are essential conditions for saving the transfer from the liability of being avoided.(3) The question of consideration and the question of good faith are not the same and the mere fact of payment of consideration does not necessarily establish good faith regardless of other circumstances,(4) though it may be an *ingredient* in showing good faith(5) and may shift the *onus* of proof of bad faith on to the person impeaching the transfer.(6) In many cases the payment of consideration may be proved and yet the object and purpose of the transfer may be to defeat and delay creditors.(7) It therefore follows that the payment of consideration alone is not sufficient if there is no good faith on the part of the transferee.(8) Similarly, the existence of good faith on the

1945 All 42 (45) [A I R V 32] : I L R (1944) All 737 (DB). (Where a person makes a real transfer, the plea of fraudulent transfer cannot succeed unless it can be shown that the transferee had entered into a conspiracy with the debtor to defeat or delay his creditors. The Court cannot deprive an innocent transferee for value on the ground that the transferor had been dishonest.)

1939 Bom 508 (512) [AIR V 26].

1936 All 663 (664) [AIR V 23] (DB). (If the transferor alone had an intention to defraud the creditors and the transferee did not share the intention, he would be a transferee in good faith and for consideration and, his rights would not be impaired by S. 53.)

1932 Rang 13 (14) [AIR V 19] : 9 Rang 614 (DB). (Where the transferee pays what is the fair value of the property, presumption is that transaction is *bona fide*.)

1926 Oudh 469 (470) [AIR V 13].

1920 Oudh 182 (185) [AIR V 7].

†1917 Pat 448 (450) [AIR V 4] : 2 Pat L Jour 546 (DB).

1917 Low Bur 124 (124) [AIR V 4] (DB).

1916 Cal 349 (351) [AIR V 3] (DB).

('09) 31 All 170 (172) (DB).

('07) 34 Cal 999 (1017) (DB). (Where, however, the transferee is himself a creditor, he occupies a more favoured position.)

('03) 5 Bom L R 213 (214, 215) (DB).

('97) 1897 Bom P J 315 (DB).

('89) 13 Bom 434 (438) (DB).

('86) 1 C P L R 63 (64).

('84) 1 C P L R 59 (60).

(1862-63) 1 Hyde 178 (191, 192), Tarrucknauth Paulit v. Gladstone.

('11) 12 Ind Cas 401 (403) (Oudh). (If transferee acts in good faith, fraudulent intention of the judgment-debtor alone is not sufficient to avoid the transfer.)

('10) 5 Ind Cas 179 (180) (All).

('13) 17 Cal L Jour 209 (215). (Purchase of property by B benami for A to shield it from creditors — B executing sham mortgage to C—C obtaining collusive decree and executing the same—D purchasing at auction in good faith—A cannot enforce his title against D.)]

3. ('55) 1955 Raj L W 316 (317) : AIR 1955 N U C 2545.

†1914 P C 137 (139) [AIR V 1] : 37 Mad 227.

1937 Oudh 349 (351) [AIR V 24] (DB).

1930 Lah 1027 (1029) [AIR V 17] : 12 Lah 194 (DB).

1927 Mad 278 (280) [A I R V 14] (DB). (Consideration means the whole consideration recited in the document of transfer.)

1927 Cal 766 (767) [AIR V 14] (DB).

†('07) 34 Cal 999 (1013) (DB).

4. 1937 Oudh 349 (351) [AIR V 24] (DB).

†('03) 5 Bom L R 213 (215, 216) (DB).

5. (1864) 1 Suth W R 319 (320) (SB). (Case before T. P. Act.)

1932 Rang 13 (15) [AIR V 19] : 9 Rang 614.

(1882) 51 L J Ch 154 (156) : 20 Ch D 389, Golden v. Gillam; In re Jonnson.

[*See also* 1937 Rang 51 (52) [A I R V 24] (DB). (Property attached in execution — Daughter of judgment-debtor executing pronote for decretal amount and getting sale deeds of released property — Decree-holder subsequently obtaining another decree against same judgment-debtor — Previous sale could not be set aside as fraudulent and collusive.)]

6. 1923 Nag 17 (18) [AIR V 10].

†(1882) 51 L J Ch 154 (156) : 20 Ch D 389, Golden v. Gillam, In re Johnson.

7. (1882) 51 L J Ch 154 (156) : 20 Ch D 389, Golden v. Gillam; In re Johnson.

('13) 36 Mad 29 (31).

8. 1914 P C 137 (139) [AIR V 1] : 37 Mad 227.

(1864) 1 Suth W R 319 (319, 320) (SB). (Case before Transfer of Property Act—A sale by a husband to his wife may be collusive and a fraud on his creditors, notwithstanding the fact that the wife paid a fair price from her own funds.)

('55) 1955 Raj L W 316 (317) : A I R 1955 N U C 2545.

1941 Cal 378 (383) [A I R V 28] : ILR (1941) 1 Cal 536.

1937 Oudh 349 (351) [AIR V 24] (DB).

1936 All 663 (664) [AIR V 23] (DB).

1926 Mad 624 (624) [AIR V 13].

1926 Lah 167 (168) [A I R V 13] : 7 Lah 12 (DB). (Payment of debts takes precedence over a right of maintenance.)

part of the transferee is alone not sufficient if there is no consideration for the transfer.(9) The mere fact that the transferee paid consideration will not be sufficient if he helped the transferor to convert his land into cash with intent to avoid the demands of his creditors.(10)

It is to be noted that the good faith contemplated by the exception is good faith on the part of the *transferee* and not of the transferor,(11) for if the transferor acted in good faith even the first paragraph of the section will not apply, and the second paragraph cannot come into operation unless the transfer is made by the transferor *with intent* to defraud the creditors.(12)

17. Consideration. — Under the English Statutes, 13 Eliz., Chap. 5 and 27 Eliz., Chap. 4, the words "good consideration" were used. But this was interpreted to mean only *valuable* consideration and not a meritorious or gratuitous consideration such as natural love and affection.(1) Under this section also, "consideration" means valuable consideration.(2) Under S. 25 of the Contract Act, an agreement made on account of natural love and affection is not one for "consideration." A transfer in consideration of natural love and affection is not a transfer for "consideration" within the

1919 Cal 773 (775) [AIR V 6] (DB).
1918 Cal 82 (85, 86) [AIR V 5] (DB).
('08) 11 Oudh Cas 197 (204) (DB).
† ('07) 34 Cal 999 (1013) (DB).
('03) 5 Bom L R 213 (215) (DB).
† ('01) 1901 Pun Re No. 6, p. 18 (25, 26). (This was so even under 13 Eliz., Chap. 5.)
('87) 11 Bom 666 (676) (DB).
(1869) 38 L J Ch 543 (545): L R 8 E Q 46, Bulmer v. Hunter.
(1860) 15 E R 251 (257): 14 Moo P C 121 (136), Corlett v. Radcliffe. (A deed of transfer is void against creditor when the debtor is in a state of insolvency, or the effect of the deed is to leave the debtor without the means of paying his present debts.)
(1859) 45 E R 233 (235): 4 De G & J 600, Thompson v. Webster.
(1856) 26 L J Ch 179 (181): 3 K & J 90, Holmes v. Penny.
(1852) 22 L J Ch 1066 (1068): 10 Hare 81, Harman v. Richards.
('13) 36 Mad 29 (31).
('10) 13 Oudh Cas 265 (276, 281) (DB).
(1776) 98 E R 1171 (1172), Cowp 432, Cadogan v. Kennett.
(1601) 76 E R 809 (814): 3 Co Rep 86, Twyne's Case.
[*See also* ('87) 1887 All W N 52 (53). (Because the transaction has the effect of delaying one particular creditor, it cannot be said that the transaction was entered into with the intention of defeating or delaying creditors.)
('69) 5 Mad H C R 368 (371) (DB).
(1853) 65 E R 98 (112): 1 Sin & G 228 (256) Colombine v. Penhall. (Marriage as a part of scheme to defeat creditors is not in good faith.)
(1926) 95 L J P 83 (85): 1926 P 93, Jagger v. Jagger. (Do.)
(1861) 70 E R 807 (811): 1 J & H 410, Acraman v. Corbett. (Do.)]

9. (1601) 76 E R 809 (815): 1 Sm L C 1, Twyne's case.

10. 1934 Mad 587 (592) [AIR V 21].

1932 Rang 13 (14) [AIR V 19]: 9 Rang 614 (DB).
1930 Mad 665 (667, 668) [AIR V 17].
1926 Nag 494 (494) [AIR V 13].
('07) 34 Cal 999 (1012) (DB).
('93) 16 Mad 397 (399) (DB).
('11) 10 Ind Cas 922 (924) (Low Bur).
† ('10) 33 Mad 334 (336, 339) (DB).
[*See also* ('13) 18 Ind Cas 332 (333) (DB) (Mad).]

11. 1951 Trav-Co 55 (61) [AIR V 38 C 20].
1928 All 29 (32) [A I R V 15] (DB). (Co-sharer effecting fraudulent partition — *Bona fide* purchaser for value of share completely protected.)
('96) 66 L J Q B 111 (115): 75 L T 166: 3 Manson 226, In re Tetley; Ex parte Jeffrey.

12. 1938 Sind 215 (216) [A I R V 25]: I L R (1939) Kar 136 (DB).

Section 53 — Note 17

1. (1843) 49 E R 1006 (1010, 1011): 13 L J Ch 186, Richardson v. Horton. (Marriage is a valuable consideration.)
(1817) 56 E R 386 (393): 2 Madd 410, Copies v. Middleton.
(1786) 29 E R 1165 (1166): 1 Cox 277, Earl of Salisbury v. Cecil.
(1758) 28 E R 647 (648): 1 Eden 166, Partridge v. Gopp.
(1743) 26 E R 758 (759): 2 Atk 600, Taylor v. Jones. (Trust left to a husband.)
✠ (1601) 76 E R 809 (822, 823): 1 Sm L C 1, Twyne's case.
(1926) 95 L J P 83 (85): 1926 P 93, Jagger v. Jagger. (Do.)
† (1877) 46 L J Ch 729 (734): 6 Ch D 29 (39), Kevan v. Crawford. (Do.)
[*See also* (1867) 15 W R Eng 919 (920), Smith v. Cherrill.
(1775) 96 E R 599 (600): 2 Wm Bl 1019, Goodright D. Humphreys v. Moses.
(1790) 30 E R 109 (111): 2 Cox 235 (240), Dundas v. Dutens. (Marriage is a valuable consideration.)]

2. (1900) 13 C P L R 180 (183).

meaning of this section.(3) A *time-barred debt*, under the said section of the Contract Act, is also not a "consideration." A transfer, therefore, in discharge of a time-barred debt cannot be a transfer for consideration within the meaning of this section. A contrary view has, however, been taken in the undermentioned case.(4) It is submitted that it is not correct.

A trust deed executed to pay the creditors and to avoid the Court of Wards taking over the estate is not a transfer for consideration, though it may be valid if there is no intention to defeat and delay the creditors.(5)

In England it has been held that the existence of an antecedent debt is not a valuable consideration for the assignment by a debtor to his creditor unless, coupled therewith, there is evidence of an express or implied request on the part of the grantor, acceded to by the grantee, to forbear to sue or some other advantage which will be regarded a valuable consideration.(6) But the law will presume, in the absence of any evidence, from the fact of the assignment itself, a promise by the assignee of a forbearance to sue.(7)

It has been held that marriage is in law a consideration of the highest value and is therefore sufficient to support an ante-nuptial conveyance of property.(8).

18. **Transfer for dower.** — A transfer for dower is a transfer for *consideration.*(1) The general rule of Muhammadan law is that a man can fix the dower at any amount he pleases even though it is far in excess of his means.(2)

A transfer in consideration of a dower debt due is a transfer in favour of a *creditor* and is merely a *preference* of one creditor over others.(3) Such a transfer does not fall within this section. See Note 20.

19. **Good faith.** — A transferee cannot be said to have acted in good faith if he has participated in the fraudulent intention of the transferor to defeat or delay his creditors.(1) Where the transferee has *notice* of the fraudulent intention of the

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3. *See* (1900) 13 C P L R 180 (183).

4. 1930 Sind 284 (286) [AIR V 17] (DB).

5. 1923 Oudh 80 (86, 87) [A I R V 10] : 25 Oudh Cas 291 (DB). (There is no necessity to consult the creditors before the trust-deed is executed.)

6. †(1912) 81 L J K B 334 (338), Glegg v. Bromley. (Reversed on another point in (1912) 81 L J K B 1081.)
(1912) 81 L J K B 1081 (1085) : (1912) 3 K B 474, Glegg v. Bromley.
[But see (1879) 27 W R (Eng) 744 (744) : 12 Ch D 314, Ex parte Games, In re Bamford. (Alton v. Harrison, (1869) 17 W R (Eng) 1034, Followed; (1879) 27 W R (Eng) 492, Reversed.)]

7. (1912) 81 L J K B 1081 (1085) : (1912) 3 K B 474, Glegg v. Bromley.

8. 1960 Mad 536 (537) [AIR V 47 C 178].

Section 53 — Note 18

1. 1952 Nag 106 (110) [AIR V 39] : I L R (1953) Nag 684.
('49) 28 Pat 97 (101).
1927 Oudh 176 (176) [AIR V 14] (DB). (Provided wife had no knowledge of husband's prior debt.)

2. *See* Mulla, Principles of Mahomedan Law, 6th Edn. 1919. p. 174 and F. B. Tyabji, Mahomedan Law, 3rd Edn., 1940, p. 174.
('94) 21 Cal 135 (139) : 20 Ind App 144 (PC). (But the Courts of Justice are armed with large powers over that class of contract.)
[*See* (1865) 10 MIA 252 (276, 277) : 2 Suth W R 55 (PC).]

3. ('49) 28 Pat 97 (101) (DB).
†1941 Oudh 457 (462, 463) [AIR V 28] : 16 Luck 832 (DB).

Section 53 — Note 19

1. 1936 Lah 286 (289, 290) [A I R V 23] (DB). (Donee party to fraud perpetrated by donor—Gift held voidable at the instance of creditors.)
1935 Lah 404 (405) [AIR V 22] : 16 Lah 680 (DB).
1934 Lah 318 (319) [AIR V 21]. (It is the knowledge and intention of the transferee which is the determining factor as to the validity of the transfer.)
1930 Lah 1027 (1028) [AIR V 17] : 12 Lah 194 (DB). (Even though consideration is shown to have passed in full.)
1929 Lah 1 (4, 5) [AIR V 16] : 10 Lah 447 (DB). (In order to avoid a transfer on the ground of fraud it must be established that the transferee had same fraudulent intention as the transferor.)
†1929 Lah 409 (413) [AIR V 16] (DB). (Removing property from creditors for debtor's benefit must

transferor, that fact will be an element in arriving at a finding on the question of good faith on his part.(2) But the mere fact that the transferee has some reason to suspect that there may be other creditors of the transferor(3) or even the fact that the transferee may have knowledge that the transferor is in financial embarrassment(3a) or that the transaction might defeat or delay some creditors of the transferor (so long as he does not share in the intention of the transferor),(4) does not necessarily import bad faith. Where the transferee has paid consideration, that fact, though it is not necessarily conclusive of good faith,(5) will give rise to a presumption of good faith.(6)

be proved even where transferee knows debtor's intention and property is not worth more than his debt.)

1927 Mad 278 (279) [AIR V 14] (DB).

1926 Nag 293 (296) [AIR V 13]. (An intention to defeat the creditors may well exist on the part of the vendor, yet the sale will be valid unless the vendee was also a party to the fraud. 27 Bom 322 and 20 Mad 465 followed.; 22 Bom 255, distinguished.)

1926 Lah 25 (26) [AIR V 13] (DB). (In each case it is a question of fact as to whether or not the transferee has bought in good faith and without the knowledge of the transferor's object in selling.)

1924 Lah 707 (709) [AIR V 11] (DB). (Father selling property to son — Consideration proved as passed —Son's good faith proved — Sale not void.)

1923 Lah 423 (424) [AIR V 10]: 4 Lah 211 (DB).

1923 Nag 17 (18) [AIR V 10].

1923 Nag 103 (103) [AIR V 10]. (In order to avoid a transfer under this section, so far as the transferee is concerned it must be found that he participated in the intention of the transferor to defeat or delay the creditors.)

1919 Cal 773 (776) [AIR V 6] (DB). (Mere knowledge on the part of a purchaser that a sale may defeat or delay the creditors is not sufficient to negative the *bona fides* of a purchaser.)

1914 Lah 356 (358) [AIR V 1] (DB). (Transferee's participation in fraudulent intention not proved —Transfer upheld.)

('37) 1937 Mad W N 1162 (1162) (DB). (It is not sufficient to show want of good faith on the part of the transferor alone; the knowledge and intention of the transferee are the determining factors.)

('09) 31 All 170 (172) (DB).

('01) 1901 Pun Re No. 6 p. 18 (25).

✠(1900) 13 C P L R 180 (183, 184). (In order to constitute breach of good faith there must be some active participation in the fraud, some collusion between the transferor and the transferee whereby an unfair advantage is to accrue to either of them.)

Note. — As seen in Note 2a, where the transferee has *agreed* with the transferor as regards the fraudulent purpose, the transfer would be void under S. 6 (h) of this Act and S. 23, Contract Act —It is only where the want of good faith on the transferee's part does not amount to his having *agreed* with the transferor as to the defrauding of the creditors that this section will apply.

2. 1960 Mad 536 (537) [AIR V 47 C 178]. (Marriage settlement transferring all property of indebted settlor — Grantee charged with notice of fraud.)

1923 Mad 558 (561) [A I R V 10]: 46 Mad 478 (DB). (Purchaser failing to inquire from person who could have given him best information as to defect in the title is not a *bona fido* purchaser.)

3. 1937 All 39 (41) [AIR V 24]: ILR (1937) All 153 (DB).

3a. 1952 Sau 47 (48) [AIR V 39] (DB). (Mortgage for pre-existing debt —Creditor aware of precarious financial position of debtor at time of mortgage —Plea of good faith can stand.)

1947 Cal 154 (156) [AIR V 34 C 45] (DB).

[*See also* 1958 Mys 35 (38) [A I R V 45 C 11]: ILR (1957) Mys 147 (DB). (Transferor in insolvent circumstances and under pressure from his creditors — Transferee having knowledge of these facts purchasing entire stock— Neither substantial contemporaneous payment made nor any promise to make such payment — Transaction cannot be held to be one entered in good faith.)]

[See however 1955 Pat 458 (467) [A I R V 42 C 122]: 34 Pat 440 (DB). (Facts indicating transferee's knowledge of debts exceeding transferor's assets —Transferee cannot be said to have acted in good faith.)

4. 1933 Rang 169 (172) [AIR V 20].

1932 Rang 13 (14) [AIR V 19]: 9 Rang 614 (DB). (Citing 24 Cal 825.)

1918 Cal 82 (85) [AIR V 5] (DB). (Payment of full consideration does not validate transfer if the transferee has full knowledge of the intention of seller to defraud creditors.)

✠('97) 24 Cal 825 (828) (DB).

('74) 22 Suth W R 473 (474) (DB). (Purchaser is not bound to see to the application of the money.)

('23) 71 Ind Cas 20 (23) (Pesh.)

5. 1927 Nag 166 (167) [AIR V 14]. (Purchaser must have acted in good faith also.)

1921 Nag 103(104) [AIR V 8]: 17 Nag LR 69(DB).

1918 Cal 82 (85) [AIR V 5] (DB).

✠('07) 34 Cal 999 (1008, 1012, 1013) (DB). (Good faith as well as consideration are essential conditions of the validity of transfer. 24 Cal 825 relied on.)

('97) 24 Cal 825 (828) (DB).

6. 1952 Sau 47 (48) [AIR V 39] (DB). (Mortgage for pre-existing debt almost equal to the value of the property—Creditor aware of precarious

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See also the undermentioned case.(7) See also Note 16.

20. Preference of one creditor over others. — Under the law relating to insolvency, a preference by the debtor of one creditor over others, is, under certain circumstances, deemed fraudulent and void as against the Official Receiver or Official Assignee.(1) Apart from the law of insolvency, however, a preference by a debtor of one creditor over others, is not *ipso facto* deemed fraudulent.(1a) The reason of the rule is stated by Palles, C.B., in *In re Moroney*,(2) as follows :

> "The right of the creditors taken as a whole is that all the property of the debtor should be applied in payment of demands of them or some of them, without any portion of it being parted with without consideration or reserved or retained by the debtor to their prejudice. It follows from this, that security given by a debtor to one creditor upon a portion of or upon all his property, although the effect of it or even the interest of the debtor in making it, may be to defeat an expected execution of another creditor, is not a fraud within the statute, because notwithstanding such an act the entire property remains available for the creditors or some or one of them, and as the statute gives no right to rateable distribution, the right of the creditors by such act is not invaded or affected."

These observations were approved by their Lordships of the Privy Council in *Musahar Sahu* v. *Hakim Lal*(3) :

> "As matter of law" said Lord Wrenbury in delivering the judgment of the Board "their Lordships take it to be clear that in a case in which no consideration of the law of bankruptcy applies there is nothing to prevent a debtor paying one creditor in full and leaving other unpaid although the result may be that the rest of his assets will be insufficient to provide for the payment of the rest of his debts;"

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financial position of debtor—Plea of good faith can stand.)

1928 Pat 199 (201) [AIR V 15] (DB). (Full consideration not paid—No ground for holding deed fraudulent.)

†(1900) 13 C P L R 180 (183). (If a transfer is for valuable consideration the burden of proving that it was not made *bona fide* is upon those who seek to set aside the deed.)

[*See also* 1958 S C 1 (6) [AIR V 45 C 1] : 1958 S C R 257. (An application by the Official Receiver for the annulment of a transfer under S. 53, Insolvency Act can be allowed on proof of either that there was no consideration or that the consideration was so inadequate as to raise the presumption of want of good faith)]

7. 1951 Trav Co 55 (62) [AIR V 38 C 20] : 1950 T C L R 707 (DB). (Whether transfer is one made in good faith must depend upon its own circumstances and is always in such cases a question of fact.)

Section 53 — Note 20

1. See Section 54 of the Provincial Insolvency Act, 1920; S. 56 of the Presidency Towns Insolvency Act; S. 44 of the English Bankruptcy Act, 1914.

1963 S C 1150 (1156) [AIR V 50 C 174] : 1963 Supp 2 S C R 55.

(1963) 2 Andh L T 224 (227).

('55) 1955. 2 Mad L Jour 380 (381) : AIR 1955 N U C 5365.

1940 Pat 683 (690) [AIR V 27] : 19 Pat 715.

1933 Mad 653 (654, 655) [AIR V 20]. (Provincial Insolvency Act, S. 54 — Transfer of whole of property to one creditor not only to secure past debts but also fresh loans — Transfer is voidable.)

1a. 1963 S C 1150 (1156) [AIR V 50 C 174] : 1963 Supp 2 S C R 55.

1944 Nag 44 (52) [AIR V 31] : ILR (1944) Nag 342 (FB). (In order to attract S. 53 when the transferee is the creditor of the transferor, it is not enough that there should be a real transfer and that it should be intended to defeat or delay the creditors, nor it is enough that both transferor and transferee share that intention. It must be shown in addition that the real object of the transfer is to place the property beyond the reach of the creditors for the benefit of the debtor and is not for the payment of his debts or for the protection of his interests.)

1967 Ker 171 (172) [AIR V 54 C 69]. (Transfer cannot be annulled unless it is established that it was intended to defeat or delay creditors of transferor.)

1966 Andh Pra 157 (158) [AIR V 53 C 52] (DB).

(1964) 1 An W R 79 (81).

(1963) 2 Andh L T 224 (227).

(1960) 73 Mad L W 195 (197).

†(1912) 81 L J K B 1081 (1087) : (1912) 3 K B 474, Glegg v. Bromley.

(1912) 81 L J K B 334 (338), Glegg v. Bromley. (Reversed on another point in (1912) 81 L J K B 1081.)

('09) 31 All 170 (172) (DB).

2. (1887) 36 W R (Eng) Dig 12 : L R 21 Ir 27. (Cited in AIR 1915 P C 115.)

3. 1915 P C 115 (115, 116) [AIR V 2] : 43 Ind App 104 : 43 Cal 521.

and later on

"The transfer which defeats or delays creditors is not an instrument which prefers one creditor to another but an instrument which removes property from the creditors to the benefit of the debtor. The debtor must not retain a benefit for himself. He may pay one creditor and leave another unpaid : *Middleton* v. *Pollock*.(4) So soon as it is found that the transfer here impeached was made for adequate consideration in satisfaction of genuine debts, and without reservation of any benefit to the debtor it follows that no ground for impeaching it lies in the fact that the plaintiff who also was a creditor was a loser by payment being made to this preferred creditor, there being in the case no question of bankruptcy."

It follows from the principles stated above that—

(1) The mere fact that one creditor is preferred to another is not of itself, in the absence of any reservation of any benefit to the debtor, sufficient to render the transaction voidable,(5) and this would be so even if the

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4. (1876) 45 L J Ch 293 (294) ; 2 Ch D 104.

5. 1929 P C 279 (281) [AIR V 16] : 56 Ind App 379 : 7 Rang 624.

1944 Nag 44 (52) [AIR V 31] : ILR (1944) Nag 342 (FB). (When the transferee is not a mere volunteer and has an interest to protect, as for instance, where he is a creditor of the transferor or a member of a joint family entitled to a share of the property, it must be shown that the real object of the transfer is to place the property beyond the reach of the creditors for the benefit of the debtor, and is not for the payment of his debts, or for the protection of his interests.)

1966 Mad 247 (252) [AIR V 53 C 75].

1961 Mad 403 (404) [AIR V 48 C 129].

(1960) 73 Mad L W 195 (197).

1960 Punj 417 (418) [AIR V 47 C 149] (DB).

1958 Mad 580 (582) [AIR V 45 C 203].

1948 Nag 110 (115) [AIR V 35 C 40] : ILR (1947) Nag 510 (DB). (A sale effected in order to pay off one creditor in preference to others, is not invalid.)

('44) 1944 Mar L R (Civ) 38 (DB). (Security given by a debtor to one creditor upon a portion of or upon all his property, although the effect of it or even the intent of the debtor in making it may be to defeat an expected execution of another creditor is not a fraud.)

1943 Nag 129 (136) [AIR V 30] : ILR (1943) Nag 42 (DB).

1941 Cal 378 (382) [AIR V 28]: ILR (1941) 1 Cal 536. (But where part of consideration for such transfer is proved to be fictitious and is put in the bond only to protect the transferor's property from his other creditors, the transfer is not a mere preference of one creditor over another but is one made to defeat and delay creditors within Section 53.)

1939 Oudh 230 (231) [AIR V 26] : 14 Luck 621 (DB).

(1940) 42 Punj L R 385 (391) (DB). (Compromise with one of the creditors surrendering portion of property under pressure.)

(1940) 42 Punj L R 119 (120).

1939 Sind 97 (99) [AIR V 26] : ILR (1939) Kar 269 (DB). (Section applies to transfers where the transferor prefers himself to his creditors.)

1938 Sind 215 (216) [AIR V 25] : ILR (1939) Kar 136 (DB). (AIR 1915 P C 115, Followed.)

1929 Sind 94 (97) [AIR V 16]. (Do.)

1933 Pat 281 (283) [AIR V 20] : 12 Pat 297 (DB). (Do.)

1938 Bom 289 (290, 291) [AIR V 25] : ILR (1938) Bom 445. (Do.)

1937 Pat 609 (611) [AIR V 24].

1938 Oudh 44 (44, 45) [AIR V 25] : 13 Luck 655 (DB). (Transfer in favour of wife for dower debt is valid.)

1938 Nag 249 (250) [AIR V 25] : ILR (1940) Nag 316. (Such transaction can be challenged only in insolvency proceedings.)

1937 Lah 220 (222) [AIR V 24] (DB).

1937 Nag 9 (11) [AIR V 24].

1937 Nag 1 (3) [AIR V 24]: ILR (1937) Nag 291 (DB). (Transfer by a Mohamedan to his wife for dower — Wife is his creditor just as others.)

1937 Rang 531 (533) [AIR V 24]. (The proper way to deal with such cases is to file a suit for administration.)

1937 Rang 471 (471) [AIR V 24].

1935 Mad 250 (251) [AIR V 22]. (AIR 1915 P C 115, Relied on.)

1934 Mad 294 (298) [AIR V 21].

1934 Lah 318 (319) [AIR V 21] (DB).

1934 Lah 705 (707) [AIR V 21]. (A transfer of property by a Mahomedan husband to his wife in lieu of a dower debt.)

1933 Rang 162 (164) [AIR V 20].

†1932 Mad 182 (184) [AIR V 19] (DB). (But the principle does not apply where the whole of the consideration of the transaction is not the debt of the preferred creditor — In such a case the whole transaction is void.)

1932 Oudh 40 (42) [AIR V 19] : 7 Luck 411 (DB). (Debts contracted by a husband must take precedence over a wife's claim for maintenance.)

†1932 Nag 33 (34) [AIR V 19] : 27 Nag L R 382.

1930 Rang 265 (268) [AIR V 17] : 8 Rang 223 (DB). (Assignment by debtor of his decree to one creditor in preference to another is not invalid even if that creditor is a party to the intention.)

1930 Lah 1027 (1028) [AIR V 17] : 12 Lah 194 (DB). (Even if the creditor is his relation.)

†1930 Oudh 93 (94, 95) [AIR V 17] : 5 Luck 625 (DB). (AIR 1915 P C 115, Followed. Even if the preference is given in anticipation of an attachment.)

debtor did this on set purpose.(6) A debtor, for all that is contained in

1929 Oudh 520 (521) [AIR V 16] : 4 Luck 343 (DB). (Transfer in favour of wife for dower debt is valid.)
1927 Oudh 617 (618) [AIR V 14]. (Do.)
1925 Oudh 267 (269) [AIR V 12]. (Do.)
1937 All 39 (41) [AIR V 24] : ILR (1937) All 153 (DB). (Do.)
1936 All 803 (805) [AIR V 23] (DB). (Do.)
1936 All 600 (603, 607) [AIR V 23] (DB). (Do.)
1929 Nag 318 (319) [AIR V 16].
1929 Lah 409 (413) [AIR V 16] (DB).
1929 Nag 110 (111) [AIR V 16].
1928 Mad 860 (864) [AIR V 15] (DB). (AIR 1915 P C 115, Followed.)
1928 Mad 793 (793, 794) [AIR V 15] (DB). (However suspicious a transaction may be there must be evidence on which the fraudulent intention must be made out.)
1927 Nag 363 (364) [AIR V 14]. (Especially where the price fetched is not alleged or proved to be grossly inadequate.)
1927 Nag 157 (157) [AIR V 14]. (Mere undue preference of a creditor does not necessarily fall within S. 53—To determine whether a transaction is fraudulent or not the crucial test is the intention of parties.)
1927 Nag 205 (205) [AIR V 14]. (Principle applied to a sale of moveable property.)
1927 Mad 684 (685) [AIR V 14] : 50 Mad 776 (DB). (Assumed.)
1927 Mad 278 (279) [AIR V 14] (DB).
1927 Mad 1144 (1144) [AIR V 14] (DB).
1927 Rang 168 (168) [AIR V 14].
1927 Cal 836 (839, 840) [AIR V 14] : 54 Cal 687. (Mortgage to one creditor, on security of entire property held not fraudulent.)
1922 Mad 447 (449) [AIR V 9] : 45 Mad 90 (DB).
1921 Pat 395 (396) [AIR V 8] (DB). (In this case transferee was wife.)
1919 Cal 858 (859) [AIR V 6] (DB). (Mortgage in favour of one of the creditors.)
1918 Nag 184 (185) [AIR V 5]. (AIR 1915 P C 115, Followed.)
†1918 Oudh 5 (6) [AIR V 5] : 21 Oudh Cas 97.
1917 Mad 886 (886) [AIR V 4] (DB).
1916 Mad 578 (578) [AIR V 3] (DB). (A transfer by a debtor for a genuine debt of a part only of his property is not voidable under S. 53.)
1914 Oudh 392 (396) [A I R V 1] : 17 Oudh Cas 173.
('08) 1908 Pun Re No. 81 p. 381 (387) (DB).
('07) 17 Mad L Jour 11 (13) (DB).
('07) 34 Cal 999 (1015, 1017) (DB).
†('04) 28 Bom 639 (642).
('03) 5 Bom L R 142 (144) (DB).
('02-03) 2 Upp Bur Rul Civ Pro 15 (17).
('01) 1901 All W N 64 (65) (DB). (Transfer in favour of wife for dower debt is valid.)
†(1900) 13 C P L R 180 (185, 186).
(1900) 25 Bom 202 (214) (DB).
(1900) 23 Mad 184 (189) (DB). (But where a document given by way of such security goes further and secures debts not due, the effect is to delay or to defeat the creditors.)
('87) 11 Bom 666 (674) (DB). (The fact of one creditor being the brother of the debtor would not make the preference impossible.)
('86) 8 All 178 (180) (DB). (Do.)
('70) 2 N W P H C R 224 (225) (DB).
('69) 1 N W P H C R 21 (22) (DB).
('39) 43 Cal W N 1136 (1138) (DB). (A I R 1915 P C 115, relied on.)
('37) 1937-2 Mad L Jour 865 (867) (DB).
('37) 168 Ind Cas 695 (695) (Lah).
('36) 162 Ind Cas 749 (750) (Nag).
('13) 20 Ind Cas 355 (357) (DB) (Lah). (Question arose as regards decree passed on award in favour of one creditor.)
('13) 36 Mad 29 (30).
('13) 20 Ind Cas 349 (350) (DB) (Low Bur).
('11) 9 Ind Cas 1037 (1038) (DB) (Lah).
('10) 5 Ind Cas 179 (180) (All).
('10) 33 Mad 334 (337) (DB). (But the burden of proving this where the sale appears otherwise to be voidable is on the defendant transferee.)
(1925) 95 L J Ch 140 (143, 144) : 1925 Ch 853 (860) : 1926 B & C R 29 : 134 L T 241, In re Lloyd's Furniture Palace Ltd.; Evans v. The Company.
(1869) 38 L J Ch 669 (671) : 4 Ch 622 : 21 L T 282 : 17 W R (Eng) 1034, Alton v. Harrison.
(1852) 68 E R 826 (832) : 10 Hare 30 : 22 L J Ch 289 : 17 Jur 30 : 20 L T (O S) 303 : 90 R R 263, Smith v. Hurst.
(1793) 101 E R 236 (239) : 5 Term R 420 : 2 Anst 381, Estwick v. Caillaud.
(1793) 101 E R 132 (134) : 5 Term R 225, Holbird v. Anderson.
(1699) 24 E R 51 (51) : 1 Eq Cas Abr 149 : 2 Freeman 236, Dewkner v. Freeman.

[*See also* 1937 Nag 400 (401) [A I R V 24] : ILR (1937) Nag 452, (Transfer by debtor to one creditor for adequate consideration — Whole consideration spent in satisfaction of debtor's dues without leaving anything for his benefit —Transfer is not fraudulent.)

1927 Nag 166 (167) [AIR V 14].

6. 1916 P C 238 (240) [A I R V 3] : 44 Ind App 172 : 44 Cal 662.
(1960) 73 Mad L W 195 (197). (Transfer made to avoid an impending execution by another creditor.)
1947 Cal 154 (155) [AIR V 34 C 45] (DB).
1943 Nag 129 (136) [AIR V 30] : ILR (1943) Nag 42 (DB.)
1941 Oudh 457 (463) [A I R V 28] : 16 Luck 832 (DB). (A Mahomedan gifting property to wife in lieu of her dower debt.)
1938 Lah 156 (158) [AIR V 25] (DB). (The circumstance that the debtor's action was prompted by revenge against the creditor who got him imprisoned was irrelevant.)
1924 Mad 450 (453) [AIR V 11] (DB).
(1861) 158 E R 333 (334) : 6 H & N 807 : 30 L J Ex 355 : 123 R R 845, Dorvill v. Terry.
(1925) 95 L J Ch 140 (143, 144) : 1925 Ch 853 : 1926 B & C R 29 : 134 L T 241, In re Lloyd's

this section, may pay his debts in any order he pleases and prefer any creditor he chooses.(7)

(2) The question of *good faith* does not ordinarily arise in the case of the preferred creditor. A creditor is entitled to safeguard his rights by obtaining a transfer from his debtor even *if he knew* that the necessary result would be that other creditors would be defeated.(8)

(3) But where the transaction, in addition to its being a preference of one creditor to another is intended to *benefit the debtor* in some way, it would be fraudulent.(9) Thus, a transfer even to a creditor, has been held to be a fraudulent one under this section where the document, beyond merely preferring a creditor, goes further and secures debts *not due*(10) or states a consideration larger than the debt due to the creditor on the understanding that the rest of the consideration should be for the benefit of the debtor and that the transfer should be used as a shield against the other creditors.(11)

Furniture Palace Ltd.; Evans v. The Company.

7. 1916 P C 238 (240) [A I R V 3] : 44 Cal 662 : 44 Ind App 172.

† 1944 Nag 44 (52) [AIR V 31] : ILR (1944) Nag 342 (FB).

(1960) 73 Mad L W 195 (197).

('39) 1939 Bom 508 (512) [AIR V 26].

1938 Oudh 44 (45) [AIR V 25] : 13 Luck 655 (DB). (Wife as a creditor for dower debt was preferred.)

1930 Lah 1027 (1028) [A I R V 17] : 12 Lah 194. (DB).

(1925) 95 L J Ch 140 (143) ; 1925 Ch 853 (861) : 1926 B & C R 29 : 134 L T 241, In re Lloyd's Furniture Palace Ltd.; Evans v. The Company. [*See also* 1929 P C 279 (281) [A I R V 16] : 56 Ind App 379 : 7 Rang 624. (AIR 1915 P C 115, followed.)]

8. ✠1943 Nag 129 (136) [A I R V 30] : ILR (1943) Nag 42 (DB).

1937 Rang 471 (471) [AIR V 24].

1934 Lah 161 (162) [AIR V 21].

1934 Mad 587 (592) [AIR V 21].

✠1930 Mad 665 (667, 668) [AIR V 17].

1927 Mad 278 (279, 280) [AIR V 14] (DB).

1914 Low Bur 180 (182) [A I R V 1]. (In his case a proof of valuable consideration is sufficient.)

9. 1919 P C 6 (9) [AIR V 6] : 15 Nag L R 68.

† 1944 Nag 44 (52) [AIR V 31] : ILR (1944) Nag 342 (FB). (Partition between members of joint family—A, a member, was assigned properties which A's creditors would not be able to touch and which A would be able to keep for himself—Properties against which A's creditor could proceed before partition given to B — Held, A retained a benefit for himself and therefore partition was liable to be set aside at the instance of A's creditors).

('56) (1956) 2 All E R 537 (544).

✠ 1943 Nag 129 (131, 136) [A I R V 30] : ILR (1943) Nag 45 (DB). (Sale to one creditor with a clause of reconveyance after other creditors settled their claims—Arrangement is not illegal but might be attacked under S. 53, because it could be argued that the debtor had retained a benefit for himself.)

† 1939 Bom 508 (512, 513) [AIR V 26]. (In such a case assignment should not be upheld even to the extent of amount which was actually due to creditor.)

1939 Mad 745 (749) [AIR V 26] (DB).

1929 Lah 409 (413) [AIR V 16] (DB).

1928 Mad 793 (793, 794) [A I R V 15] (DB). (Fraud must be distinctly alleged and proved by the creditors.)

1924 Nag 318 (319) [AIR V 11].

('07) 34 Cal 999 (1018) (DB).

(1923) 92 L J Ch 400 (407, 408) : (1933) 2 Ch 1, In Fasey: Ex parte Trustees.

(1876) 45 L J Q B 498 (499) : 1 C P D 265, Blacklock v. Dobie.

(1878) 45 L J Ch 293 (294, 295) : 2 Ch D 104, Middleton v. Pollock; Ex parte Elliott.

(1869) 38 L J Ch 669 (671) : 4 Ch 692, Alton v. Harrison.

(1852) 68 E R 826 (832) : 10 Hare 30, Smith v. Hurst. (Creditor becomes a party to the fraud of the debtor, and being a party to this fraud he cannot be in any better position than the debtor who has perpetrated it.)

('13) 20 Ind Cas 349 (350) (DB). (Low Bur).

('10) 5 Low Bur Rul 195.

(1601) 76 E R 809 (814) : 3 Coke Rep 86, Twyne's case.

10. (1960) 73 Mad L W 195 (197). (Fictitious debt.)

1941 Cal 378 (382) [AIR V 28] : ILR (1941) 1 Cal 526.

(1900) 23 Mad 184 (189) (DB). (Inclusion of such debts in a document which would otherwise not be within the section is prima facie evidence of an intention to defeat or delay the creditors.)

11 (1960) 73 Mad L W 195 (197). (So also sale of land more than is necessary to satisfy the debt enables the debtor to keep property out of reach of creditors.)

See also the undermentioned case.(11a)

The principle that a transfer to a creditor in preference over another or others is not, unless it secures a benefit to the debtor, bad, applies only where the creditor takes the transfer for his *pre-existing* debts. It will not apply to a case where the transferee becomes a creditor for the first time by advancing money to the debtor *at the time* of the transfer.(12)

21. Transferee from a transferee. — Where the first transferee is a *bona fide* transferee for consideration, he gets a good title and even a fraudulent transferee from such transferee will be protected.(1) A *bona fide* transferee from a fraudulent transferee would also be protected.(2) Where, however, fictitious mortgage was executed by *A* in favour of *B* in order to defeat the creditors of *A* and *B* assigned his rights under the mortgage in part satisfaction of her dower debt, to his wife *C*, who had no knowledge of the fictitious nature of the mortgage, it was held that as *B* acquired no interest at all by the mortgage in his favour the last paragraph of the old S. 53 would not help *C*.(3)

22. Questions of intent and good faith are questions of fact.—The question with what intent a document was executed(1) or whether the transferee acted in good faith and without knowledge of the transferor's fraudulent intention(2) is

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1932 Mad 182 (184) [AIR V 19] (DB). (In such cases whole document must be set aside.)
1927 Mad 278 (279) [AIR V 14] (DB).
('10) 5 Low Bur Rul 195 (197).

11a. 1933 Rang 191 (192) [AIR V 20]. (Absence of cash or any proved prior consideration and absence of pressure from transferee — *Prima facie* transfer is voidable.)

12. †1935 Lah 404 (406) [AIR V 22] : 16 Lah 680 (DB).
[*See also* 1933 Mad 653 (654, 655) [AIR V 20]. (Transfer of whole property not merely for existing debts but also fresh loans advanced—Transfer is voidable under S. 54, Provincial Insolvency Act.)]

Section 53 — Note 21

1. *See* (1738) 26 E R 359 (359) : 1 Atk 571, Brandlyn v. Ord.

2. 1940 Lah 198 (199) [AIR V 27].
1938 Lah 73 (75) [AIR V 25] : ILR (1938) Lah 439. (Fraudulent transfer by insolvent in favour of his wife more than two years before his adjudication—B purchasing property in execution of mortgage decree against her — Application by Official Receiver to avoid transfer — Transfer in favour of B stands.)
1936 Lah 286 (289) [AIR V 23] (DB).
1930 All 438 (439, 440) [AIR V 17]. (Person whose claim is defeated is estopped in equity from denying such third person's title.)
1929 Lah 1 (4) [AIR V 16] : 10 Lah 447 (DB).
1928 All 29 (31, 32) [AIR V 15] (DB).
†1923 Mad 558 (560) [AIR V 10] : 46 Mad 478 (DB).
(1864) 1864 Suth W R 225 (225) (DB).
(1916) 85 L J Ch 677 (681) : (1916) 2 Ch 544 : 115 L T 291 : 1916 H B R 147 : 32 T L R 723, Pearce v. Bulteel.
(1891) 60 L J Ch 181 (185) : (1891) 1 Ch 31 (39), Halifax Joint Stock Banking Co. v. Gledhil.
(1805) 127 E R 492 (493) : 1 Bos & P N R 332 : 8 R R 821, Deo v. Martyr.
[*See also* 1924 Mad 67 (69) [AIR V 11] (DB). (Person with voidable title can give good title to the transferee—See S. 8 of the Transfer of Property Act.)]

3. ('08) 30 All 297 (308).

Section 53 — Note 22

1. 1965 Mad 337 (338) [AIR V 52 C 111] : ILR (1965) 1 Mad 691. (Finding on the question is conclusive in second appeal.)
1948 Nag 110 (115) [AIR V 35 C 40] : ILR (1947) Nag 510 (DB). (Finding that sale was not fraudulent and not made to defeat or delay creditors is one of fact and binding in second appeal in absence of any vitiating circumstance.)
1942 Mad 522 (523) [A I R V 29]. (Whether alienation was in fraud of creditors is pure question of fact — Finding is conclusive in second appeal.)
('21) 63 Ind Cas 169 (170) (DB) (Cal). (Do.)
1939 Oudh 230 (231) [AIR V 26] : 14 Luck 621 (DB).
1926 Oudh 501 (502) [AIR V 13].
1920 Lah 24 (25) [AIR V 7].
('07) 30 Mad 6 (9) (DB).
('28) 107 Ind Cas 490 (491) (DB) (Lah).
('11) 9 Ind Cas 1018 (1018) (Lah). (Hence they cannot be disturbed by the High Court on the revision side.)
[*See also* ('89) 18 Bom P J 37 (DB).]

2. 1926 Lah 25 (26) [AIR V 13] (DB).
1924 Lah 707 (709) [AIR V 11] (DB).
†('01) 25 Bom 202 (228) (DB).

generally one of fact, but may be a question of law(3) or a mixed question of law and fact(4) if it involves legal inferences to be drawn from other facts. See also the undermentioned cases.(5)

23. Frame of suit under the section. — A suit under this section is one for a bare *declaration* under S. 42 of the Specific Relief Act, 1877, that the transfer by the debtor is not binding on the creditors. It is not a suit for cancellation of the document under S. 39 of the Specific Relief Act.(1) (See now Ss. 34 and 31 of the Specific Relief Act of 1963). The reason is that the plaintiff is, in such cases, not a party to the document and cannot obtain the *cancellation* of the document which may be good between the parties to it.(2) It was, however, observed *obiter* in the undermentioned Rangoon case(3) that the plaintiff in a suit under this section must ask for the cancellation of the document under S. 39 of the Specific Relief Act. It is submitted that this view is not correct. But even according to the Rangoon High Court where a suit is brought under O. 21, R. 63 of the Code of Civil Procedure, and a transfer by the debtor is attacked as a fraudulent transfer under S. 53 of the Transfer of Property Act, it must be regarded only as a suit for a bare declaration under S. 42 of the Specific Relief Act.(4)

See also the undermentioned cases.(5)

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3. 1939 Sind 97 (98) [AIR V 26] : ILR (1939) Kar 269 (DB).
1938 Sind 215 (216) [AIR V 25] : ILR (1939) Kar 136 (DB). (Whether, for instance, the possession is adverse or not, whether a transfer is made with intent to defeat or delay within the meaning of S. 53, are questions of law.)
('08) 1908 Pun Re No. 81, p. 381 (386) (DB).

4. 1923 Nag 124 (125) [AIR V 10].
[*See also* 1928 Pat 199 (200) [AIR V 15] (DB).]

5. 1944 Nag 44 (52) [AIR V 31] : ILR (1944) Nag 342 (FB). (Where the lower appellate Court holds that a transaction is bogus and at the same time says that it can be set aside under this section. the High Court in second appeal is justified in declining to accept the finding as a proper finding of fact and is empowered to record its own conclusion.)
1943 Nag 129 (131) [AIR V 30] : ILR (1943) Nag 42 (DB). (A finding that a transaction is unreal is inconsistent with a finding that the transaction amounts to a sale with a clause for reconveyance.)
('28) 110 Ind Cas 868 (869) (Nag). (Facts warranting inference of bad faith—No explanation or contradiction by party — Conclusion indicated by the proof must be adopted.)

Section 53 — Note 23

1. 1939 Mad 894 (896) [AIR V 26] : I L R (1940) Mad 73.

2. 1939 Mad 894 (896) [AIR V 26] : I L R (1940) Mad 73.
1930 Rang 27 (29) [AIR V 17] : 7 Rang 477 (DB). (Correctness doubted in AIR 1931 Rang 310.)
[But see 1941 Bom 65 (66) [A I R V 28] (DB). (Assumed that the Court could cancel the document – Case was of moveable property.)]

3. 1931 Rang 310 (311) [AIR V 18]: 9 Rang 367.

4. 1934 Rang 332 (333) [A I R V 21] : 12 Rang 670. (Suit by attaching decree-holder under O. 21, R. 63 — Suit for mere declaration lies — court-fee of Rs. 10 is sufficient — Value for court-fee and jurisdiction would be different.)
1931 Rang 310 (311) [AIR V 18] : 9 Rang 367.

5. 1963 Andh Pra 6 (7) [A I R V 50 C 2] : I L R (1963) Andh Pra 403 (DB). (Execution of money decree against father — Pending execution partition decree passed — Objection by one of the son to attachment of property in his hands allotted by partition allowed — Suit by decree-holder under O. 21, R. 63, Civil P. C. challenging decree under S. 53, T. P. Act is maintainable.)
1962 Madh Pra 363 (364) [AIR V 49 C 103] (DB). (Plaint alleging that transfer was made for purpose of delaying the plaintiff and other creditors and has not the effect of binding the plaintiff — It also containing statement that it is filed on behalf of plaintiff and other creditors — Suit is clearly only under S. 53 even though no mention of the section is made in the plaint.)
1962 Andh Pra 25 (29) [AIR V 49 C 9]. (Decree obtained by creditor against debtor who has created a sham or collusive transaction—Proper remedy for creditor would be to attach property in execution and file a suit for declaration that the transaction is not binding on him if any claim is allowed — He cannot file such suit directly whether by a resort to this section or S. 42, Specific Relief Act—Remedy provided by S. 39 is not also available to him.)
('55) 1955 Raj L W 316 (317). (Creditor relying on alternative pleas namely that sale was made with intent to delay or defeat and also that it was fictitious—He cannot be non-suited merely because he has failed to establish the latter plea.)

24. Suit must be a representative one. — In England a creditor who has not secured a judgment on his debt has to sue on behalf of himself and of all the other creditors of the transferor.(1) But a creditor who has obtained a judgment on his debt may sue on his own behalf and not in a representative character.(2)

In this country there was, in cases arising under the old section, a difference of opinion on the point.(2a) In some cases(3) it was held following the English law, that a creditor should sue only in a representative character. In others, that this was not necessary.(4) In a third class of cases, it was held that a *judgment-creditor* whose attachment has been raised and who is suing under O. 21, R. 63 of the Code of Civil Procedure could bring his suit otherwise than in a representative character.(5) In the undermentioned case(6) Coutts-Trotter, J., expressed the opinion that a judgment-creditor who had not taken out execution could not invoke the provisions of this

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1954 Cal 440 (441) [A I R V 41 C 147] (DB). (A suit in which the plaint does not aver that it is being filed on behalf of the plaintiff and all other creditors of the debtor cannot be regarded as one under this section.)

1953 Mad 545 (548) [A I R V 40 C 206]. (Sale of property to defraud creditors — Fraud not carried out — Sale is not void but voidable by transferor — Transferor cannot recover without getting sale deed set aside upon a mere declaration of his title.)

1926 Pat 404 (407) [AIR V 13] (DB). (Plaint by widow entitled to dower alleging that transfers by the husband were made with intent to defeat her claim and of the other creditors — Suit falls under S. 53 and decree made in the suit has only the effect of declaring that the transfers were fraudulent — It has no effect of creating a charge in favour of the plaintiff widow.)

1918 Mad 225 (228) [A I R V 5] (DB). (Any creditor can avoid under this section a transfer by his debtor but his plaint must allege that the transfer was intended to defraud him and others similarly placed.)

Section 53 — Note 24

1. Halsbury, Laws of England, Vol. 15, p. 89.

2. Halsbury, Laws of England, Vol. 15, p. 89.

2a. *See* 1940 Mad 789 (790) [A I R V 27] : I L R (1940) Mad 808 (DB). (The conflicting cases have been referred to in this case.)

3. † 1932 Bom 498 (504) [A I R V 19] : 56 Bom 595 (DB).

1921 Pat 53 (53) [A I R V 8] : 6 Pat L Jour 48 (DB).

1918 Mad 697 (699) [A I R V 5] (DB). (27 Bom 146 and 31 Mad 206, Followed.)

1914 Low Bur 180 (182) [A I R V 1]. (Objection on this ground must be raised in first Court.)

† ('07) 34 Cal 999 (1006) (DB). (('32) Cal 198 : 32 Ind App 1 (PC), Explained.)

('03) 27 Bom 146 (150) (DB).

('92) 16 Bom 1 (20).

[*See also* 1926 Pat 404 (407) [A I R V 13] (DB). (Plaint by widow entitled to dower alleging that transfers by husband were made with intent to defeat her claim and of other creditors—Suit falls under S. 53.)

1918 Mad 225 (228) [A I R V 5] (DB). (Plaint must allege that transfer was intended to defraud the plaintiff and other creditors similarly placed.)

('12) 1912 Pun Re No. 74 (DB). (Decree-holder suing under O. 21, R. 63 for declaration — Suit must be on behalf of all creditors—Judgment-debtor becoming insolvent—Decree passed declaring rights of all the creditors in the property.)]

4. 1931 Lah 70 (2) (71) [AIR V 18] : 12 Lah 262 (DB). (Right under section is an individual right — But when exercised it enures for the benefit of the general body of creditors. A I R 1926 Mad 66, Foll.)

1928 Rang 1 (3) [A I R V 15] : 5 Rang 588 (DB). (Attachment raised — Creditor suing under O. 21, R. 63 — Action need not be on behalf of other creditors. A I R 1919 Mad 257, Followed.)

1926 Mad 66 (69, 72) [A I R V 13] (DB). (An individual right is conferred upon each creditor by S. 53 of the T. P. Act and the inaction or laches of one creditor cannot deprive the others of their rights. Consequently, the failure by one creditor to file a suit within 6 years under Art. 120 of the Limitation Act does not debar the general body of creditors.)

1920 Nag 80 (81, 83) [A I R V 7] : 16 Nag L R 3. (AIR 1919 Mad 257, Followed.)

1919 Mad 257 (258, 259) [AIR V 6] : 42 Mad 143 (DB).

1917 Mad 519 (522) [A I R V 4] (DB). (But the decree obtained would enure to the benefit of all creditors like himself — Per Seshagiri Ayyar J.)

('08) 11 Oudh Cas 197 (205) (DB).

('96) 18 All 432 (434) (DB).

5. 1959 Andh Pra 280 (284) [A I R V 46 C 85] (DB).

1934 Rang 200 (201) [A I R V 21] (DB). (No reference was made to the present section. A I R 1928 Rang 1, was simply followed.)

1928 Rang 1 (3) [A I R V 15] : 5 Rang 588 (DB). (AIR 1919 Mad 257, Followed.)

6. 1917 Mad 519 (520) [A I R V 4] (DB). (1838) 3 Myl & Cr 407, Followed.)

section at all. In Lahore to which province this Act does not apply it was held that a suit by creditor should be brought in a representative capacity.(7) The view that a suit under O. 21, R. 63 by a judgment-creditor, whose attachment has been raised, need not be in a representative character was followed in the undermentioned case(8) of the Peshawar Court.

The last paragraph of sub-s. (1) now makes it quite clear that a suit by a creditor, whether he is a *judgment-creditor* or not and whether he has or has not applied for execution of decree, to avoid a transfer executed with intent to defeat or delay the creditors shall be brought in a representative capacity, that is to say, in accordance with the procedure prescribed by O. 1, R. 8 of the Code of Civil Procedure.(9)

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7. 1926 Lah 167 (168) [A I R V 13] : 7 Lah 12. (It is not clear from the judgment whether the creditor had obtained a judgment on his debt.)

8. † ('23) 71 Ind Cas 20 (22) (Pesh). (A I R 1919 Mad 257, Followed.)

9. 1963 S C 1150 (1160) [AIR V 50 C 174] : 1963 Supp 2 S C R 55.

1963 Andh Pra 6 (7) [AIR V 50 C 2] : ILR (1963) Andh Pra 403 (DB).

1963 Guj 276 (276) [A I R V 50 C 67]. (Suit to declare partition to be fraud on creditors —Suit when not filed in representative capacity, is not maintainable.)

1963 Ker 356 (357) [AIR V 50 C 86]. (Suit under O. 21, R. 63 Civil P. C.)

1962 Madh-Pra 363 (365) [AIR V 49 C 103] (DB). (Express permission of Court not obtained – Notices under O. 1, R. 8, Civil P.C. not issued—Everybody concerned including Court forgetting about it —These points raised for first time in appeal —Omission could not be condoned under S. 99, Civil P. C at appellate stage but could be remedied by granting permission to plaintiffs and by issuing notice to creditors if nature of suit is not changed.)

1959 Andh-Pra 280 (283) [AIR V 46 C 85] (DB).

(1958) 2 Mad L Jour 540 (543). (Suit under O. 21, R. 63 Civil P. C. on grounds falling under S. 53 T. P. Act.)

('57) 1957 M P L Jour 107 (108). (Basis of suit under O. 21, R. 63 Civil P. C., S. 53, T. P. Act —Suit must be in representative character — Stand taken being sham character of suit — S. 53 does not apply.)

1955 Madh-Bha 159 (160) [AIR V 42 C 49] : ILR (1955) Madh-Bha 297 (DB). (But this requirement could not apply if his suit is based on the allegation that the transaction is sham and colourable and the creditor decree-holder is entitled to bring his suit under O. 21, R. 63 on that allegation.)

1954 Cal 440 (441) [A I R V 41 C 147] (DB). (A suit in which the plaint does not aver that it is being filed on behalf of the plaintiff and all other creditors of the debtor cannot be regarded as one under this section.)

1946 Mad 25 (30) [AIR V 33 C 11] : I L R (1946) Mad 486 (DB). (The conditions laid down in S. 53 that the suit should be on behalf of all the creditors apply only to a case where all the other creditors are not made parties to the suit.)

1944 All 214 (215) [AIR V 31] : ILR (1944) All 325.

1944 Nag 133 (134) [AIR V 31] : ILR (1944) Nag 125.

1943 Lah 96 (97) [AIR V 30] (DB). (Suit under O. 21, R. 63 without obtaining leave of Court under O. 1, R. 8, C. P. C. — Mere assertion in plaint that suit is representative and is laid under S. 53 in order to avoid an alienation intended to defeat not only the claim of plaintiff but of other creditors will not make it a representative suit.)

1943 Mad 531 (534) [AIR V 30] (DB). (Suit under S. 53 on behalf of plaintiff alone without following the procedure under O. 1, R. 8 — Suit is liable to be dismissed summarily.)

1941 Oudh 457 (465) [AIR V 28] : 16 Luck 832 (DB). (Proper test to apply in determining whether a suit comes within the purview of S. 53 is to see whether if the plaintiff succeeds in the action, the property claimed would be available to general body of creditors.)

1941 Rang 76 (77) [AIR V 28] : 1940 Rang L R 777 (DB). (Even if plaintiff is the only creditor, he can bring a suit in a representative capacity.)

†1940 Mad 789 (790) [AIR V 27] : ILR (1940) Mad 808 (DB). (Case law discussed.)

1936 Cal 783 (784) [AIR V 23]. (It will be unjust to grant decree under S. 53 in a suit not so instituted.)

1936 Pesh 15 (16) [AIR V 23] (DB).

1936 Rang 117 (118) [A I R V 23] : 14 Rang 81 (DB). (AIR 1935 Rang 489, followed.)

1935 Rang 489 (490) [AIR V 22]. (Where a Court has inherent jurisdiction to try a particular suit, but its jurisdiction is irregularly invoked, a litigant by his conduct may be precluded from maintaining in the circumstances of the case that the suit was not maintainable as framed, *a fortiori* in a case where the irregular institution of the suit was due to a failure on the part of the plaintiff to conform to an enactment passed for the benefit of a particular class of persons.)

1935 Rang 275 (275) [AIR V 22]. (Where defendant elected to go to trial on footing that plaintiff was entitled to bring suit and had been content that the suit should be heard on merits on that basis, he was not entitled in the appellate Court to claim that the suit as framed was not maintainable by reason of S. 53, T. P. Act.)

†1934 Rang 302 (302, 303) [AIR V 21] : 12 Rang 666. (The transferee and the judgment-debtors

The reason of the rule is, firstly, that the debtor(10) or the transferee(11) should not be harassed by a multiplicity of suits,(11a) and, secondly, that the primary object of an action under this section is to make the assets of the transferor available to the general body of creditors.(12) A view has been expressed in the undermentioned cases,(12a) namely that a creditor suing under O. 21, R. 63 of the Civil Procedure Code to establish his rights against the transferee from the judgment-debtor need not sue in a representative capacity. This view must be held to be no longer good law in view of the Supreme Court decision in *Abdul Shukoor* v. *Azji Papa Rao*.(12b)

As seen in Note 6 it has been held in some cases that the benefit of this section cannot be denied to a defeated and delayed creditor on the ground that at the time of the institution of the suit by him the debtor has no other creditor in existence than himself. It has been held by the Chief Court of Oudh that a creditor, who when proceeding under O. 21, R. 63 of the Civil Procedure Code does not know the existence of other creditors, is not bound to bring a representative suit, and that it is for the defendant to object that there are other creditors and that a representative suit should be filed.(13) See also the observation in the undermentioned Madras case(13a) and the undermentioned Punjab High Court decision to a similar effect.(13b) In the recent

as transferors will be necessary defendants in such a suit.)

1934 Rang 332 (332) [AIR V 21]: 12 Rang 670.

1933 Nag 169 (170) [AIR V 20]: 29 Nag L R 246.

[*See also* 1963 Mys 257 (260) [AIR V 50 C 62]. (A relief given under S. 53 enures to the benefit of all the creditors of the transferor whether those creditors are parties to the suit wherein alienation is challenged or not.)

1962 Mad 189 (191) [AIR V 49 C 39]. (Representative suit by creditor of insolvent under S. 53, T. P. Act — No notice to Official Receiver — Decision in suit not binding on Official Receiver —Subsequent petition under S. 54, Provincial Insolvency Act not barred.)

1960 Punj 417 (418) [AIR V 47 C 149] (DB). (Suit by one creditor under O. 21, R. 63, Civil P. C.— Permission under O. 1, R. 8 not obtained — Suit cannot be considered to be representative within the scope of S. 53, T. P. Act.)

1953 Mad 619 (619) [AIR V 40 C 243]. (Suit originally laid under O. 21, R. 63 Civil P. C.— Application by plaintiff made to trial Court to amend plaint so as to comply with requirements of O. 1, R. 8 of that Code — Held application should be allowed.)]

10. 1965 Andh Pra 68 (69) [AIR V 52 C 21] (DB).

1955 Madh Bha 159 (160) [AIR V 42 C 49]: ILR (1955) Madh B 297 (DB).

1939 Bom 508 (512) [AIR V 26]. (But this does not mean that the creditor, even when he is defendant, must defend the suit on behalf of the whole body of creditors.)

11. 1955 Madh B 159 (160) [AIR V 42 C 49]: I L R (1955) Madh B 297 (DB).

1921 Pat 53 (53) [AIR V 8]: 6 Pat L Jour 48 (DB).

†('07) 34 Cal 999 (1007) (DB).

11a. (1958) 2 Mad L Jour 540 (541).

1943 Mad 531 (536) [AIR V 30]: I L R (1944) Mad 133 (DB).

12. 1965 Andh Pra 68 (69) [AIR V 52 C 21](DB).

(1958) 2 Mad L Jour 540 (541).

1921 Pat 53 (54) [AIR V 8]: 6 Pat L Jour 48 (DB).

[*See* 1939 Pat 5 (6) [AIR V 26] (DB).]

Also see Note 6.

12a. 1946 Sind 78 (80, 81) [AIR V 33 C 24] I L R (1946) Kar 98 (DB). (The mere fact that the plaintiff in a suit under O. 21, R. 63, Civil P. C. to remove he bar imposed by the decision of the execution Court, states that the impugned transfer was made for the purpose of deceiving and putting to loss not only the plaintiff but other creditors and for defeating the claims of not only the plaintiff but of other creditors, does not necessarily make the suit one under S. 53, T. P. Act and in such a suit the procedure laid down in O. 1, R. 8 will not apply— AIR 1938 Bom 289 and AIR 1937 Bom 476, Foll.)

1938 Bom 289 (291) [AIR V 25]: I L R (1938) Bom 445. (Following AIR 1937 Bom 476.)

1934 Rang 200 (201) [AIR V 21] (DB). (Appears to have been decided with reference to the old section.)

1931 Lah 430 (431) [AIR V 18]: 32 P L R 201 (DB).

[*See* 1939 Pat 138 (139) [AIR V 26]: 17 Pat 588 (DB). (In this case there was only one creditor, hence question was not decided.)]

12b. 1963 S C 1150 (1160) [A I R V 50 C 174] 1963 Supp 2 S C R 55.

13. 1940 Oudh 200 (202) [A I R V 27]: 15 Luck 503.

13a. 1958-2 Mad L Jour 540 (541). (As such a creditor can also file a representative suit it becomes the duty of the Court to see whether it could be proceeded with as a representative suit or not.)

13b. ('55) 57 Punj L R 366 (368): AIR 1955 N U C 3428. (Suit by creditor to avoid transfer

undermentioned case(13c) the Rajasthan High Court, while taking the same view, has also observed that, where as a result of a claim order made against him, a decree-holder seeks to enforce his individual rights on the ground that the transaction in question which has adversely affected his rights is a sham and colourable one, he is entitled under law to bring a suit under O. 21, R. 63, Civil Procedure Code without complying with the requirements of this section as to the frame of suit. It will be seen from Note 5 that this section does not apply to sham transactions and therefore it seems that a suit of this type will not be governed by the abovementioned Supreme Court decision.

A suit which is not meant to be for the benefit of all the creditors is not a suit under this section and need not be brought in a representative capacity.(14) So also is a suit which does not involve the avoidance of any transfer.(15)

It was held by the Peshawar Court that the technical rule of procedure laid down in the section did not apply to the North-West Frontier Province and that a suit to avoid a fraudulent transfer need not be in a representative character.(16) The undermentioned cases of the Pepsu High Court(16a) and the Punjab High Court(16b) are also to the same effect.

The objection as to the non-representative character of the suit must be taken in the trial Court. If it is not so taken, it cannot be taken in the appellate Court.(17)

25. Leave of Court. — A creditor instituting a suit to set aside a fraudulent transfer must follow the procedure provided by O. 1, R. 8 of the Civil Procedure Code; that is to say, he must obtain the permission of the Court and the Court must, at his expense, give notice of the institution of the suit to all persons whom it is sought to

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by debtor—No indication that there were other creditors in existence — In the absence of proof that there are such creditors defence that suit is bad on the ground of it being on behalf of all creditors is not available to the defendant.)

13c. 1967 Raj 283 (287, 288) [AIR V 54 C 57]. (1963 S C 1150 [AIR V 50] has not been noticed.)

14. 1956 Orissa 58 (60) [AIR V 43 C 16] : I L R (1956) Cut 42 (DB). (Summary order passed against decree-holder under O. 21, R. 58—Suit by decree-holder under O. 21, R. 63 for protecting his individual right of executing the decree against the property—Plaint not in the least involving interests of other creditors—Suit cannot be dismissed for non-compliance with O. 1, R. 8, Civil P. C.)

1951 Mys 103 (105) [AIR V 38 C 36] : I L R (1951) Mys 407 (DB).

1933 Cal 812 (812) [A I R V 20]. (Though the claim in it proceeds on the principles enunciated in the section).

('04) 28 Bom 364 (369) (DB). (Assignment of substantial part of property in trust for creditors—Composition deed not signed by a few creditors Composition however found to be beneficial for all creditors—Suit by one of the non-signatory creditor to avoid the composition—He cannot be considered to be suing for and on behalf of all the creditors—S. 53 will not apply to the case.)

15. ('57) 1957 M P L Jour 107 (109). (Suit under O. 21, R. 63 on the allegation that the transaction is a sham and bogus one.)

1956 Orissa 58 (60) [AIR V 43 C 16] : I L R (1956) Cut 42 (DB). (Action on ground that transaction in favour of defendant is nominal one.)

1934 Rang 302 (303) [AIR V 21] : 12 Rang 666.

16. 1936 Pesh 158 (160) [AIR V 23] (DB).

16a. ('49) 1 Pepsu L R 198 (211) (DB).

16b. 1961 Punj 398 (399) [AIR V 48 C 117] : I L R (1962) 2 Punj 378 (DB).

17. 1967 Raj 283 (287) [AIR V 54 C 57].

(1958) 2 Mad L Jour 540 (541).

('57) 1957 M P L Jour 107 (110). (Trial Court should permit the plaintiff to set matters right when an objection is raised before it.)

('55) 57 Punj L R 366 (368) : AIR 1955 N U C 3428.

1944 All 214 (215) [AIR V 31] : I L R (1944) All 325. (Plea cannot be raised in second appeal for the first time. AIR 1940 All 407, followed.)

1938 Oudh 33 (35) [AIR V 25] (DB). (It makes no difference whether the point was first taken in first appeal or second appeal.)

1936 Rang 117 (118) [AIR V 23] : 14 Rang 81 (DB). (AIR 1934 Rang 332, Not followed.)

1935 Rang 489 (490) [AIR V 22].

1935 Rang 275 (275) [A I R V 22].

1934 Rang 308 (308) [AIR V 21]. (Point raised for first time in appeal as to maintainability of suit - Appellant is not entitled to claim that suit is not maintainable.)

1927 Mad 666 (666, 667) [AIR V 14]. (Objection not raised in the first appellate Court cannot be raised in the second appeal.)

1914 Low Bur 180 (182) [AIR V 1].

('07) 34 Cal 999 (1007, 1008) (DB).

represent.(1) The requirement as to the obtaining of the permission of the Court cannot be waived.(2) It has been held in the undermentioned case(2a) that where in a suit under this section all the persons interested are made parties to the suit, O. 1, R. 8, Civil P. C. will not apply and therefore leave of Court need not be obtained under that rule. A suit by which the plaintiff seeks declaration from the Court under S. 42 of the Specific Relief Act, 1877 to the effect that the sale deed in question is a sham and fictitious transaction which conveyed no title to the transferee cannot be dismissed for the non-fulfilment of the requirements of O. 1, R. 8 even though the plaintiff has also made an additional allegation in the plaint that the transferee is not a transferee in good faith and for consideration and that the suit is one instituted for the benefit of all the creditors of the transferor.(2b)

The proper course is to obtain the permission of the Court before the suit is instituted. But the permission may, in proper cases, be granted even after the institution of the suit and even though it had been refused on a previous occasion.(3)

26. Defence need not be in representative capacity.— A creditor pleading S. 53 in defence need not do so in a representative capacity. The fourth paragraph of sub-s. (1) applies only to suits and not to defences.(1)

27. Suit under this section is a "suit for land" within the meaning of the Letters Patent. — A suit to set aside a transfer created in fraud of creditors is a "suit for land" within the meaning of Clauses 11 and 12 of the Letters Patent (Madras).(1)

28. Transferor insolvent — Suit by creditor under this section. – Where an alienation in fraud of creditors is made by a debtor and subsequently the debtor is adjudged insolvent, a suit by a creditor under this section to set aside the transfer is, according to the Madras High Court, maintainable without the leave of the Insolvency Court.(1) According to the High Court of Lahore a suit without such leave is not maintainable where the alienation attacked is a mortgage of which the equity of redemption has vested in the Official Receiver.(2)

29. Receiver in insolvency, if can avoid fraudulent transfer under Section 4 of the Provincial Insolvency Act. — A Receiver in insolvency can, as

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Section 53 — Note 25

1. 1934 Rang 302(303) [AIR V 21]: 12 Rang 666.
1934 Rang 332 (332, 333) [AIR V 21] : 12 Rang 670.
1927 Mad 666 (666) [AIR V 14].
[*See also* 1962 Mad 189 (191) [A I R V 49 C 39]. (Representative suit by creditor of insolvent under S. 53, T. P. Act — No notice to Official Receiver — Decision in suit is not binding on Official Receiver — Subsequent petition under S. 54, Provincial Insolvency Act not barred.)]

2. 1943 Lah 96 (97) [AIR V 30] (DB).

2a. 1946 Mad 25 (30) [AIR V 33 C 11] : ILR (1946) Mad 486 (DB).

2b. 1964 All L Jour 1079 (1083).

3. 1953 Mad 619 (619) [AIR V 40 C 243]. (Suit originally laid under O. 21, R. 63, Civil P. C. —Application by plaintiff made to trial Court to amend plaint so as to comply with O. 1, R. 8—Application should be allowed.)

See Note 11 on O. 1, R. 8 of the AIR Commentaries on the Code of Civil Procedure, 7th (1963) Edn.

Section 53 — Note 26

1. 1963 S C 1150 (1160) [AIR V 50 C 174] : 1963 (Supp) 2 S C R 55.
1942 Mad 128 (129) [AIR V 29].
1939 Bom 508 (512) [AIR V 26].

Section 53 — Note 27

1. ('12) 17 Ind Cas 342 (343) (Mad).

Section 53 — Note 28

1. 1941 Mad 903 (905) [AIR V 28] : ILR (1942) Mad 1 (FB). (AIR 1919 Mad 167, Overruled and AIR 1929 Mad 323, Approved.)
1946 Mad 25 (29, 30) [AIR V 33 C 11] : ILR (1946) Mad 486.
1942 Mad 483 (484) [AIR V 29] : ILR (1942) Mad 862 (DB). (AIR 1941 Mad 903 : ILR (1942) Mad 1 (FB), Rel. on.)

2. 1938 Lah 856 (857) [AIR V 25]. (Official Receiver is a necessary party to such a suit.)

representing the creditors, file a regular suit to set aside a transfer by the insolvent as being in fraud of creditors under S. 53 of this Act.(1) It has been held that such Receiver can even in a case where a transfer by the insolvent is more than two years before his insolvency, *apply* under S. 4 of the Provincial Insolvency Act, 1920 to avoid the transfer as being in fraud of creditors under S. 53 of this Act.(2) In the undermentioned cases(3) it was further held that he can do so even if a suit to set aside the transaction would be barred by limitation, though the Court would, in such cases, refuse to exercise its jurisdiction except in special circumstances. The High Court of Madras has, however, held that the Insolvency Court cannot entertain such application which if filed as a suit under this section would be dismissed as barred by limitation.(4) The High Court of Patna(4a) has held that a real transfer in fraud of creditors made by an insolvent beyond two years from the date of his insolvency cannot be annulled either under S. 53 of the Provincial Insolvency Act, or under S. 4 of that Act under which the insolvency Court has only power to make a declaration but has no power to give consequential relief. The relief by way of annulment in such cases can be granted only by a Civil Court in a suit instituted by the receiver under this section. In the undermentioned case(5) in England, the Bankruptcy Court was held to have jurisdiction to set aside a transfer as being in fraud of creditors under 13 Eliz., Chap. 5 on an application by the trustee in bankruptcy.

30. Distinction between this section and Sections 53 and 54 of the Provincial Insolvency Act.—The following are the main points of distinction between this section and Ss. 53 and 54 of the Provincial Insolvency Act, 1920 :

Section 53 — Note 29

1. 1952 Sau 47 (49) [AIR V 39] (DB). (Transfer to creditor who had knowledge of the debtor's precarious pecuniary conditions voidable at the instance of the Receiver and other creditors.)

1947 Pat 471 (473, 474) [AIR V 34 C 153] : 26 Pat 253 (DB).

1926 Mad 826 (827) [AIR V 13] (DB). (Though he has got another remedy under S. 53 of the Provincial Insolvency Act.)

[*See also* 1926 Mad 66 (67) [AIR V 13] (DB). (Such a suit is governed by Art. 120 of Limitation Act.)

1918 Oudh 29 (30) [AIR V 5] : 20 Oudh Cas 295. (Receiver can also apply under S. 36, Provincial Insolvency Act, for an annulment of the transfer.)]

2. 1944 Nag 44 (54) [AIR V 31] : ILR (1944) Nag 342 (FB). (Section 53, Provincial Insolvency Act, is wider than S. 53, T. P. Act, and it gives added benefits to the creditors. If they want to avail themselves of these additional benefits they must bring themselves within the two years' rule. If not they are left to their remedies under the ordinary law. But these remedies can be pursued in insolvency Court under S. 4, though it would be open to that Court, on grounds of expediency, to refer the parties to a civil suit — AIR 1938 Nag 546, Overruled.)

1929 All 105 (107, 112) [AIR V 16] : 51 All 550 (FB). (Sen J., contra.)

1935 Bom 316 (316, 317) [AIR V 22] (DB).

1933 Mad 527 (528) [AIR V 20].

1932 Cal 642 (647, 648) [AIR V 19] : 59 Cal 1135 (DB).

1932 Sind 50 (51, 52) [AIR V 19] : 25 Sind L R 521. (Case under S. 7 of the Presidency Towns Insolvency Act corresponding to S. 4 of the Provincial Insolvency Act.)

1927 Cal 474 (476) [AIR V 14] (DB).

[*See also* 1943 Mad 252 (252) [AIR V 30]. (Section 53 of the Provincial Insolvency Act not being exhaustive an application to challenge a transaction as sham and nominal can also be entertained.)]

3. 1929 Sind 94 (96) [AIR V 16].

[*See also* 1922 All 196 (196) [AIR V 9] : 44 All 71 (DB).]

4. 1943 Mad 252 (252, 253) [AIR V 30]. (Where there are a number of creditors, limitation for an application by the Official Receiver under S. 4 to set aside the transfer may be computed from the date on which the last of the creditors became aware of the transaction.)

4a. 1947 Pat 471 (473, 474) [AIR V 34 C 153] : 26 Pat 253 (DB). (The proper course for the Insolvency Court in such circumstances is first to satisfy itself whether the transfer is really one liable to be annulled under S. 53 T. P. Act and if it decides that it is so, then to instruct the Receiver to file a suit for that purpose in Civil Court.)

5. (1880) 29 WR (Eng) 876 (877) : 14 Ch D 265 : 43 L T 2, Ex parte Butters; In re Harrison.

[*See also* (1886) 55 A J Q B 558 (561) : 17 QBD 290 : 54 L T 720, Ex parte Mercer; In re Wise (Assumed.)]

(1) In a suit under this section it is for the creditor to prove that the transfer was made *with intent to defeat or delay the creditors of the transferor.* Until this is established it is not for the transferee to prove good faith and consideration. But under S. 53 of the Provincial Insolvency Act, if the transfer has been made within two years of the insolvency of the transferor, it is not necessary for the Receiver to prove the fraudulent intent of the insolvent. It is for the transferee to show good faith on his part and the payment of consideration.(1)

(2) Under this section a *preference* of one creditor over another is not fraudulent whereas under S. 54 of the Provincial Insolvency Act, a preference by the debtor, who is unable to pay his debts, of one creditor over the other creditors, is *deemed* fraudulent if the debtor is adjudged insolvent within three months of the act of preference.(2) The object of S. 53 of this Act is to protect the rights of creditors against their debtor, namely, that the latter's property should be made available in payment of demands *of them or some of them* for the discharge of their debts.(3) It is not the object of this section to secure the *equal distribution* of the property of the bankrupt.(4) The object of S. 54 of the Provincial Insolvency Act is, however, to secure an equal distribution of the insolvent's property among his creditors.(5)

(3) Even though a transfer cannot be avoided under the insolvency law as having been made more than two years before the insolvency of the transferor, it can be avoided under this section.(6)

See also the undermentioned cases.(7)

See also Note 20.

31. Sub-section (2) — Transfer in fraud of subsequent transferee. — Sub-section (1) deals with transfers made with intent to defeat or delay the creditors. Sub-section (2) deals with transfers made with intent to defraud *subsequent transferees.* The difference between the two provisions is that while any transfer, whether for consideration or not, can be avoided as being in fraud of creditors, only *gratuitous transfers* i. e., transfers for no consideration can be avoided as being in fraud of subsequent transferees.

In England the statute 27 Elizabeth, Chap. 4 was construed as meaning that a

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Section 53 — Note 30

1. 1944 Nag 44 (53) [A I R V 31] : ILR (1944) Nag 342 (FB).
1917 All 32 (33, 34) [A I R V 4] : 39 All 95 (DB). (Scope of S. 36, Pro. Ins. Act, 1907 and that of S. 53, T. P. Act, compared.)
1916 Pat 279 (280) [AIR V 3] : 2 Pat L Jour 101 (DB).

2. 1938 Sind 215 (216) [AIR V 25] : ILR (1939) Kar 136 (DB).
('37) 1937 Mad W N 1162 (1163) (DB).
('12) 13 Ind Cas 68 (69) (Lah).

3. †1915 P C 115 (116) [A I R V 2] : 43 Cal 521 : 43 Ind App 104.

4. (1882) 51 L J Ch 154 (156) : 20 Ch D 389 : 46 L T 222, Golden v. Gilliam. (Case under 13 Eliz., Ch. 5 corresponding to S. 53, T. P. Act.)

5. 1925 Cal 640 (647) [AIR V 12] (DB).
† ('07) 34 Cal 999 (1015) (DB).

6. 1953 Trav-Co 321 (323) [A I R V 40 C 119] : ILR (1953) Trav-Co 326 (DB).
1947 Pat 471 (472, 473) [A I R V 34 C 153] : 26 Pat 253 (DB).
1929 Sind 94 (96) [AIR V 16].
1922 All 443 (443) [AIR V 9] (DB). (Transaction being several years old the insolvency Court declined to adjudicate upon, held that the question was not res judicata in a subsequent suit under S. 53, T. P. Act.)

7. ('55) 1955 NUC(Mad) 3168 [AIR V 42]. (Fraudulent transfers coming under S. 6 (b), Provincial Insolvency Act are voidable under this section independently of the insolvency of the transferor.)
1952 Sau 47 (48) [AIR V 39] (DB).

voluntary transfer except where it was in favour of a charity(1) became *ipso facto* void on the subsequent execution of transfer of the same property for consideration whether the second transferee took his transfer with notice or not.(2) By the very fact of the execution of a subsequent transfer for consideration, the former voluntary conveyance was deemed fraudulent. This view was followed in this country also before the Act was passed(3) and even in cases under the old section it was held that the presumption was to that effect.(4) The second paragraph of sub-section (2) of the present section, however, now makes it clear that the mere fact that the subsequent transfer is made for consideration is not sufficient to enable the Court to deem the prior transfer a fraudulent one.

A transfer which is not voluntary, but which is for *some* consideration, however small, is not voidable at the option of a subsequent transferee.(5)

Under the Statute 27 Elizabeth, Chap. 4 a judgment-creditor was held not to

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Section 53 — Note 31

1. (1845) 8 E R 1464 (1470, 1472) : 12 Cl & Fin 402, New Castle upon Tyne Corporation v. Attorney-General.
(1892) 61 L J P C 72 (73, 74) : (1892) A C 412 (415, 416), Ramsay v. Gilchrist.

2. (1812) 34 E R 255 (259) : 11 R R 155, Buckle v. Mitchell. (Even when the purchaser purchased with notice.)
(1750) 28 E R 1 (7, 11) : 2 Ves Sen 1, Lord Townsend v. Windham.
(1875) 44 L J Ch 487 (489) : 23 W R (Eng) 944, In re Barker's Estate; Jones v. Bygott.
(1876) 46 L J Ch 214 (223) : 4 Ch D 483, Price v. Jenkins. (Voluntary settlement by a father upon his son.)
(1878) 47 L J Ch 738 (739) : 8 Ch D 318, Trowell v. Shenton. (Post-nuptial settlement which was in pursuance of ante-nuptial contract by an infant, held a voluntary one.)
(1883) 53 L J Ch 87 (88) : 24 Ch D 597, Shurmur v. Sedgwick.
(1891) 60 L J PC 66 (67) : 1891 A C 264, De Mestre v. West.
(1852) 21 L J Q B 139 (141) : 17 Q B 723, Doe d. Newman v. Rusham.
(1852) 51 E R 595 (598) : 15 Beav 408, Butterfield v. Heath. (Post-nuptial settlement of life-estate executed by husband and wife in favour of themselves and their children.)
(1807) 103 E R 495 (500) : 9 East 59, Doe d. Otley v. Catharine Manning.
(1755) 27 E R 192 (194) : Ambl 285 : 2 Ves 450, Senhouse v. Earle.
(1690) 21 E R 815 (815) : 1 Nels 160, Wathins v. Steevens.
(1775) 98 E R 1085 (1086) : 1 Cowp 278, Chapman v. Emery. (Mortgagee is a purchaser.)
(1727) 21 E R 1084 (1084) : 1 Eq Cas Abr 334, Tonkins v. Ennis.
(1811) 34 E R 249 (251) : 18 Ves 90, Pulvertoft v. Pulvertoft.
(1812) 104 E R 1069 (1070) : 16 East 212, Doe Leseee of Parry v. James.
(1817) 35 E R 887 (888) : 2 Mer 123, Smith v. Garland.
(1737) 95 E R 857 (859) : 2 Wills 356 (358), Roe v. Mitton.
(1590) 77 E R 146 (147) : 5 Co Rep 60a, Gooch's case.
[*See* (1895) 43 W R (Eng) 657 (659) : (1895) W N 85, Attorney-General v. Jacobs Smith. ("Consideration of marriage extends only to the husband and wife and children of that marriage, and that all other persons are volunteers in some sense.")
(1822) 37 E R 1107 (1112) : Turn & R 281, Johnson v. Legard.]
[But see (1776) 98 E R 1171 (1172) : 2 Cowp 432, Cadogan v. Kennett. (A fair voluntary conveyance may be good against creditors, notwithstanding its being voluntary.)
(1777) 98 E R 1314 (1321) : 2 Cowp 705, Doe d. Watson v. Routledge. (It must also be fraudulent.)
(1738) 26 E R 9 (11) : 1 Atk 13, Rusell v. Hammand. (Voluntary settlement is not fraudulent but an evidence of fraud only.)
(1805) 127 E R 492 (493) : 1 B & P (N R) 332, Doe v. Martyr. (Subsequent transferee with notice of prior voluntary transfer, not protected.)
(1803) 32 E R 575 (576) : 9 Ves 190 (194), George v. Milbanke. (It is only *prima facie* evidence of fraud.)
(1804) 32 E R 741 (741) : 9 Ves Jun 612, Gilham v. Locke. (Do.)
(1816) 56 E R 152 (154) : 1 Madd 414, Holloway v. Millard. (Do.)
(1736) 26 ER 393 (393) : 1 Atk 625, Oxley v. Lee.]

3. ('74) 22 Suth W R 60 (67) (DB).
('95) 22 Cal 185 (200, 201) (DB). (Per Sale, J.—According to Statute 27 Eliz., Chap. 4, a voluntary deed of transfer or conveyance had no effect as against the subsequent purchaser for consideration, 22 Suth W R 60, followed.)

4. ('95) 22 Cal 185 (202, 203) (DB). (Per Sale, J.)

5. (1871) 40 L J Ch 289 (290, 291) : 6 Ch App 228, Bayspoole v. Collins.
(1876) 46 L J Ch 396 (398), Teasdale v. Brithwaite.

be a "purchaser" for the purposes of that section.(6) Obviously such a person will not also be a "subsequent transferee" within the meaning of this section.

See also the undermentioned case.(7)

32 Auction purchaser, whether is a subsequent transferee.—An auction-purchaser at a sale in execution of a decree, whether he be a third party purchaser(1) or the decree-holder himself,(2) is not a "subsequent transferee" within the meaning of this section, inasmuch as a "transfer" within the meaning of this Act is a transfer by *act of parties*(3). He cannot, therefore, avoid the transfer under this section in that capacity. But if he happens to be also a *creditor* of the transferor, the transfer could, according to the Bombay High Court, be avoided by him as a creditor, even after he had purchased the property in auction.(4) According to the Madras High Court, he cannot, *after* his purchase, avoid the transfer as a *creditor* though he could have done so before he became the purchaser and if he had done so he could rely after his purchase upon his avoidance of the transfer before his purchase.(5) An auction-purchaser who is not a creditor of the transferor can, if the decree-holder himself had avoided the fraudulent transfer, get the benefit of such avoidance.(6)

33. Plea of fraudulent transfer. — In *Bal Gangadhar Tilak* v. *Srinivas Pandit*(1) their Lordships of the Privy Council relied upon the following passage from the judgment of Lord Selborne in *Wallingford* v. *Mutual Society*(2) :

> "With regard to fraud, if there be any principle which is perfectly well settled, it is that general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice."

Their Lordships further observed, that the law in India is, in no way, different from the principles stated in the passage quoted. Order 6, R. 4 of the Code of Civil Procedure provides :

> "In all cases in which the party pleading relies on any , . . . fraud . . . . and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars (with dates and items, if necessary) shall be stated in the pleading."(3)

The principle referred to above applies to a plea that a transfer is fraudulent under S. 53 of this Act.(4)

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6. (1856) 25 L J Ch 299 (305) : 6 De M & G 507, Beavan v. Earl of Oxford.

7. 1935 Lah 953 (953) [A I R V 22]. (Claim under mortgage against *bona fide* purchaser for value — Plaintiff has to prove both good faith and actual execution of mortgage — Mere recital of considerations in the deed is no *prima facie* evidence of good faith.)

Section 53 — Note 32

1. 1958 Pat 568 (569) [AIR V 45 C 186].
1954 Mad 173 (175) [AIR V 41 C 68].
1930 Nag 51 (53) [AIR V 17].
1919 Nag 122 (123) [AIR V 6].
1915 Bom 89 (90) [AIR V 2] : 39 Bom 507 (DB).

2. 1939 Bom 508 (512) [AIR V 26].

3. 1958 Pat 568 (569) [AIR V 45 C 186].
1919 Nag 122 (123) [AIR V 6].
[*See also* 1937 Cal 203 (206) [AIR V 24] (DB). (Property under mortgage sold in execution of a money decree against mortgagor — Absence of cogent evidence to show that mortgage was a sham and fictitious transaction — Auction-purchaser of property cannot challenge the validity of mortgage on the ground of absence of consideration or the inadequacy of it.)

4. †1939 Bom 508 (512) [AIR V 26].

5. 1921 Mad 657 (659) [AIR V 8] (DB).

6. 1954 Mad 173 (176) [AIR V 41 C 68].
1936 Mad 408 (410) [AIR V 23].

Section 53 — Note 33

1. 1915 P C 7 (13) [AIR V 2] : 39 Bom 441 : 42 Ind App 135.

2. (1881) 50 L J Q B 49 (54) : 5 App Cas 685.

3. See the AIR Commentaries on the Code of Civil Procedure 7th (1963) Edn,, O. 6, R. 4, Note 2.

4. 1933 Rang 169 (172) [AIR V 20]. (A I R 1915 P C 7, followed.)
1928 Mad 793 (794) [AIR V 15] (DB). (AIR 1916 P C 238, Relied on.)
1920 Oudh 182 (184) [AIR V 7]. (Transfer intending to defeat anticipated execution does not fall under the section.)

The plea must be taken in the first Court itself and not in the appellate Court.(5)

34. Onus of proof. — The general principle is that the *onus* of proving fraud is on the person alleging it.(1) Accordingly the onus of proving a deed as fraudulent is on the person alleging it.(1a) Further, a charge of fraud must be substantially proved *as laid* and where one kind of fraud is charged, another kind of fraud cannot, upon failure of proof, be substituted for it.(2) But fraud is generally

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5. (1843) 49 E R 1006 (1011): 7 Beav 112, Richardson v. Harton.

Section 53 — Note 34

1. 1958 S C 1 (4) [A I R V 45 C 1]: 1958 S C R 257. (Application by official receiver to set aside a conveyance by insolvent — Onus is on him to prove that it was not made in good faith and for consideration.)
1928 Mad 793 (794) [AIR V 15] (DB).
('94) 21 Cal 612 (621) (DB). (Party charging fraud is not relieved from this obligation because the other party has told an untrue story.)
('92) 6 C P L R 19 (21).
(1913) 21 Ind Cas 333 (334) (Burma).
('11) 10 Ind Cas 922 (923) (Burma).

1a. ('69) 13 Suth W R 14 (15) (P C).
('75) 23 Suth W R 111 (112) (P C).
1966 Andh Pra 157 (158) [AIR V 53 C 52] (DB).
1961 Punj 361 (363) [AIR V 48 C 105] (DB).
1960 Punj 548 (549) [AIR V 47 C 196] (DB).
1954 Nag 129 (132) [AIR V 41 C 51]: ILR (1953) Nag 937 (DB).
1950 Kutch 57 (57) [AIR V 37 C 45].
1950 Ker L T 502 (505) (DB).
1947 Cal 154 (155, 156) [AIR V 34 C 45] (DB). (Onus of proving fraudulent intent within S. 53 is on person challenging the transaction.)
1943 All 2 (5) [AIR V 30] (DB).
1941 Mad 690 (693) [AIR V 28].
†1941 Oudh 178 (179) [AIR V 28] (DB).
1941 Oudh 205 (210) [AIR V 28] (DB).
1941 Rang 108 (108, 109) [AIR V 28]: 1940 Rang L R 659 (DB).
1938 Lah 73 (74) [AIR V 25]: I L R (1938) Lah 439. (Fraudulent transfer by insolvent in favour of his wife more than two years before his adjudication — B purchasing property in execution of mortgage decree against her — Application by Official Receiver to avoid transfer—Onus is on the Official Receiver to prove that it was fraudulent.)
1938 Oudh 230 (231) [AIR V 25] (DB).
1936 Lah 222 (223) [AIR V 23] (DB).
1934 Rang 308 (308, 309) [A I R V 21]. (It is essential that decision of the Court rests not upon suspicion, but upon legal grounds established by legal testimony.)
1934 Lah 365 (366) [A I R V 21]: 15 Lah 294 (DB). (Application by Official Receiver to declare invalid gift made by insolvent more than two years before insolvency — Burden of proof is on the Official Receiver.)
1934 Lah 136 (137) [AIR V 17].
1930 Mad 665 (667) [AIR V 17].
1929 Lah 409 (413) [AIR V 16] (DB).
1927 Lah 420 (421) [A I R V 14]: 8 Lah 544 (DB).
1926 Oudh 501 (502) [AIR V 13].
1925 Rang 227 (228) [A I R V 12]: 3 Rang 71. (Where the execution of a sale-deed by a father to his daughter is admitted and there is nothing on the face of it to suggest fraud, the burden of proving that it was a fraudulent conveyance lies on the party who alleges it — As against such party, the daughter need not prove consideration.)
1924 Nag 363 (365) [AIR V 11].
1923 Nag 17 (18) [AIR V 10].
1921 Low Bur 58 (59) [AIR V 8]: 11 Low Bur Rul 89 (DB).
1913 Punj L R No. 246 page 827 (829) (DB).
†('09) 1 Ind Cas 795 (796) (DB) (All).
('09) 12 Oudh Case 74 (76).
('07) 17 Mad L Jour 11 (14) (DB). (In a suit for declaration that a deed of sale is not binding on the plaintiff being in fraud of creditors, it is for the plaintiff to establish affirmatively an intent to defeat or delay creditors.)
('03) 5 Bom L R 142 (143) (DB).
('01) 25 Bom 202 (206, 207) (DB).
('01) 1901 All W N 67 (68).
('92-96) 2 Upp Bur Rul 315 (317).
('91) 4 C P L R 179 (180).
('89) 2 C P L R 63 (64).
†('86) 8 All 178 (180) (DB).
('84) 1 C P L R 59 (62).
†('38) 42 Cal W N 34 (36).
('21) 60 Ind Cas 825 (826) (DB) (All).
('13) 20 Ind Cas 355 (356) (DB) (Lah). (Suit for setting aside a decree obtained on award as fraudulent.)
('13) 21 Ind Cas 333 (334) (Low Bur).
('11) 11 Ind Cas 781 (781) (Low Bur).
('10) 8 Ind Cas 1205 (1206) (Low Bur). (Purchaser not a woman of independent means—Vendor still retaining possession of the property — —Onus to prove the sale for consideration and *bona fide* is on the purchaser.)
('10) 13 Oudh Cas 265 (276, 281) (DB).
(1895) 64 L J P C 136 (138): 1895 A C 625: 11 R 554: 72 L T 879: 44 W R (Eng) 65, In re Cook; Morris v. Morris.
(1881) 51 L J Ch 503 (503), Golden v. Gillam. (Affirming (1881) 51 L J Ch 154.)

2. ('87) 11 Bom 620 (643): 14 Ind App 111 (PC).
✠1920 Cal 26 (32) [AIR V 7] (DB).
1916 Cal 120 (123) [AIR V 3] (DB).
1916 Cal 876 (878) [AIR V 3] (DB).
('11) 10 Ind Cas 922 (923) (Low Bur).

seldom possible to be established by direct evidence ; it is usually established by the surrounding circumstances(3) that is, by circumstantial evidence.(4) But it is not established by mere suspicion and conjecture.(5) In *Satish Chandra Chatterji* v. *Satish Kantka Roy*(6) their Lordships of the Privy Council observed as follows :

> "Charges of fraud and collusion like those contained in the plaint in this case must, no doubt, be proved by those who make them—proved by established facts or inferences legitimately drawn from those facts taken together as a whole. Suspicions and surmises and conjecture are not permissible substitutes for those facts or those inferences, but that by no means requires that every puzzling artifice or contrivance resorted to by one accused of fraud must necessarily be completely unravelled and cleared up and made plain before a verdict can be properly found against him. If this were not so, many a clever and dexterous knave would escape."

As to the circumstances that may raise a *presumption* of fraudulent intent under this section, see Note 6.

Where a transfer is proved to have been made with intent to defeat or delay the creditors, the *onus* will shift to the transferee to show good faith and consideration.(7) Question of onus of proof will, however, be academic where the entire evidence

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[*See also* (1940) 42 Punj L R 385 (392) (DB). (Fraud not pleaded and proved cannot be presumed.)]

3. ILR (1962) 12 Raj 517 (521).
('49) 1 Pepsu L R 198 (204) (DB). (Per Teja Singh C. J. in his order of reference to a Division Bench.)
1943 Mad 531 (533) [AIR V 30] (DB). (Fraudulent intent has to be inferred from the conduct of the party and circumstances proved.)
1937 Oudh 349 (351) [AIR V 24] (DB).
1931 Oudh 405 (407) [AIR V 18] (DB).
1931 Oudh 344 (344) [AIR V 18] (DB).
1930 Lah 12 (14) [AIR V 17].
1928 Nag 1 (4) [AIR V 15]: 23 Nag L R 143 (DB).
1925 Nag 460 (462) [AIR V 12]. (Fraud can be inferred from the conduct of the parties.)
[*See als*› 1925 Nag 427 (431) [AIR V 12]. (Evidence of forgery.)
1950 Kutch 57 (57, 58) [AIR V 37 C 45]. (Transfer of immovable property by person in favour of his daughter, who was child widow, living on maintenance, during pendency of money suit against transferor is significant.)]

4. 1932 Cal 434 (435) [AIR V 19]: 59 Cal 160 (DB).
1937 Oudh 349 (351) [AIR V 24] (DB).
1931 Oudh 333 (338) [AIR V 18] : 7 Luck 131 (DB).
1931 Oudh 256 (259) [AIR V 18] : 6 Luck 546 (DB). (AIR 1923 P C 73, relied on.)
✠(1900) 13 C P L R 180 (187).
('95) 9 C P L R 142 (144).
('93) 7 C P L R 73 (75, 76).
('69) 3 Beng L R (AC) 108 (110, 111) (DB).

5. 1960 Punj 548 (549) [AIR V 47 C 196] (DB).
1954 Nag 129 (132) [AIR V 41 C 51] : ILR (1959) Nag 937 (DB).
1935 All 995 (995) [AIR V 22] : 58 All 342.
1932 Mad 182 (184) [AIR V 19] (DB).
1920 Oudh 182 (184) [AIR V 7]. (A I R 1916 P C 238, Relied on.)
†1918 Pat 632 (633) [AIR V 5] (DB).
Bom Unrep Case No. 129 of 1872.
Bom Unrep Case No. 185 of 1872.
('07) 6 Cal L Jour 472 (489) (DB).
('92-96) 2 Upp Bur Rul 318 (321, 322).
†('74) 22 Suth W R 124 (125) (DB).
('66) 6 Suth W R 235 (236) (DB).
('69) 3 Beng L R (AC) 108 : 11 Suth W R 482 (484) (DB).

6. 1923 P C 73 (76) [AIR V 10].

7. 1963 S C 1150 (1157) [AIR V 50 C 174]: 1963 Supp 2 SCR 55.
1961 Punj 361 (363) [AIR V 48 C 105], (When creditors have established facts which show the *prima facie* intention of the debtor to defeat or delay creditors it is then for the debtor to meet the case made out and to explain the facts.)
1954 Nag 129 (132) [AIR V 41 C 51]: ILR (1953) Nag 937.
1950 Ker L T 502 (505) (DB).
1947 Cal 154 (156) [AIR V 34 C 45] (DB). (A mere general knowledge that the transferor was in financial embarrassment would not by itself, establish want of good faith on the part of the transferee.)
1943 All 2 (5) [AIR V 30] (DB). (When the person attacking the transfer proves facts which are sufficient to show that *prima facie* the intention of the transferor was to defeat or delay creditors, it is for the transferor to meet the case and to explain the facts. Mere mutation in accordance with transfer is not enough to show absence of such intention.)
1933 Rang 191 (192) [AIR V 20].
1941 Mad 690 (693) [AIR V 28].
1930 Lah 136 (137) [AIR V 17].
1927 Rang 331 (332) [AIR V 14].
1926 Nag 494 (494) [AIR V 13].
1921 Low Bur 58 (58, 59) [AIR V 8] : 11 Low Bur Rul 89 (DB).
('13) 21 Ind Cas 333 (334) (Burma).
('07-08) 4 Low Bur Rul 211 (212).
('02) 5 Bom L R 142 (143) (DB).
('10) 33 Mad 334 (338) (DB). (5 Bom L R 142, Followed.)
[*See also* ('66) 1 Agra 79 (81) (DB). (Case before the Act.)

is before the Court and will have little significance except in a rare case where the considerations are evenly balanced.(7a) See also the undermentioned cases.(8)

As to burden of proof in suits under O. 21, R. 63 of the Code of Civil Procedure in which the question whether a transfer is fraudulent arises, see Note 19 on that rule in the A. I. R. Commentaries on the Code of Civil Procedure, 7th (1963) Edn.

35. Limitation for suit to avoid document under this section. — See Note 23 on Art. 113 of the A. I. R. Commentaries on the Limitation Act, 1963, 4th (1965) Edn. See also the undermentioned cases.(1)

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[a] **53A.** Where any person contracts to transfer for consideration any immoveable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,

Part performance.

and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract,

and the transferee has performed or is willing to perform his part of the contract,

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(1900) 23 Mad 184 (189) (DB).

1927 Nag 166 (168) [AIR V 14]. (It is necessary for the purchaser to show that there was real intention of the debtor to pass ownership and of himself to acquire it. Mere transfer of possession is insufficient.)]

7a. 1963 S C 1150 (1154) [AIR V 50 C 174] : 1963 Supp 2 S C R 55.

8. 1963 Mad 450 (452) [AIR V 50 C 152]. (Mortgage affected by statutory presumption under S. 6 of Madras Indebted Agriculturists (Temporary Relief) Act that it was executed with intent to defeat or delay creditors—Onus will be on judgment-debtor under mortgage decree to prove that there was no such intent.)

1919 Pat 181 (181, 183) [AIR V 6] (DB).

Section 53 — Note 35

1. 1953 Trav-Co 321 (323) [AIR V 40 C 119] : ILR (1953) Trav-Co 326 (DB). (No suit under S. 53 brought and question whether transactions were fraudulent not arising on pleadings – Held to send case back for necessary amendments will be to permit amendments after expiry of period of limitation.)

1948 Bom 265 (268, 270, 271) [AIR V 35 C 72] : ILR (1947) Bom 807 (DB). (Suits under S. 53 —Art. 120 and not Art. 91, Limitation Act governs such suits — Right accrues when creditor has knowledge of fraud and not when the plaintiff decides to exercise his option of avoiding transfer — View of Lokur J. in AIR 1944 Bom 267 in so far as it goes against this view not approved on Letters Patent appeal.)

1947 Pat 257 (260) [AIR V 34 C 92] (DB). (Suit under O. 21, R. 63, Civil P. C. in representative capacity against defendants 1 and 2, husband and wife respectively, alleging transfer by former in favour of latter as fraudulent— Will by defendant 2 giving property to deity — Defendant 1 appointed shebait - Death of defendant 2 —Deity through defandant 1 as shebait applying to be added as legal representative —Plaintiff objecting—Application rejected - Plaintiff held could not after limitation ask deity to be brought on record as legal representative— Shebaits being already on record in another capacity was of no avail — Application could not be treated as fresh suit under S. 53, T. P. Act against deity since it would be barred, six years having elapsed after the impugned transaction.)

1942 Mad 483 (484) [AIR V 29] : ILR (1942) Mad 862 (DB). (Application by Official Receiver to set aside transfers by insolvent under Ss. 53 and 54, Provincial Insolvency Act, dismissed— On appeal by Official Receiver, District Judge directing that proper remedy was suit by creditors under S. 53 T. P. Act, for declaration of transfers as void—Suit by *A*, one of creditors under S. 53—*A* claiming to deduct time spent in prosecution of appeal before District Judge— Section 14, Limitation Act, held did not apply.)

1940 Lah 198 (198, 199) [AIR V 27]. (Though the creditor has to challenge the transfer only within six years, no time limit affects his defence where he has occupied the position of a defendant.)

then, notwithstanding that the contract, though required to be registered, has not been registered, or, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract :

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof.[a]

a. *Inserted* by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), S. 16.

Synopsis

1. The English equitable doctrine of part performance.
2. Doctrine of part performance distinguished from the doctrine of Walsh v. Lonsdale, (1852) 21 Ch D 9.
2a. Doctrines of acquiescence and expectation. See S. 51, Notes 22 to 24.
3. Law in India before the introduction of this section.
4. Scope of the section.
5. Section, if retrospective in operation.
6. "Contracts to transfer."
7. Consideration.
8. "Immovable property."
9. Contract must show clearly terms of transfer.
9a. "Writing signed by him or on his behalf."
10. Acts of part performance under the section.
11. Third paragraph—Transferee's willingness to perform his part.
12. Section applies only if the contract or transfer is invalid for want of completion in the prescribed manner.
13. Transferor debarred from enforcing his right to the property.
14. "Any person claiming under him."
14a. "Any right in respect of the property."
15. Proviso to the section.
16. Contract to transfer—Proof.
16a. Fraud on registration—Effect. See Note 16.
17. This section and S. 27A of the Specific Relief Act (1877), compared.
18. Law in States to which this Act does not apply.
19. Limitation.
20. Plea of part performance.

1. The English equitable doctrine of part performance.— Where a contract, which was unenforceable under the Statute of Frauds (1677) 29 Car II, c. 3 as not being in writing signed by the parties, had been *partly performed* and the acts of part performance were such, as unequivocally gave rise to an inference that there must have been such a contract as that alleged, Courts of Equity held that they had power, notwithstanding the Statutes of Frauds to discover by parol evidence the actual terms of such contract and give relief to the parties on that basis. This, in short, is the English equitable doctrine of part performance.

History of the doctrine.

The Statute of Frauds was passed in England in the year 1677 and S. 4 thereof provided *inter alia* that:

> "No action shall be brought whereby . . . to charge any person upon any agreement made in consideration of marriage or upon any contract for sale of lands, tenements, or hereditaments or any interest in or concerning them, ... unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorised."

It will be noticed that a contract which failed to comply with the requirements of the Statute of Frauds was *not void* but was merely one which could not be proved

except by a memo in writing.(1) On this principle it was held that if a parol agreement of the nature referred to in the Statute of Frauds was *admitted* by the party bound, it was out of the statute.(2) The object of the statute was held to be merely to prevent *fraud* being perpetrated. But in the application of the statute it was found in practice that it was sometimes capable of being taken advantage of to *effectuate* a fraud. It enabled a person who induced another to *act* upon his promise and change his position, subsequently to turn round and repudiate his promise on the ground that it was not reduced to writing. Courts of Equity, therefore, sought out means to relieve this difficulty. The theory on which they proceeded was that a statute intended to guard against fraud should not be allowed to so operate as to encourage fraud. By construction, they limited the operation of the statute to those cases only where the relief was claimed on the *contract itself as alleged* and held that it did not apply to cases where the contract was *partly performed* by the parties and the acts of part performance gave rise to an inference *by themselves* that there must have been some contract between them.(2a) In other words, where material acts were done in part performance of a contract it was held that it was taken out of the mischief of the statute.(2b)

In such cases, the Courts of Equity felt themselves at liberty to receive parol evidence as to the terms of the contract and to grant relief to the parties on the basis of such contract, such as by decreeing specific performance of the contract(3) or by granting an injunction preventing a party from acting in breach of the contract. In *Caton* v. *Caton*(4) Lord Cranworth, L. C., observed :

> "Though Courts of Equity have held themselves bound by this last enactment (i. e., the Statute of Frauds), they have yet, in many cases, felt themselves at liberty to disregard it, when to insist on it, would be to make it the means of effecting, instead of preventing, fraud. This is the ground on which they decree specific performance of parol contracts for the sale or purchase of land, when the contract has been in part performed. The right to relief in such cases rests, not merely on the contract, but on what has been done in pursuance of the contract .... The ground on which the Court holds that part performance takes a contract out of the purview of the Statute of Frauds, is, that when one of two contracting parties has been induced or allowed by the other to alter his position on the faith of the contract; as, for instance, by taking possession of land, expending money in building, or by other like acts; there, it would be a fraud in the other party to set up the legal invalidity of the contract, on the faith of which he induced or allowed the person contracting with him to act."

The leading case on the subject is *Maddison* v. *Alderson*.(5) Lord Selborne after stating that the equity of part performance rests on the principle of fraud and that

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Section 53A — Note 1

1. (1883) 52 L J Q B 737 (741, 749) : 47 J P 821 : 31 W R (Eng) 820 : 8 App Cas 467 : 49 L T 303, Maddison v. Alderson.
(1879) 48 L J Ex 362 (364, 365) : 11 Q B D 123 (128) : 40 L T 240 : 27 W R (Eng) 482, Britain v. Rossiter.
(1805) 102 E R 1419 (1423) : 6 East 602 : 2 Smith 559 : 8 R R 566, Crosby v. Wadsworth.
(1740) 36 E R 939 (941) : 3 Swan 437 : 19 R R 254, Pembroke v. Thorpe.

2. (1801) 31 E R 913 (927) : 6 Ves 12, Cocthe v. Jockson.
(1739) 27 E R 381 (381) : Amb 586, Gunter v. Halsey.
[*See also* (1806) 33 E R 176 (178) : 12 Ves 466 : 8 R R 354, Blagden v. Bradbear.]

2a. (1807) 33 E R 569 (569, 570) : 14 Ves 386 : 9 R R 304, Frame v. Dawson.

2b. (1784) 28 E R 1205 (1212) : 1 Bro C C 404, Whibread v. Brockhurst.
(1739) 27 E R 381 (381) : Amb 586, Gunter v. Halsey.

3. (1761) 21 E R 303 (303) : 1 Dick 346, Lawson v. Laude.
(1739) 27 E R 381 (381) : Amb 586, Gunter v. Halsey.
(1719) 24 E R 232 (232) : Pre Ch 518, Lockey v. Lockey.

4. (1866) 35 L J Ch 292 (295) : 1 Ch App 137 : 12 Jur (NS) 171 : 14 L T (NS) 34 : 14 W R (Eng) 267.

5. (1883) 8 App Cas 467 (475, 476) : 52 L J Q B 737 (742) : 31 W R (Eng) 820 : 49 L T 303 : 47 J P 821.

Courts of Equity will not permit the statute to be made an instrument of fraud, observed as follows :

> "In a suit founded on such part performance, the defendant is really 'charged' upon the equities resulting from the acts done in execution of the contract, and not (within the meaning of the statute) upon the contract itself. If such equities were excluded, injustice of a kind which the statute cannot be thought to have had in contemplation would follow. Let the case be supposed of a parol contract to sell land, completely performed on both sides, as to everything except conveyance, the whole purchase money paid; the purchaser put into possession; expenditure by him (say in costly building) upon the property; leases granted by him to tenants. The contract is not a nullity; there is nothing in the statute to estop any Court which may have to exercise jurisdiction in the matter from enquiring into and taking notice of the truth of the facts. All the acts done must be referred to the actual contract, which is the measure and test of their legal and equitable character and consequences. If, therefore, in such a case a conveyance were refused, and an action of ejectment brought by the vendor or his heir against the purchaser nothing could be done towards ascertaining and adjusting the equitable rights and liabilities of the parties without taking the contract into account. The matter has advanced beyond the stage of contract; and the equities which arise out of the stage which it has reached cannot be administered, unless the contract is regarded. The choice is between undoing what has been done (which is not always possible, or, if possible, just) and completing what has been left undone. The line may not always be capable of being so clearly drawn as in the case which I have supposed; but it is not arbitrary or unreasonable to hold that, when the statute says that no action is to be brought to charge any person upon a contract concerning land, it has in view the simple case in which he is charged upon the contract, only, and not that in which there are equities resulting from *res gestae* subsequent to and arising out of the contract. So long as the connexion of those *res gestae* with the alleged contract does not depend upon mere parol testimony, but is reasonably to be inferred from the *res gestae* themselves, justice seems to require some such limitation of the scope of the statute, which might otherwise interpose an obstacle even to the rectification of material errors, however clearly proved, in an executed conveyance, founded upon an unsigned agreement."

It was, however, held that the doctrine of part performance was one which should not be unduly extended,(6) but should be confined within limits intended to prevent the recurrence of the very mischief which the statute was intended to suppress.(7)

The following are the limitations:

(a) The act of part performance must unequivocally be referable to the alleged contract.

(b) It must be such an act of part performance as to have changed the relative positions of the parties as to the subject-matter of the contract.(7a)

(c) It must not be an act *preparatory* to the completion of the contract.

(A) Act must be unequivocal.

The act of part performance which will take the case out of the Statute of Frauds must unequivocally be referable to the contract alleged. As was observed by Lord Hardwick in *Gunter* v. *Halsey*(8) "the acts done in part performance must be such as could be done with no other view or design than to perform the agreement." The mere fact that the act is *consistent* with the alleged contract is not sufficient. An act, which though in truth done in pursuance of a contract, *admits of an explanation*

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6. (1761) 30 E R 126 (127) : 2 Cox Eq Cas 271 : 2 R R 41, O'Reilly v. Thompson.
(1804) 9 R R 54 (57) : 2 Sch and Lefr 1, Lindsay v. Lynch.

7. (1925) 94 L J Ch 113 (121) : 1925 Ch 96 (112) : 132 L T 370 : 69 S J 142, Rawlinson v. Ames.
(1883) 52 L J Q B 737 (743) : 8 App Cas 467 (478) : 31 W R (Eng) 820 : 49 L T 303 : 47 J P 821, Maddison v. Alderson.

7a. †1923 Bom 473 (475, 476) [A I R V 10] : 47 Bom 621 (DB).
1926 Bom 384 (387) [AIR V 13] (DB).

8. (1739) 27 E R 381 (381) : Amb 586.

without supposing a contract is not an act of part performance taking the case out of the statute.(9)

The *taking of possession* by the promisee has always been considered a marked circumstance which is unequivocally referable to the contract(9a) and which is therefore sufficient to take the case out of the Statute of Frauds. "If a Court found a man" said Cotton, L. J., in *Britain* v. *Rossiter*,(10)

> "in occupation of land or doing acts with regard to it under circumstances which would *prima facie* render him a trespasser, the Court would say that there was strong evidence from the user of the land of the existence of a contract, and would therefore allow parol evidence to be brought to show the real circumstances under which possession was taken."

In *Dale* v. *Hamilton*(11) Sir James Wigram, V. C., said :

> "one man without being amenable to the charge of trespass is found in the possession of another man's land. Such a state of things is considered as showing unequivocally that some contract has taken place between the litigant parties; and it has, therefore, on that specific ground been admitted to be an act of part performance."

He relied upon the decision in *Morphett* v. *Jones*(12) where Sir Thomas Plumer, M. R., observed :

> "When a person not in possession makes an agreement with the owner, and enters into possession, such possession has always been held to be a performance, because it is an unequivocal act referable to the contract. The act of a stranger on the land cannot be explained except by reference to a contract; it has always been considered as evidence of some antecedent contract and lets in the enquiry what that contract was, the Court not considering the act to be mere trespass or unauthorised possession."

See also the undermentioned cases.(13)

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9. 1925 Rang 322 (324) [AIR V 12] : 3 Rang 243. (Mortgagee claiming to be in possession under an oral agreement to sell the mortgaged property to him — Possession would ordinarily be referable to the mortgage and not only to the agreement—Doctrine does not apply—Overruled on another point in AIR 1927 Rang 33 (FB).)

(1846) 67 E R 955 (960) : 5 Hare 369 : 16 L J Ch 126 : 11 Jur 163 : 71 R R 127, Dale v. Hamilton.

(1883) 52 L J Ch 737 (744) : 31 W R (Eng) 820 : 8 App Cas 467 (479) : 49 L T 303 : 47 J P 821, Maddison v. Alderson.

(1807) 33 E R 569 (569, 570) : 14 Ves 386 : 9 R R 304, Frame v. Dawson.

† (1882) 52 L J Q B 140 (143) : 10 Q B D 148 (154) : 48 L T 60 : 47 J P 244, Humphreys v. Green. (Payment of part or whole of purchase-money is not sufficient for act of part performance unless shown that it is in respect of particular land which is subject-matter of parol agreement.)

[*See also* (1743) 26 E R 803 (805) : 3 Atk 1, Lacon v. Mestins.

(1896) 65 L J Ch 754 (756) : 44 W R (Eng) 684 : 2 Ch 428 (433) : 74 L T 811, Hodson v. Heuland.]

9a. 1926 Bom 384 (387) [AIR V 13] (DB).

10. (1879) 48 L J Ex 362 (366, 367) : 11 Q B D 123 (131) : 40 L T 240 : 27 W R (Eng) 482.

11. (1846) 67 E R 955 (960) : 5 Hare 369 : 16 L J Ch 126 : 11 Jur 163 : 71 R R 127.

12. (1818) 37 E R 45 (49) : 1 Swan 172 : 1 Wils Ch 100 : 18 R R 48.

13. (1955) 1 All E R 914 (920, 923) : 1955 App Cas 778.

(1802) 9 R R 3 (9) : 1 Sch & Lef 22, Clinan v. Cooke.

(1883) 52 L J Ch 577 (582) : 22 Ch D 797 (808) : 48 L T 497 : 31 W R (Eng) 774, Re Foster; Ex parte Foster.

(1811) 34 E R 341 (343) : 18 Ves 328 : 11 R R 207, Gregory v. Mighell.

(1740) 36 E R 939 (941) : 3 Swan 437 : 19 R R 254, Pembroke v. Thorpe.

(1685) 23 E R 524 (525) : 1 Vern 363 : 1 Eq Cas Abr 21, Butcher v. Stapely.

(1864) 55 E R 626 (627) : 24 Beav 237 : 11 L T (NS) 360 (361) : 11 Jur (NS) 1167 : 13 W R (Eng) 125 : 145 R R 498, Millard v. Harvey.

(1857) 44 E R 634 (640) : 1 De G & J 34 : 3 Jur (NS) 847 : 118 R R 16, Pain v. Coombs.

(1737) 26 E R 9 (9) : 1 Atk 12, Clark v. Wright.

(1743) 26 E R 803 (805) : 3 Atk 1, Lacon v. Mertins.

(1876) 46 L J Ch 189 (191) : 4 Ch D 73 (76, 78) : 25 W R (Eng) 39 : 35 L T 619, Ungley v. Ungley.

(1797) 30 E R 1063 (1065) : 3 Ves Jun 378 : 4 R R 26, Wills v. Stradling. (Payment of increased rent and its acceptance by landlord is strong proof of act of part performance.)

(1921) 90 L J Ch 373 (375) : (1921) 2 Ch 25 (28) : 124 L T 823 : 65 S J 515, Brough v. Nettleton.

(1896) 65 L J Ch 754 (757) : 74 L T 811 : (1896) 2 Ch 428 (433) : 44 W R (Eng) 684, Hodson v. Heuland.

The mere *continuing* in possession by a lessee is not an act of part performance of a contract to grant a fresh lease.(14) But the continuing in possession by the tenant coupled with the payment of *increased rent* is an act of performance.(15) The reason is that the former is an equivocal act not necessarily referable to an agreement to grant a lease while the latter acts are such as are referable only to an agreement to grant a fresh lease. Where, however, a tenant entered into possession during negotiations for a lease, and continued in possession after the agreement was concluded, it was held that this was a part performance of the contract.(15a)

The mere *payment of money* even if it be the whole of the purchase-money is not an act of part performance.(16) It is an equivocal act capable of various explanations.(17)

(B) The act of part performance must be such as to have changed the relative positions of the parties as to the subject-matter of the contract.

"It is not enough," said Lord Selbourne in *Maddison* v. *Alderson*,(18)

> "that an act done should be a condition of, or good consideration for, a contract, unless it is, as between the parties, such a part execution as to change their relative positions as to the subject-matter of the contract."

As was stated by Sir William Grant, M. R., in *Frame* v. *Dawson*,(19) "the act must be such that the party would suffer an injury amounting to fraud by the refusal to execute the agreement."(20) "It is, in general, of the essence of such an act," said Sir James Wigram, in *Dale* v. *Hamilton*(21)

> "that the Court shall, by reason of the act itself, without knowing whether there was an agreement or not, find the parties unequivocally in a position different from that, which according to their legal rights, they would be in, if there were no contract."

See also the undermentioned cases.(22) The taking of possession would consti-

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[*See also* (1914) 83 L J Ch 579 (585): (1914) 1 Ch 788 (799): 109 L T 922 : 58 S J 271, Danials v. Trefusis.
(1887) 56 L J Ch 662 (666) : 35 Ch D 681 (691): 56 L T 900 : 35 W R (Eng) 754 : 51 J P 708, Mcmanus v. Cooke. (The doctrine of part performance also applied to parol agreement for easements, though no interests in land is intended to be acquired.)]

14. †(1883) 52 L J Q B 737 (744): 31 W R (Eng) 820 : 8 App Cas 467 (481) : 49 L T 303 : 47 J P 821, Maddison v. Alderson.
(1797) 30 E R 1063 (1065) : 3 Ves Jun 378 : 4 R R 26, Wills v. Stradling.

15. (1883) 52 L J Q B 737 (744): 31 W R (Eng) 820 : 8 App Cas 467 (480) : 49 L T 303 : 47 J P 821, Maddison v. Alderson.
(1899) 68 L J Ch 322 (323) : (1899) 1 Ch 622 (625) : 80 L T 77 : 47 W R (Eng) 268, Miller and Aldworth v. Sharp.
(1865) 35 L J Ch 140 (143) : 1 Ch 35 (40, 41) : 11 Jur (N S) 868 : 13 L T (N S) 343 : 148 R R 111, Nunn v. Fabian.

15a. (1918) 87 L J K B 1101 (1103) : (1918) 2 K B 314 (318) : 119 L T 281, Biss v. Hygate.

16. (1917) 86 L J Ch 726 (729) : (1917) 2 Ch 356 (359, 360) : 117 L T 353 : 61 S J 592 : 33 T L R 485, Chaproniere v. Lambert.
(1802) 9 R R 3 (8) : 1 Sch and Lefr 22, Clinan v. Cooke.
(1846) 67 E R 955 (960) : 5 Hare 369 : 16 L J Ch 126 : 11 Jur 163 : 71 R R 127, Dale v. Hamilton.
(1709) 22 E R 40 : 2 Eq Cas Abr 46, Pengall v. Rose.
(1852) 42 E R 907 (910) : 2 D M & G 349 : 21 L J Ch 761 : 16 Jur 603 : 95 R R 136, Hughes v. Morris.
(1743) 26 E R 803 (805) : 3 Atk 1, Lacon v. Mertins.
(1815) 34 E R 593 (594) : 19 Ves 479 : 1 Mer 7 : 13 R R 244, Ex parte Hooper. (Payment of whole purchase-money in case of parol contract for sale and mortgage distinguished—In former it is part performance, in latter case, it is not.)

† 1923 Bom 473 (476) [AIR V 10] : 47 Bom 621 (DB).

17. (1883) 52 L J Q B 737 (744) : 31 W R (Eng) 820 : L R 8 App Cas 467 (479) : 49 L T 303 : 47 J P 821, Maddison v. Alderson.

18. (1883) 52 LJ QB 737 (744): 31 WR (Eng) 820: 8 App Cas 467 (478): 49 L T 303: 47 JP 821.

19. (1807) 33 E R 569 (569, 570) : 14 Ves 386 : 9 R R 304.

20. *See also* (1739) 27 E R 381 (381) : Amb 586, Gunter v. Halsey.

21. (1846) 67 E R 955 (960) : 5 Hare 369 : 16 L J Ch 126 : 11 Jur 163 : 71 R R 127.

22. (1866) 35 L J Ch 292 (295) : 1 Ch 137 (148): 12 Jur (NS) 171 : 14 L T (NS) 34 : 14 W R (Eng) 267, Caton v. Caton.

tute such an act as would change the position of the parties as to the subject-matter of the contract, and it would be a fraud on the other party thereafter to set up the legal invalidity of the contract.

(C) Acts preparatory to the contract are not acts of part performance.

The act of part performance must not be an act preparatory to the completion of the contract.(23) In *Buckmaster* v. *Harrop*(24) Sir William Grant, M. R., said: "that without which there could have been no contract cannot be said to be in part performance of the contract." Thus, the measurement by a party of the subject-matter of an agreement is not a part performance of the agreement but is only a step towards performance.(24a) The going, by a purchaser, to inspect the property which is the subject-matter of an agreement for sale is not part performance of the agreement.(25) Where *B* agreed to grant a lease of certain properties to *A*, if *A* procured a certain release from a stranger, and *A* procured such a release, it was held that the act was merely a preparatory one necessary to be fulfilled by *A* to entitle him to call for an execution of the contract.(26)

Under the English doctrine of part performance, as stated above, a party to a parol contract may be either as a *plaintiff* or as a *defendant* rely upon part performance.(27) But the part performance must come from the *party seeking performance*.(28) The doctrine, though generally applied to contracts relating to interests in land, is not confined to such contracts but extends to all contracts required by the Statute of Frauds to be evidenced by a memo in writing.(29)

Further the taking of possession is not the only mode of part performance recognised. Where the plaintiff altered her own building in accordance with the wishes and suggestions of the defendant it was held that this necessarily suggested the existence of the alleged contract to take the house on rent, that the plaintiff had changed her position for worse, and that the doctrine applied even to the acts of the plaintiff on her own property and no possession was taken by the defendant.(30)

(1802) 9 R R 3 (9) : 1 Sch & Lef 22, Clinan v. Cooke.

(1924) 94 L J Ch 113 (115) : 1925 Ch 96 : 132 L T 370 : 69 S J 142, Rawlinson v. Ames. [*See also* (1875) 24 W R (Eng) 8 (9), Phillips v. Alderson.]

23. (1784) 28 E R 1205 (1209) : 1 Bro C C 404, Whitbread v. Brockhurst.

24. (1802) 32 E R 139 (141) : 7 Ves 341 : 13 Ves 456 : 6 R R 132.

24a. (1740) 36 E R 939 (941) : 3 Swanst 437n : 19 R R 254, Pembroke v. Thorpe.

25. (1737) 26 E R 9 (9) : 1 Atk 12, Clerk v. Wright.

26. (1791) 30 E R 126 (127) : 2 Cox 271 : 2 R R 41, O'Reilly v. Thompson.

27. (1811) 34 E R 341 (342) : 18 Ves 328 : 11 R R 207, Gregory v. Mighell.

(1802) 32 E R 139 (141) : 7 Ves 341 : 13 Ves 456: 6 R R 132, Buckmaster v. Harrop.

(1807) 33 E R 569 (569) : 14 Ves 386 : 9 R R 304, Frame v. Dawson.

(1701) 1 E R 205 : Colles's P C 103, Lester v. Foxcroft.

(1857) 44 E R 634 (640) : 1 De G & J 34 : 3 Jur (NS) 847, Pain v. Coombs.

(1864) 55 E R 626 (627) : 34 Beav 137 : 11 Jur (N S) 1167 : 11 L T (N S) 360 (361) : 13 W R (Eng) 125 : 145 R R 498, Millard v. Harvey.

(1685) 23 E R 524 (525) : 1 Vern 363 : 1 Eq Cas Abr 21, Butcher v. Stapely.

(1924) 94 L J Ch 113 (121) : 1925 Ch 96 (109) : 132 L T 370 : 69 S J 142, Rawlinson v. Ames. [*See* (1737) 26 E R 9 (9) : 1 Atk 12, Clerk v. Wright.]

28. (1802) 32 E R 139 (141) : 7 Ves 341 : 13 Ves 456 : 6 R R 132, Buckmaster v. Harrop.

(1924) 94 L J Ch 113 (121, 122) : 1925 Ch 96 : 132 L T 370 : 69 S J 142, Rawlinson v. Ames.

(1866) 35 L J Ch 292 (295) : 1 Ch 137 (147) : 12 Jur (NS) 171 : 14 L T (NS) 34 : 14 W R (Eng) 267, Caton v. Caton.

29. (1888) 57 L J Ch 570 (575) : 39 Ch D 508 : 58 L T 846 : 37 W R (Eng) 163, Lavery v. Pursell.

(1887) 56 L J Ch 662 (665) : 35 Ch D 681 (690, 691) : 56 L T 900 : 35 W R (Eng) 754 : 51 J P 708, McManus v. Cooke. (Britain v. Rossiter, (1879) 48 L J Ex 362, considered. Applicable to parol agreement for easement.)

30. (1924) 94 L J Ch 113 (115) : 1925 Ch 96 : 132 L T 370 : 69 S J 142, Rawalinson v. Ames.

2. **Doctrine of part performance distinguished from the doctrine of *Walsh* v. *Lonsdale*, (1882) 21 Ch. D. 9.** — It is a maxim of equity in England that "Equity looks on that as done which ought to have been done." In other words, equity will treat the subject-matter of a contract, as to its consequences and incidents in the same manner as if the act contemplated in the contract had been completely executed. Thus, a contract to transfer real property did not *at law* pass any title to the property to the transferee, but equity acting on the above maxim treated the contract as if it had been executed and regarded the transferee as if he was a transferee at law. In other words, he obtained an *equitable interest* in the property transferred. It was, however, necessary for the application of this maxim, that at the time the Court was called upon to apply this maxim, *the right to specific performance of the contract* subsisted. For if such right did not subsist as, for example, where it had been barred by limitation, it could not be said by the Court that it was one "which ought to be performed by the parties," and it was only if the contract ought to be performed that equity will regard it as performed. The decision in *Walsh* v. *Lonsdale*,(1) rests upon this principle.(2) In that case there was an *agreement in writing* to execute a lease deed by *A* in favour of *B*. *B* entered into possession, but *A* failed to execute a lease deed. He, however, distrained for rent due by *B*. *B* thereupon sued *A* for an injunction that by the non-execution of a lease deed, he was only a tenant from year to year and that *A* could not distrain for rent. It was found that the right to specific performance of the contract was subsisting. It was held that *A* was entitled to distrain on the basis that *B* was a lessee in equity.

It is to be noticed that the rule referred to above, presupposes that a valid *contract has been proved or established*, and states that equity will treat it as executed and give relief on that basis, where the right to specific performance of such contract is not barred.

The doctrine of *part performance*, on the other hand, applies where a *contract cannot be proved* by reason of its not being in writing as required by the Statute of Frauds. In such cases, if acts of part performance have been performed by the parties, and the acts by themselves were such that they could not have been done had there been no contract such as that alleged, Courts of Equity held that the case was outside the Statute of Frauds and felt themselves enabled to admit proof of the contract, on the ground that a party cannot be allowed to take advantage of even an Act of Parliament to commit fraud on others. Having thus come to the conclusion that a contract to transfer had been made, they held that relief could be granted to the parties on this basis. They enforced specific performance of the contract where the right to specific performance was subsisting.(3) Where a party had changed his position by acting in pursuance of the contract, they prevented the other party from turning round and giving the go-by to the contract on the ground that it was not in writing and this they did whether the right to specific performance did or did not subsist.

2a. **Doctrine of acquiescence and expectation.**—See S. 51, Notes 22 to 24.

3. **Law in India before the introduction of this section.** — Before the Transfer of Property Act was passed, the English doctrine of part performance was

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(1904) 73 L J Ch 701 (703): (1904) 2 Ch 339 (344): 91 L T 161, Dickinson v. Barrow.

Section 53A — Note 2

1. (1882) 31 W R (Eng) 109 (110): 21 Ch D 9 (14, 15): 52 L J Ch 2: 46 L T 858.

2. 1938 Cal 97 (101) [AIR V 25]: ILR (1938) 1 Cal 607 (DB).

3. 1938 Cal 97 (101, 102) [AIR V 25]: ILR (1938) 1 Cal 607 (DB).

applied to cases arising in this country.(1) In *Immudipatian Thiruganga* v. *Periya Dorasami*,(2) where the contract to transfer was made *after the passing of the Act*, their Lordships of the Privy Council observed as follows :

> "It is contended that though the mortgage may fall short of an actual transfer (i. e., for want of registration) it shows a good contract for one and that the defendant may now call upon Ovala's heir to implement that contract. Certainly 'if such a right exists it would be an answer to the plaintiff's claim' and the exact form in which it could be enforced need not be considered."

The actual decision in the case was, however, that there was no valid contract at all established in the case. The decisions of the High Courts in India expressed conflicting views.(2a) The matter came up before the Privy Council in *Mahomed Musa* v. *Aghore Kumar Ganguli*(3) in 1914. In that case, a compromise was entered into between parties by which certain mortgage debts were to be extinguished and certain property divided between the parties in specific shares. No conveyance was executed in pursuance of the compromise, but the parties took possession of their respective shares and enjoyed them in accordance therewith. 'The compromise was before the Transfer of Property Act was enacted and under the law then prevailing no written conveyance was necessary to transfer title'. Their Lordships applied the doctrine of part performance as laid down in *Maddison* v. *Alderson*(4) and held that the actings of the parties were such as to supply all defects. "Their Lordships do not think" said Lord Shaw in delivering the judgment of the Board, "that there is anything either in the law of India or of England inconsistent with it but on the contrary that these laws follow the same rule." In *Venkayyamma* v. *Appa Rao*(5) *A* promised to *B* in 1886 to purchase and convey to *B* certain properties in consideration of *B* living with the promisor *A*. The parties acted on this basis for a long time but no conveyance was executed by *A* to *B*. *B* sued *A* for possession of the properties. Their Lordships of the Privy Council held that *B* was entitled to a decree and they referred to the doctrine of part performance as laid down in *Mahomed Musa's case*.(5a) It may be noted that the transaction in question in the case was subsequent to the passing of the Act.

Section 53A — Note 3

1. (1861) 8 Moo Ind App 43 (65) : 4 Suth W R P C 51 : 13 Moo P C 162 (PC).
('66) 5 Suth W R P C 111 (112) (PC).
('01) 28 Cal 693 (705, 706) : 28 Ind App 211 (PC). (Contract was before the passing of the Act.)
(1864-66) 2 Bom H C R 168 (175) (DB).
('76) 25 Suth W R 335 (339) (DB).
('10) 6 Ind Cas 346 (351) (Cal). (Doctrine of part performance not applied as the acts were not unequivocally referable to the contract.)
[*See also* ('71) 3 N W P H C R 153 (155) (DB).
('66) 1 Agra 283 (284) (DB).]

2 ('01) 24 Mad 377 (385, 386) : 28 Ind App 46 (PC).

2a. In the following cases the doctrine of part performance was applied :
('94) 16 All 344 (358) (FB). (Per Banerji, J.)
('85) 7 All 482 (488). (Per Petharam, C. J.)
('09) 5 Nag L R 70 (72).
('04) 17 C P L R 19 (20).
(1900) 13 C P L R 163 (164).
(1900) 24 Bom 400 (402) (DB).
('12) 17 Ind Cas 180 (184) (DB) (Cal).
('10) 5 Ind Cas 562 (564) (Cal).
[*See also* ('12) 39 Cal 663 (667) (DB). (Principle laid down in Walsh v. Lonsdale. (1882) 21 Ch D 9, followed.)
('04) 26 All 266 (269) (DB).
('99) 12 C P L R 154 (155).]

In the following cases the doctrine of part performance was not applied :
('10) 6 Ind Cas 632 (633) (Cal).
('09) 36 Cal 920 (922) (DB).
('05) 2 Cal L Jour 343 (349) (DB).
('04) 28 Bom 466 (472) (DB). (Equitable doctrine cannot be applied to override express provisions of statute.)
('01) 24 Mad 449 (466) (DB).
('93) 16 Mad 464 (466) (DB).
[*See also* ('06) 3 Nag L R 72 (79).
('03) 13 Mad L Jour 217 (220) (DB).]

3. 1914 P C 27 (30) [AIR V 1] : 42 Cal 801 : 42 Ind App 1.

4. (1883) 52 L J Q B 737 : 8 App Cas 473 : 31 W R (Eng) 820 : 49 L T 303 : 47 J P 821.

5. 1916 P C 9 (13) [AIR V 3] : 43 Ind App 133 : 39 Mad 509.

5a. 1914 PC 27 [AIR V 1] : 42 Cal 801 : 42 Ind App 1.

The conflict of opinion in the High Courts, not unnaturally, continued. In some cases the doctrine of part performance of a contract was applied so as to support a plea in defence to a suit for ejectment, provided that the right to sue for specific performance of the contract still subsisted.(6) In some cases it was applied without reference to any question as to whether the right to claim specific performance of the contract to transfer was or was not barred by limitation.(7)

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6. 1927 Rang 33 (37) [AIR V 14] : 4 Rang 368 (FB). (Mortgagee under a simple registered mortgage subsequently put in possession by the mortgagor, can set up plea of subsequent oral agreement of sale in a suit for redemption.)
1924 Mad 271 (273) [AIR V 11] : 46 Mad 919 (925) (FB). (AIR 1919 Mad 1083 and 29 Mad 336, Overruled.)
1924 Rang 214 (216) [AIR V 11] : 2 Rang 285 (FB).
1916 Bom 1 (4) [AIR V 3] : 41 Bom 438 (FB).
1930 Pat 61 (63) [AIR V 17] (DB).
1928 Nag 211 (212) [AIR V 15].
1927 All 355 (357) [AIR V 14].
1927 Cal 954 (956) [AIR V 14] (DB). (Doctrine of part performance not applied in favour of defendant whose right to specific performance was barred.)
1927 Cal 365 (370) [AIR V 14].
1927 Nag 353 (354) [AIR V 14]. (A person in possession of the property of another is entitled to retain that possession if he can show that he could successfully maintain a suit against that person for specific performance of a contract that would give him that title.)
1926 Mad 757 (758) [AIR V 13].
1926 Nag 79 (80) [AIR V 13].
1925 Oudh 120 (125) [AIR V 12] : 27 Oudh Cas 175 (DB).
1925 Rang 1 (3) [AIR V 12] : 2 Rang 313 (DB). (Mortgagee in possession under an invalid usufructuary mortgage can resist possession till the loan is paid.)
1925 Rang 102 (102) [AIR V 12].
1923 Cal 345 (348) [AIR V 10]. (The doctrine of part performance is only applicable where specific performance could have been obtained.)
1919 Cal 710 (716) [AIR V 6] (DB).
1915 Mad 807 (807, 808) [AIR V 2].
[*See also* 1929 Cal 186 (187) [AIR V 16] (DB). (Suit for rent by lessor upon written agreement to lease under which lessee put in possession —Decree given because right of specific performance was not barred.)
1930 Pat 20 (24) [AIR V 17] (DB). (Case of a lease of a site.)]

7. 1930 Mad 1 (3) [AIR V 17]. (Writing is not a necessary preliminary condition before the doctrine of part performance could be invoked.)
1929 Nag 194 (200) [AIR V 16] : 25 Nag L R 131 (DB).
1929 Mad 291 (292) [AIR V 16] (DB). (Doctrine applied to partition.)
1929 Rang 251 (252) [AIR V 16] : 7 Rang 288 (DB).
1929 Rang 280 (281) [AIR V 16] : 7 Rang 271 (DB).
1929 Rang 293 (294) [AIR V 16] : 7 Rang 414 (DB).
1928 Sind 61 (63) [AIR V 15] : 23 Sind L R 237.
1928 Bom 305 (306) [AIR V 15] : 52 Bom 693.
1928 Rang 182 (184) [AIR V 15] : 6 Rang 276 (DB).
1928 Rang 237 (238) [AIR V 15] : 6 Rang 315.
1928 Rang 321 (323) [AIR V 15] : 6 Rang 270 (DB).
1928 Oudh 479 (480) [AIR V 15] (DB).
1928 Rang 124 (124) [AIR V 15] : 6 Rang 125.
1927 Rang 234 (235) [AIR V 14].
1927 Mad 830 (833) [AIR V 14]. (Doctrine applied to partition—Hindu law.)
1927 Bom 627 (628, 629) [AIR V 14] (DB).
1927 Nag 402 (403) [AIR V 14].
1927 Oudh 162 (167) [AIR V 14] (DB).
1927 Oudh 570 (571) [AIR V 14] (DB).
1927 Oudh 485 (487, 488) [AIR V 14] (DB).
1926 Pat 184 (186) [A I R V 13] : 5 Pat 40 (DB). (Principle applied to unregistered lease.)
1926 Nag 466 (468) [AIR V 13] (DB).
1926 Rang 81 (82) [AIR V 13] : 3 Rang 603.
1926 Bom 384 (387) [A I R V 13] (DB). (On facts, however, it was held that the elements necessary to constitute part performance were not established.)
1925 Mad 763 (764) [AIR V 12].
1925 Mad 965 (967) [AIR V 12] (DB). (Applicability of doctrine assumed—But on facts held not to apply.)
1925 Rang 119 (120) [AIR V 12] : 2 Rang 479.
1925 Rang 118 (118) [AIR V 12]. (Doctrine applied to unregistered lease.)
1924 Rang 89 (90) [AIR V 11].
1924 Pat 433 (434) [AIR V 11].
1924 All 772 (775) [AIR V 11] : 46 All 759 (DB).
1924 All 826 (827) [AIR V 11] : 46 All 847 (DB).
1924 Mad 296 (297) [AIR V 11] (DB).
1923 Bom 473 (477) [AIR V 10] : 47 Bom 621 (DB).
1923 Rang 125 (126, 127) [A I R V 10] : 11 Low Bur Rul 462.
1923 Rang 222 (223) [AIR V 10] : 1 Rang 261.
1923 Nag 177 (179) [AIR V 10].
1923 Pat 492 (505) [AIR V 10] : 2 Pat 607 (DB). (Deed of surrender by Hindu widow without giving possession—Doctrine held inapplicable.)
1922 Oudh 133 (135) [A I R V 9] : 25 Oudh Cas 83.
1922 Oudh 217 (218) [AIR V 9].
1921 Bom 401 (403) [AIR V 8] : 45 Bom 1170 (DB).
1921 Low Bur 16 (18) [A I R V 8] : 11 Low Bur Rul 94 (DB).
1921 Upp Bur 10 (13) [A I R V 8] : 4 Upp Bur Rul 179.
1920 Pat 647 (648) [A I R V 7] (DB). (Doctrine of part performance not applied where the matter rested in negotiation.)

In some cases,(8) possession taken under a contract for sale or lease was held to be a good defence to a suit for ejectment on the principle of *Walsh* v. *Lonsdale*.(9) In a fourth class of cases(10) the doctrine of *Walsh* v. *Lonsdale*(11) was mixed up with the doctrine of part performance and both were invoked and applied to the same set of circumstances. In a fifth class of cases(12) it was held that the equitable doctrines could not be invoked so as to override the express provisions of the Act.

In *John H. Arseculeratne* v. *J. B. M. Pereira*,(13) the Privy Council had to decide the question of the applicability of the doctrine to a case to which the Ceylon Ordinance VII of 1840 applied. Under that Ordinance a contract for the purpose of effecting a transfer of immovable property should be made in writing and attested by a notary and in the absence thereof the contract "was of no force or avail in law." Their Lordships held that the doctrine of part performance which had reference to S. 4 of the English Statute of Frauds had no application to the stringent provisions of the Ordinance by which the agreement was "of no force or avail in law."

In this state of the authorities S. 53-A was introduced by the amending Act of 1929. This section is a partial importation into India of the English equitable doctrine of part performance.(14)

1918 Cal 923 (925) [AIR V 5] (DB).
('29) 114 Ind Cas 416 (416) (DB) (Cal).
('30) 122 Ind Cas 410 (411) (DB) (All). (Where a member of a joint family conveys a portion of the property belonging to him to another member of the family in lieu of consideration and the transaction has been followed up by the actions of the parties, it is not open to any impeachment by reason of the absence of a registered instrument to support the transaction.)
('26) 98 Ind Cas 691 (693) (DB) (Mad).
('23) 71 Ind Cas 781 (782) (Pesh). (Applicability assumed but held elements wanting.)
See also 1918 All 211 (213, 214) [AIR V 5] : 40 All 187 (DB).
1919 All 302 (303) [AIR V 6] : 41 All 443 (DB).
1921 All 248 (253) [AIR V 8] : 43 All 1 (DB).
1923 All 433 (434) [A I R V 10] : 45 All 388 (DB).]

8. 1920 Low Bur 97 (101, 102) [A I R V 7] : 10 Low Bur 241 (FB).
1934 Mad 583 (583) [A I R V 21] (DB). (Party can take advantage of the doctrine when remedy for specific performance is not time-barred.)
1925 Cal 856 (857) [AIR V 12] : 52 Cal 425 (DB).
1924 Cal 483 (484, 485) [AIR V 11] (DB). (Principle not applied where execution of a decree for specific performance of a contract of lease was barred by limitation.)
1921 Cal 519 (520) [AIR V 8] (DB). (Lease.)
1919 Cal 607 (611) [AIR V 6] (DB). (But held that the rule will apply even if a suit for specific performance would be barred.)
1916 Cal 376 (377) [AIR V 3] (DB). (Sale.)
1914 Cal 21 (22) [AIR V 1] (DB).

9. (1882) 31 W R (Eng) 109 (110) : 21 Ch D 9 : 52 L J Ch 2 : 46 L T 858 (860).
[*See also* 1921 Pat 326 (328) [A I R V 8] (DB). (This case simply follows Walsh v. Lonsdale and 20 Ind Cas 803.)]

10. 1930 Pat 53 (54) [AIR V 17] (DB).
1928 Pat 44 (45) [AIR V 15] : 7 Pat 95 (DB).
1923 Cal 130 (133, 134) [AIR V 10] (DB).
1923 Cal 63 (65) [A I R V 10] : 41 Cal 345 (DB). (AIR 1921 Cal 383 followed — Where possession was obtained in pursuance of an agreement, though document was not executed, held that lease could be executed.)
1921 Cal 383 (384) [AIR V 8] (DB).
1920 Cal 388 (390) [AIR V 7] (DB).
1919 Cal 845 (846) [AIR V 6].
1918 Cal 923 (924) [AIR V 5] (DB).
1916 Cal 722 (725, 726) [AIR V 3] (DB).

11. (1882) 46 L T 858 (860) : 21 Ch D 9 : 31 W R (Eng) 109 : 62 L J Ch 2.

12. 1928 All 641 (649) [AIR V 15] : 51 All 79 (FB).
1919 Mad 1083 (1094, 1095) [AIR V 6] : 40 Mad 1134 (FB).
1931 Oudh 288 (291) [A I R V 18] : 7 Luck 16 (DB).
1931 Mad 580 (586) [AIR V 18] : 55 Mad 72 (DB). (Per Cornish J.)
1931 All 59 (62) [AIR V 18] (DB).
1930 All 175 (177) [AIR V 17].
1929 All 831 (832) [AIR V 16] (DB). (Provisions of S. 107, T. P. Act, and S. 17, Registration Act, are imperative and cannot be over-ridden by the doctrine.)
1928 All 699 (703) [AIR V 16] (DB).
1922 Cal 436 (439, 442) [AIR V 9] : 49 Cal 507.
1916 Low Bur 38 (39) [AIR V 3].
1916 Mad 821 (822) [AIR V 3] : 38 Mad 519 (DB).
1916 Mad 14 (15) [AIR V 3] (DB).
1915 Bom 22 (23) [AIR V 2] : 39 Bom 472.
[*See also* 1924 All 396 (397) [AIR V 11].
1930 Mad 84 (90, 97) [AIR V 17] (DB).]

13. 1928 P C 273 (275) [AIR V 15].

14. 1964 S C 877 (880) [AIR V 51 C 112] : (1964) 3 S C R 985.
1950 S C 1 (4) [AIR V 37 C 1] : 1950 S C R 75.

The matter of the applicability of both these doctrines to agreements made before the enactment of the new section directly came into question the next year in *Ariff* v. *Jadunath*.(15) In that case *A*, the owner, agreed in 1913 to grant a permanent lease to *B* and gave him possession. *B* built upon it. The performance of the agreement by execution of a registered instrument was refused in 1918. *A* gave notice to quit in 1922 and subsequently sued *B* for ejectment. At the date of the suit *B's* right to have the contract specifically performed had been barred by limitation. Their Lordships after reviewing the English law relating to part performance of a contract held that neither the doctrine of *Walsh* v. *Lonsdale*(16) nor the doctrine of part performance applied, so as to relieve a transaction from the operation of the statute. As to the doctrine of part performance, their Lordships observed as follows :

> "Whether an English equitable doctrine should in any case be applied so as to modify the effect of an Indian statute may well be doubted ; but that an English equitable doctrine affecting the provisions of an English statute relating to the right to sue upon a contract, should be applied by analogy to such a statute as the Transfer of Property Act and with such a result as to create without any writing an interest which the statute says can only be created by means of a registered instrument, appears to their Lordships, in the absence of some binding authority to that effect, to be impossible."

As to the doctrine of *Walsh* v. *Lonsdale*(16a) their Lordships referring to the legal position, if the contract had been, at the date of the suit, capable of specific performance observed :

> "Had he (B) been so entitled, the position would be very different for then the respondent could claim to have executed in his favour by the appellant (A) an instrument in writing which he could duly have registered, 'the appellant's ejectment action being stayed in the meantime'."

It may be noted that their Lordships did not say that if the contract was capable of specific performance, the principle of *Walsh* v. *Lonsdale*(16b) would apply. They merely stated that the fact would enable the defendant in the suit for ejectment to have the suit *stayed* while he filed a separate suit to enforce specific performance of the contract. The view was reiterated in *Currimbhoy* v. *Creet*(17) The position was made still more clear in *Pir Bux* v. *Mahomed Tahar* (18) where *A* agreed to transfer

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1941 Lah 407 (410) [AIR V 28] : ILR (1942) Lah 79 (FB). (The section is not a reproduction of the English doctrine though it is based upon it.)
1964 Cal 235 (237) [AIR V 51 C 45] (DB).
1963 Mad 310 (311) [AIR V 50 C 113]: ILR (1963) Mad 722 (DB).
1961 Punj 378 (382) [A I R V 48 C 111] : I L R (1961) 2 Punj 293 (DB).
1959 Andh-Pra 568 (570) [AIR V 46 C 163] (DB).
1955 Hyd 101 (102) [AIR V 42 C 25] : ILR (1954) Hyd 822.
1955 Mysore 38 (39) [AIR V 42 C 15] : I L R (1955) Mys 234.
1954 Mad 702 (703) [AIR V 41 C 233].
1952 Orissa 116 (117) [AIR V 39] (DB).
1950 Cal 23 (26) [AIR V 37 C 6] : I L R (1950) 2 Cal 443 (DB).
1943 Sind 81 (81) [AIR V 30] : I L R (1942) Kar 513 (DB).
('41) 45 Cal W N 132 (136) (DB).
1939 Cal 163 (166) [AIR V 26] : ILR (1938) 2 Cal 328 (DB). (There is no bar of defence under limitation to that section.)
†1938 Cal 97 (99, 101, 103) [AIR V 25] : ILR (1938) 1 Cal 607 (DB).
1936 Lah 5 (5) [AIR V 23].
1934 Lah 751 (752) [AIR V 21] (DB).
1934 Pat 301 (302) [AIR V 21].
1932 Sind 42 (43, 44) [AIR V 19] : 25 Sind L R 433 (DB).
[*See also* 1944 Lah 179 (180) [AIR V 31] (DB). (Section 53A is in no way an enactment of the law as stated in AIR 1931 P C 79, but is an extension of it.)]

15. * 1931 P C 79 (82) [AIR V 18] : 58 Ind App 91 : 58 Cal 1235. (On appeal from AIR 1929 Cal 101.)

16. (1882) 31 W R (Eng) 109 (110) : L R 21 Ch D 9 : 53 L J Ch 2 : 46 L T 858.

16a. (1882) 31 W R (Eng) 109 : L R 21 Ch D 9: 52 L J Ch 2 : 46 L T 858.

16b. (1882) 31 W R (Eng) 109 : L R 21 Ch D 9: 52 L J Ch 2 : 46 L T 858.

17. 1933 P C 29 (32) [AIR V 20] : 60 Cal 980 : 60 Ind App 297. (On appeal from AIR 1930 Cal 113.)

18. 1934 P C 235 (237, 238) [A I R V 21] : 58 Bom 650 (657, 658) : 61 Ind App 388: 29 Sind L R 74.

property to *B* but did not execute a conveyance. *B* without any authority from *A* entered into possession and *A* sued for ejectment. The ejectment was decreed. After observing that a contract for sale of immovable property in India does not of itself create any interest in the property, their Lordships stated as follows :

"The defendant's proper course in the present case as Lord Russell of Killowen points out in *Ariff* v. *Jadunath*,(18a) would have been to have founded on the agreement of sale and to have applied for a stay of the proceedings in order to enable him to compel the plaintiff to execute an instrument in his favour which he could have duly registered. The remedy thus available to the defendant would not have depended on any recognition of the agreement of sale as in itself a defence to the action of ejectment, but rather on the principle that the Court will not grant a decree of ejectment which can at once be rendered ineffective by the same Court being required to grant a decree of specific performance resulting in reinstatement. But the defendant did not ask for a stay, and did not raise any action for specific performance. Now he is too late to do so; the agreement of sale has become unenforceable.

"The result is that, under the law applicable to the present case, an averment of the existence of a contract of sale, whether with or without an averment of possession following upon the contract, is not a relevant defence to an action of ejectment in India. If the contract is still enforceable the defendant may found upon it to have the action stayed, and by suing for specific performance obtain a title which will protect him from ejectment. But if it is no longer enforceable, its part performance will not avail him to any effect."

See also the undermentioned cases(19) to a similar effect.

18a. 1931 P C 79 (82) [AIR V 18] : 58 Cal 1235 (1246) : 58 Ind App 91 (101).

19. 1951 S C 469 (474) [AIR V 38 C 63] : 1952 S C R 43. (Per Patanjali Sastri, J.)

1938 Mad 358 (359) [A I R V 25] : I L R (1938) Mad 829 (SB). (Widow obtaining decree for maintenance against X — Maintenance made a charge on property — X selling property to Y— Widow agreeing with Y that if Y paid balance of maintenance amount due to widow she would release her charge on the property — Balance not paid — Y selling property to Z and Z suing for possession — Doctrine of part performance does not apply.)

1935 Pat 291 (296) [AIR V 22] : 14 Pat 672 (FB). (Suit commenced before S. 53A was introduced —Doctrine of part performance is not available in view of AIR 1931 P C 79.)

1935 Rang 230 (232) [AIR V 22] : 13 Rang 274 (FB). (AIR 1924 Rang 214 : AIR 1925 Rang 1 ; AIR 1925 Rang 119 : AIR 1927 Rang 33; AIR 1928 Rang 93 : and AIR 1928 Rang 321, held wrong law.)

1948 Nag 67 (68) [AIR V 35 C 24] : ILR (1947) Nag 449. (Mistake in unregistered sale deed — Wrong field number given—Delivery of possession of correct property — Vendee does not get title thereby in absence of a registered sale deed transferring the correct field and therefore he cannct sue for declaration of his title to property —Case is governed by AIR 1931 P C 79 and English doctrine of part performance does not apply on the basis that there was an oral contract to transfer the correct field.)

1947 Cal 353 (361) [AIR V 34 C 105] (DB). (Oral agreement in 1933 for grant of permanent lease of land by S to B at monthly rent—In anticipation of execution of lease B let into possession— B erecting substantial structures with knowledge and approval of S— No lease executed —In 1940 S suing for ejectment — Held S. 53A was not applicable—Suit was governed by Privy Council decision of Ariff v. Jadunath (AIR 1931 P C 79) —Further, B was not entitled to compensation for structures erected but could remove them under S. 108 (h).)

1944 Bom 105 (106) [AIR V 31] (DB). (Agreement to lease unregistered — Person put in possession — Suit for possession brought after enactment of S. 53A — Doctrine of part performance does not apply : AIR 1931 P C 79, Relied on — Reversed on another point in A I R 1950 S. C. 1.)

1940 Cal 254 (257) [AIR V 27]. (The English doctrine of part performance is not available in India by way of defence to a suit for ejectment except under provisions of S. 53A of the Transfer of Property Act and in cases to which that section is applicable.)

1937 All 328 (332) [AIR V 24] (DB). (Covenant for renewal of lease before introduction of S. 53A— Lessee cannot resist ejectment by landlord under S. 53A.)

1936 Oudh 102 (104) [AIR V 23] (DB). (Lease executed before S. 53A—Neither S. 53A nor the doctrine of part performance applies: AIR 1931 P C 79, Followed.)

1936 Nag 174 (176) [AIR V 23]. (Doctrine of part performance not applicable apart from provisions of S. 53A.)

1936 Bom 290 (292) [AIR V 23] : 60 Bom 736 (DB).

1936 Nag 282 (282) [AIR V 23] : ILR (1937) Nag 242. (Case before S. 53A was introduced. AIR 1931 P C 79, Followed.)

1935 Rang 448 (448) [AIR V 22]. (Case before S. 53A was introduced — Doctrine of part performance is not applicable except under S. 53A.)

1935 Cal 541 (542) [AIR V 22] : 62 Cal 492. (Suit for ejectment of lessee under an unregistered

4. Scope of the section.—As has been seen in Note 3, this section partially imports into this country the English equitable doctrine of part performance. Apart from this section and except as provided therein the doctrine of part performance is not applicable in India.(1)

The chief differences between the English doctrine of part performance and the present section are as follows :

(1) The contract to which the English doctrine is applicable may be *oral*. The contract to which this section applies must be in *writing* signed by the transferor.(2) (See Notes 9 and 9a).

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lease brought before enactment of S. 53A – Lessee is liable to be ejected and doctrine of part performance is not available to him.)

1935 Rang 84 (86) [AIR V 22] : 12 Rang 589 (DB). (AIR 1931 P C 79, Followed.)

1935 Mad 404 (408) [AIR V 22] (DB). (AIR 1934 P C 235, Followed.)

1935 Mad 404 (408) [AIR V 22] (DB).

1935 Bom 208 (211) [AIR V 22] (DB).

1934 Pat 546 (548) [AIR V 21] (DB). (Suit before enactment of S. 53A—Doctrine of part performance cannot operate to nullify statutory requirement of a registered instrument. AIR 1931 P C 79, Followed.)

1934 Mad 583 (583) [AIR V 21] (DB). (AIR 1930 Mad 1021, Reversed.)

1933 Cal 393 (396) [AIR V 20].

1933 Pat 485 (486) [AIR V 20].

1916 Mad 14 (15) [AIR V 3] (DB).

('35) 37 Bom L R 246 (247) (DB). (Case before S. 53A was introduced. AIR 1934 P C 235, Followed.)

('34) 67 Mad L Jour (SN) 62 (62) (DB). (Even if at the date of the suit by the legal owner the defendant in possession had an enforceable contract of sale in his favour, he cannot rely upon the fact as a defence to the claim for ejectment — He could at best only apply for stay of the ejectment suit till he could obtain a decree for specific performance in proper proceedings.)

[*See also* 1941 Cal 32 (37) [AIR V 28]. (Where provisions of Registration Act were applicable, doctrine of part performance not applied.)]

[See however 1934 Cal 235 (238) [AIR V 21] 60 Cal 1372 (DB). (Lease — Contract complete —Agreement registered but formal lease not executed or registered — Lessee in possession under agreement — Material terms performed — Parties are bound in equity by contract to lease. AIR 1931 P C 79, Followed.)]

Section 53-A — Note 4

1. 1964 S C 877 (880) [AIR V 51 C 112] : (1964) 3 S C R 985. (After S. 53A was enacted the only case in which the English doctrine of equity of part performance could be applied in India is where the requirements of S. 53A are satisfied.)

1961 Punj 378 (382) [AIR V 38 C 111] : ILR (1961) 2 Punj 293 (DB).

1958 Pat 133 (140, 141) [AIR V 45 C 55] (DB). (When the doctrine of part performance as laid down in S. 53-A is not applicable for want of writing as contemplated in S. 53-A, any order defence based on equitable consideration cannot succeed. AIR 1931 P C 72 and AIR 1934 P C 235, Rel. on.)

(1957) 1 Andhra W R 366 (368).

1957 Andh-Pra 854 (855) [AIR V 44 C 260] : ILR (1956) Andhra 1019 (DB).

1957 Andh-Pra 58 (59) [AIR V 44 C 26].

1956 Andh 209 (212) [AIR V 43 C 59] (DB).

1951 Nag 403 (405) [AIR V 38 C 126] : ILR (1950) Nag 25. (Right to retain possession on ground of part performance is no longer based on equity — It now rests on express provisions of S. 53-A).

1949 Assam 8 (10) [AIR V 36 C 7] (DB). (Where S. 53A in terms applies there is no justification for referring to general discussion on the English doctrine of part performance in order to import into S. 53A limitations not to be found in the statute itself. Hence it is immaterial that defendant could not have sued for specific performance of contract of sale on account of limitation expiring.)

1944 Oudh 212 (215) [AIR V 31] : 19 Luck 565 (DB). (Section defines the limits with which the English equitable doctrine of part performance can be applied in India.)

1938 Mad 746 (748) [AIR V 25]. (This section is generally available to defendant.)

1935 Rang 448 (448) [AIR V 22].

[*See also* 1944 Lah 179 (180) [AIR V 31] (DB). ("Section 53A creates rights which certainly were not in existence before that enactment was passed—There was previous to that enactment no right to put up an unregistered agreement and part performance under it as a defence to a suit for ejectment.")]

2. 1962 Punj 475 (476) [AIR V 49 C 130]. (The transaction of oral sale requiring compulsory registration under S. 54 is not saved by the doctrine of part performance.)

1947 Cal 353 (361) [AIR V 34 C 405] (DB). (S. 53A not applicable to oral agreement.)

†1943 Sind 81 (81) [AIR V 30] : ILR (1942) Kar 513 (DB). (Section does not apply to oral contracts.)

1941 Bom 346 (348) [AIR V 28] : ILR (1941) Bom 529 (DB). (Or 'signed on his behalf'.)

1938 Cal 97 (103) [AIR V 25] : ILR (1938) 1 Cal 607 (DB).

(2) Under this section, the transferor is only 'debarred from enforcing any right in respect of the property other than a right expressly provided by the terms of the contract. The transferee cannot sue for any declaration of his right on the basis of part performance. (See also Note 13.) Under the English law both the parties can claim as plaintiff that the contract be carried into execution, and each can resist a suit by the other claiming rights in violation of the contract.(3)

(3) Under the English law, the part performance of a contract gives rise only to an *equity* and not to a legal right. But under the present section the part performance gives rise to a statutory right of defence. The right is, however, one, which, but for the lack of some formality, the party would have had, under written agreement. The section does not give any right which the informal agreement itself will not give.(4)

The necessary conditions for application of S. 53A are that (i) there is a contract to transfer immovable property for consideration, (ii) the contract is signed by or on behalf of the transferor, (iii) the terms can be ascertained with reasonable certainty from the document, (iv) the transferee is put in possession or if he has been already in possession, continues in possession, (v) he has done some act in furtherance of the contract and (vi) the transferee has performed or is willing to perform his part of the contract. If the aforesaid conditions are fulfilled, the transferor or any person claiming under him is debarred from enforcing against the transferee and persons claiming under him any right in respect of the property.(5)

This section was inserted principally for the protection of ignorant transferees who take possession or spend money in improvements relying on documents which are ineffective as transfers or on contracts which cannot be proved for want of registration. The effect of the section is to relax the strict provisions of the Transfer of Property Act and the Registration Act in favour of the transferees in order to allow the defence of part performance to be established.(6)

5. Section, if retrospective in operation. – It has been held that the section is not retrospective in the sense that it can be applied to cases where the act of part

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1934 Pat 546 (547) [AIR V 21] (DB). (It is the minimum requirement of the section.)
1934 Rang 127 (129) [AIR V 21].
1933 Pat 485 (487) [AIR V 20].
1933 Rang 136 (138) [AIR V 20].

3. † 1938 Cal 97 (103) [AIR V 25] : ILR (1938) 1 Cal 607 (DB).

4. 1939 Pat 296 (303) [AIR V 26].
[*See also* (1957) 1 Andh W R 366 (368). (The provisions of S. 53A are not to be applied on equitable considerations: it is a legal right given by a statute.)]

5. (1967) 2 Andh W R 2 (6). (Further rights of other transferees for consideration without notice should not be affected.)
1966 Assam 46 (47) [AIR V 53 C 7] : ILR (1964) 16 Assam 493 (DB).
1959 Andh Pra 534 (535, 536) [AIR V 46 C 154] : ILR (1959) Andh Pra 547 (DB).
1957 Andh Pra 854 (855) [AIR V 44 C 260] : ILR (1956) Andh 1019 (DB).
1955 Hyd 101 (102) [AIR V 42 C 25] : ILR (1954) Hyd 822.
1952 Nag 244 (245) [AIR V 39] : ILR (1949) Nag 959.
[*See also* 1953 Ajmer 19 (20) [AIR V 40 C 20]. (When possession has been given to transferee and he has performed his part of the contract. The transferee or persons claiming under him, can defend their possession against the transferor or persons claiming under him, even though the document is not registered.)
1953 Ajmer 47 (47, 48) [AIR V 40 C 50]. (The section envisages a case in which the transferee has obtained possession and has performed his part of the contract. Paragraph 1 of the section envisages the execution of some contract also. Therefore if only the step of registration has not been taken the contract remains only partly performed and the transferee can take advantage of the section.)]

6. 1967 Raj L W 413 (415).
1955 Nag 306 (310) [AIR V 42 C 82] : ILR (1956) Nag 10 (DB).

performance was before the section came into operation and a *suit was pending* at the time it came into operation.(1) But before the decision of the Supreme Court in *Maneklal v. H. J. Ginwalia and Sons* (1a) there was a difference of opinion as to whether it is retrospective in the sense that it will apply to cases where the part performance was before the section came into operation, but the *suit is instituted after it came into operation.* According to one line of decisions,(2) the section was not retrospective so as to affect acts of part performance which took place before 1st April, 1930 (the date on which the section came into operation) whether the suit was filed before or after that date. In the undermentioned cases(3) the contrary view had been taken namely that the section would apply where the suit was instituted after the 1st April, 1930 though the act of part performance took place before that date. This view proceeds upon the ground that this section is not one of the sections referred to in S. 63 of the amending Act 20 of 1929 as being not retrospective. As will be seen in Note 13, the section does not create any *title* to or *substantive right* in the property in favour of

Section 53A —Note 5

1. 1934 P C 235 (238) [AIR V 21] : 58 Bom 650: 61 Ind App 388.
1935 Pat 291 (297) [AIR V 22] : 14 Pat 672 (FB).
1943 Sind 81 (81) [AIR V 30] : ILR (1942) Kar 513 (DB).
1939 Bom 31 (34) [AIR V 26] : ILR (1939) Bom 71 (DB).
1937 All 10 (11) [AIR V 24] : ILR (1937) All 312 (DB).
1937 Nag 74 (76) [AIR V 24] : ILR (1936) Nag 115 (DB).
1935 Cal 541 (543) [AIR V 22] : 62 Cal 492.
1935 Mad 404 (408, 409) [AIR V 22] (DB).
1934 Pat 546 (547) [AIR V 21] (DB).
[*See also* 1935 Bom 208 (211) [AIR V 22] (DB).]
[But see 1961 Manipur 54 (56) [AIR V 48 C 19]. (Retrospective operation — Act extended to Manipur during pendency of suit — Court can give relief by applying S. 53A. AIR 1941 Lah 407 (FB), Rel. on, Submitted not good law.)]

1a. 1950 SC 1(4) [AIR V 37 C 1]:1950 SC R 75.

2. 1956 Mad 354 (362, 363) [AIR V 43 C 109] : ILR (1956) Mad 587 (FB). (S. 63 of Amending Act 20 of 1929 did not by itself make S. 53A of the T. P. Act retrospective. The question whether independently of S. 63 of Act 20 of 1929, S. 53A of the T. P. Act is to be held retrospective not considered.)
1945 Mad 171 (172) [AIR V 32]. (A vendee claiming under an unregistered sale deed executed before the section came into operation cannot therefore plead part performance in a suit for possession by a person having legal title.)
1944 Mad 556 (556) [AIR V 31]. (AIR 1943 Mad 445 (FB), Followed.)
1943 Mad 445 (448, 449) [AIR V 30] : ILR (1943) Mad 831 (FB). (Approving AIR 1932 Mad 734.)
1939 Pat 488 (489) [AIR V 26] (DB).
1938 Cal 795 (796) [AIR V 25].
†1938 Pat 337 (346, 352) [AIR V 25] : 17 Pat 460 (DB). (Canons of construction in order to decide whether an Act is retrospective or prospective stated.)
1936 Mad 916 (916) [AIR V 23].
1936 Nag 282 (282) [AIR V 23] : ILR (1937) Nag 242.
1936 Oudh 306 (307) [AIR V 23] (DB).
1936 Oudh 102 (104) [AIR V 23] (DB).
1935 Bom 91 (93) [AIR V 22].
1934 All 701 (701) [AIR V 21].
1932 Mad 734 (736) [AIR V 19]: 56 Mad 169 (DB).
('34) 18 R D 572 (573).
[*See also* 1941 Oudh 41 (43) [AIR V 28] : 16 Luck 99 (DB). (Doubtful whether it has retrospective effect.)
1931 Mad 580 (586) [AIR V 18] : 55 Mad 72 (DB). (Per Cornish, J.)]

3. 1940 Pat 385 (388, 392) [AIR V 27] : 19 Pat 752 (FB). (There is no inconsistency in the view that S. 53A is retrospective while S. 27A, Specific Relief Act, 1877 is not so.)
1955 Vind Pra 15 (16) [AIR V 42 C 7].
1953 Ajmer 19 (20) [AIR V 40 C 20].
1944 Bom 105 (106) [AIR V 31] (DB). (Reversed on another point in AIR 1950 S C 1.)
1943 Pat 363 (364) [AIR V 30] (DB). (Dissenting from AIR 1938 Pat 337 and AIR 1939 Pat 488 —AIR 1940 Pat 385 (FB), Followed.)
1941 Cal 33 (36) [AIR V 28].
1941 Cal 287 (287) [AIR V 28].
1940 Bom 90 (93) [AIR V 27] : I L R (1940) Bom 50 (DB).
1940 Bom 193 (194) [AIR V 27] (DB).
1940 Nag 396 (400) [AIR V 27].
†1939 Rang 175 (177) [AIR V 26].
1938 Cal 97 (99, 100, 104) [AIR V 25] : I L R 1938) 1 Cal 607 (DB).
1938 Nag 377 (383) [AIR V 25] : ILR (1939) Nag 432 (DB).
1937 Cal 467 (467) [AIR V 24].
1937 Pat 36 (37, 38) [AIR V 24] : : 15 Pat 786 (DB).
1937 Rang 402 (405) [AIR V 24] : 1938 Rang L R 216 (DB).
1936 Lah 5 (5) [AIR V 23]. (Obiter.)
1936 Nag 254 (256) [AIR V 23].
1934 All 768 (770) [AIR V 21].
1933 Bom 381 (384) [AIR V 20].

the transferee. It merely creates a right of *defence* in answer to a suit by the transferor. As pointed out in *Ko Po Mo* v. *Maung Lu Khin*(4) in considering whether a person is entitled to bring such a defence, the date on which the agreement or contract was entered into is really not relevant. What is relevant is really the date on which the suit was filed. The absence of reference to this section in S. 63 of the amending Act 20 of 1929 would also seem to indicate, if anything, that the section would be retrospective in the sense referred to above. The latter view now finds support in the Supreme Court decision in *Maneklal* v. *H. J. Ginmalia & Sons.*(5) See also the undermentioned cases(6) to the same effect. The former view and the decision of the Andhra Pradesh High Court in the undermentioned case(7) decided after the Supreme Court Judgment must be held to be no longer good law.

6. **"Contracts to transfer."**— The section applies only where any person *contracts to transfer* property. A document of transfer which is not registered or not completed in the manner prescribed by law, may, as will be seen in the Notes on S. 54, operate as a *contract to transfer*. Consequently, the section applies not only to contracts to transfer as such, but also to instruments of transfer. This is made clear by the words "or where there is an instrument of transfer" in the fourth paragraph of the section.(1) A lease is a transfer of property, and the section applies to an

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4. 1937 Rang 402 (405) (AIR V 24] : 1938 Rang L R 216 (DB).

5. 1950 S C 1 (4) [AIR V 37 C 1] : 1950 S C R 75.

6. 1955 Hyd 101 (103) [AIR V 42 C 25] : I L R (1954) Hyd 822.

1955 Madh Bha 49 (52) [AIR V 42 C 14] : I L R (1954) M B 237 (DB). (Section 54, Gwalior Transfer of Property Act would apply to all suits instituted after the Act came into force in 1945 in the former Gwalior State although the transaction was effected before its enactment AIR 1950 S C 1, Foll.)

1953 Sau 56 (57) [AIR V 40 C 24) (DB). (S. 53A applies to suits filed after the application of the T. P. Act to Saurashtra even though the transaction may have taken place earlier.)

1951 Mys 126 (127) [AIR V 38 C 48] : I L R (1951) Mys 414 (DB). (Retrospective effect can be given to S. 53A. ('46) 51 Mys H C R 148 (FB) held no longer good law in view of AIR 1950 S C 1.)

7. 1961 Andh Pra 31 (33) [AIR V 48 C 9] : ILR (1961) 1 Andh Pra 473 (DB). (Section has no retrospective operation and would not apply to document executed before year 1929.)

Section 53A — Note 6

1. 1965 Punj 117 (118) [AIR V 52 C 38]. (The first clause of section 53-A makes it clear that the contract which is sought to be enforced must itself constitute the transaction of transfer. An agreement to raise the rate of interest on the mortgage amount cannot be regarded as an instrument of transfer and therefore the doctrine of part performance has no application.)

1963 Andh Pra 239 (240) [A I R V 50 C 76]. (S. 53A applies both to cases of out-right sales as also to contracts to sell, provided the other conditions are satisfied. Reversed on another point in AIR 1963 A. P. 489.)

1959 Andh Pra 568 (570) [AIR V 46 C 163] (DB). (The most important condition that should be established in order to invoke the section is the existence of a document in writing which constitutes a contract of sale.)

1959 Mad 354 (355) [A I R V 46 C 107] : ILR (1959) Mad 796. (It is not necessary that a deed of transfer should have been obtained by the party before he could invoke S. 53-A. The conditions laid down in S. 53-A are fulfilled even though a contract to sell alone was obtained.)

1957 Bom 236 (237) [A I R V 44 C 80] : I L R (1957) Bom 769. (Sauda Chitti executed — Vendee put in possession of property on payment of consideration — Proper conveyance to be executed later — Transaction held, is only a contract and not transfer — Vendee is, however, being in possession, entitled to the benefit of S. 53A.)

1957 Bom 138 (140) [A I R V 44 C 46] : I L R (1958) Bom 556 (DB). (Instrument of transfer — Sale deed of property worth less than Rs. 100 — Deed not registered — Transferee in possession — Suit for possession by vendor — Unregistered deed is contract in writing — Defendant can claim benefit of doctrine of part performance — AIR 1943 Bom 431, Overruled.)

Madh B L J 1954 H C R 803 (805).

1939 Oudh 85 (86) [A I R V 26]. (A lease on 8 anna stamp paper.)

[*See also* 1964 All 300 (301) [AIR V 51 C 85]. (No contract to transfer immovable property — Question of part-performance of contract does not arise.)

1961 Andh Pra 31 (33) [A I R V 48 C 9] : ILR (1961) 1 Andh-Pra 473 (DB). (Lessee in possession of land without any agreement for sale

unregistered instrument of lease.(2) A formal lease is not necessary to attract the application of the section. All that is required is that an agreement in writting signed by the transferor can be gathered from the evidence.(2a) In the undermentioned case(3) before the introduction of the section, it was held by the Lahore High Court, that in the case of a lease the transaction can never be said to be *completed* and that consequently the doctrine of part performance did not apply. This would not be good law under the section.

A grant of a partial and limited interest in immovable property such as a right to dig minerals where the grantor does not exclude himself from working the mines has been held not to be transfer of property so as to make the provisions of this section applicable.(3a)

Mortgage being a transfer of an interest in specific immovable property and for consideration attracts S. 53.A.(3aa)

A *surrender* by a tenant to the landlord is not a *transfer* and the section has no application to such a case.(4)

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of the land in his favour — Continuance of possession not being in pursuance of any agreement for sale, S. 53A not applicable.)]

2. 1963 Andh Pra 239 (240, 241) [A I R V 50 C 76]. (Reversed on another point in AIR 1963 A. P. 489.)
1953 Cal 349 (351) [AIR V 40 C 130].
1953 Hyd 97 (97) [A I R V 40 C 37] : ILR (1953) Hyd 110.
1951 Bom 127 (129) [A I R V 38 C 25] : I L R (1951) Bom 692 (DB). (The fact that section 105 of T. P. Act defines lease of immovable property as a transfer of a right to enjoy the property does not affect the above position.)
1951 Nag 285 (287) [AIR V 38 C 81] : ILR (1950) Nag 799 (DB).
1950 Cal 23 (28) [AIR V 36 C 6] : I L R (1950) 2 Cal 443 (DB).
1946 Mad 310 (311) [AIR V 33 C 162].
1939 Oudh 85 (86) [AIR V 26].
1937 All 10 (12) [AIR V 24] : ILR (1937) All 312 (DB).
1936 Lah 5 (5) [AIR V 23]. (Lessee under prior unregistered lease — Possession and continuous payment of rent to landlord—Part performance can be invoked against subsequent lessee.)
[*See also* ('55) 8 Sau L R 378 (381). (Document of lease not signed by lessor—Document is admissible as evidence of part performance of agreement to grant lease under S. 53A.)
('55) 8 Sau L R 1 (1). (There is no difference between a contract to lease and an agreement to lease.)]

2a. 1950 S C 1 (5) [A I R V 37 C 1] : 1950 S C R 75.
1965 Pat 467 (468, 469) [A I R V 52 C 132] : 44 Pat 596 (DB). (AIR 1950 S C 1, Rel. on; AIR 1960 Pat 354, Affirmed.)
1956 Mad 693 (694) [A I R V 43 C 226]. (Agreement in writing is not required to be in any particular form.)
1944 Pat 35 (36) [A I R V 31]. (Person put in possession under agreement to lease expressed in two registered documents, a patta signed by landlord alone and a kabuliyat signed by tenant alone—Transaction does not operate to create a validly executed lease — Tenant is, however, entitled to benefit of S. 53-A provided he pays rent for period of his occupancy and thus performs his part of contract.)

3. 1927 Lah 489 (490) [AIR V 14].

3a. 1944 Pat 261 (266) [AIR V 31] : 23 Pat 115 (DB). (Grant of right to dig mica—Owner not excluding himself from working the mine — Held, grant was not a lease but in the nature of an easement.)

3aa. 1963 Andh-Pra 489 (490) [A I R V 50 C 120] : ILR (1964) Andh-Pra 542 (DB). (AIR 1963 A P 239, Reversed.)
1960 Punj 604 (604) [AIR V 47 C 212]. (Unregistered mortgage — Possession delivered to mortgagee — Insolvency of mortgagor—Benefit conferred by S. 53-A, T. P. Act, is available to mortgagee as against Receiver, in whom interest of mortgagor vests—Insolvency does not put an end to the possession of a mortgagee under an unregistered document of mortgage.)
1955 N U C (Mad) 3923. (Unregistered usufructuary mortgage—Mortgagee in possession—Part performance — Mortgagee is entitled under S. 53A to protect his possession and resist dispossession.)
1950 Bur L R (H C) 80 (87, 88). (Usufructuary mortgage not registered — Mortgagee taking possession in part performance of the contract —Section applies.)
[*See also* 1950 Trav-Co 81 (82) [AIR V 37 C 38] (DB). (Mortgage with possession — Mortgagee retaining portion of mortgage security and surrendering rest to mortgagor in pursuance of arrangement between parties to extinguish mortgage—Subsequent deed of arrangement not registered—Suit by mortgagor to redeem mortgage barred by doctrine of part performance.)]

4. 1940 Nag 175 (176) [A I R V 27] : ILR (1940) Nag 177.

It has been held in the undermentioned cases (4a) that a relinquishment of a right in property is a transfer within the meaning of the section.

A *family arrangement* cannot be said to operate as a transfer of property or of a contract to transfer property. Such an arrangement may be made orally, but if in writing, registration is necessary for its validity under S. 17 of the Indian Registration Act. Consequently, it has been held that where such arrangement is in writing but not registered, S. 53A has no application to the case and that the defect in the want of registration cannot be cured.(5) The view that had been taken in some cases,(6) before the section was introduced, that the doctrine of part performance could be applied to family arrangements also is no longer good law.

Partition of property is not a *transfer* within the meaning of this section and as such the section is not applicable to partition.(7)

7. Consideration.—It was held in some cases before this section was enacted that the doctrine of part performance was applicable even to gifts,(1) and in other cases that it did not apply.(2) In the case noted below,(3) also decided before this section was introduced, it was held that the doctrine of part performance did not apply to a gift by way of *sankalp* at the time of marriage, as marriage under the Hindu law was a sacrament and not a *contract for consideration.* The section makes it clear that it applies only to contracts to transfer for *consideration* and not to gifts.(3a)

In the undermentioned case.(4) a letter relinquishing right to immovable property did not recite the passing of consideration. It was held that the passing of consideration not being a *term* of the contract could be proved by oral evidence by virtue of proviso 2 to S. 92, Evidence Act, and that, therefore, this section was applicable if the passing of consideration was proved.

See also the undermentioned case.(5)

4a. 1966 M P 307 (310) [AIR V 53 C 77] (DB).
1953 Hyd 114 (116) [AIR V 40 C 42] : ILR (1952) Hyd 449 (DB).

5. † 1937 All 578 (580) [AIR V 24] : ILR (1937) All 817 (FB).
1950 All 700 (704) [A I R V 37 C 274] : I L R (1952) 2 All 703 (DB).
1939 All 529 (531) [AIR V 26] (DB).

6. 1933 Lah 648 (650) [A I R V 20] : 14 Lah 635 (DB).
1929 Oudh 373 (375) [A I R V 16] : 4 Luck 57 (DB).
1924 Nag 373 (374) [AIR V 11].

7. 1954 Sau 46 (48) [AIR V 41 C 24] (DB).
1951 Mad 213 (218) [AIR V 38 C 43] : ILR (1951) Mad 607 (DB).
1950 Assam 129 (130) [AIR V 37 C 49] (DB).
[*See also* 1949 R D 373 (374). (Private division of land by mutual consent is not the same thing as a 'transfer for consideration.')]

Section 53A — Note 7

1. 1927 Nag 402 (403) [AIR V 14].
1927 Rang 128 (128) [AIR V 14]. (The rule that where a donee of property is in bona fide possession of it though the gift had not been perfected by a registered instrument in accordance with law, the donor cannot oust the donee is not applicable to a donee from the donee, neither of the deeds of gift being registered.)

2. 1929 Rang 316 (317) [AIR V 16].
1929 Rang 272 (273) [AIR V 16].
[*See* 1928 Bom 250 (252) [AIR V 15] (DB). (In so far as the decision says that, because specific performance cannot be granted, the doctrine does not apply, it is not correct. See Note 2.)]

3. 1928 All 699 (703) [AIR V 15] (DB).

3a. (1959) 2 Mad L Jour 502 (506).

4. 1946 Mad 452 (453) [AIR V 33 C 230].

5. 1950 Assam 107 (120) [AIR V 37 C 42] (DB). (Admission in writing by the vendor in mutation proceeding to the effect that he sold the property in question to the vendee could not be a contract in writing transferring the property within S. 53A and especially that it contained no averment as to the passing of considaration and that it did not contain all the terms of transfer.)

8. "Immovable property."—The section applies only to contracts to transfer *immovable* property. It does not apply to contracts to transfer *movable* property.(1) Even under the English law, the doctrine was not applicable to contracts relating to movable property.(2) In the undermentioned case(3) the immovable property in possession of the transferee was sold for recovery of taxes due on the property and the money realised was deposited in Court. The transferor made a claim to the money. It was held that it could not be held that this section was inapplicable on the ground that the transferor was enforcing his right against the money and not against the immovable property, because unless the transferor could enforce his right against the property he could not enforce it against the money.

9. Contract must show clearly terms of transfer. — It has been seen in Note 1 that the doctrine of part performance in England is applicable only where the acts of part performance *unequivocally* give rise to an inference of a contract. When this is established, the Court could go into parol evidence to ascertain the terms of the contract. Under this section, there is no question of the Court taking any parol evidence as to the terms of the contract. The contract itself must be in writing,(1) and must show clearly what are the terms necessary to constitute the transfer.(2)

Section 53A — Note 8

1. 1957 Manipur 9 (13) [AIR V 46 C 5].
1934 Rang 303 (304) [AIR V 21].

2. *See* 1930 Mad 84 (95) [AIR V 17] (DB).

3. 1957 Andh Pra 854 (858, 859) [AIR V 44 C 260] : ILR (1956) Andh Pra 1019 (DB).

Section 53A — Note 9

1. 1964 S C 877 (880) [AIR V 51 C 112] : (1964) 3 S C R 985. (C bringing in N into his family under an oral arrangment that latter would marry his wife's sister's daughter and help him in cultivation and management of his properties in consideration of which N would inherit the entire properties on C's death — Aliences from reversioners of C suing for recovery of property in the hands of N's sons — N's sons cannot rely on equitable doctrine of part performance and resist the claim—Considerations of equity, held, could not confer on N or his heirs title in the lands which under the statute could be conferred only by a registered instrument—AIR 1956 Andhra 209, Affirmed.)
1965 Madh Pra 275 (280) [AIR V 52 C 75] (DB).
1962 Punj 475 (476) [AIR V 49 C 130].
('61) 1961 M P L J 1179 (1180). (Where possession of property is claimed through an unregistered deed of exchange and it is not proved that the deed of exchange was executed, the right of part performance under S. 53-A of the Act is not available.)
1960 Raj L W 103 (104). (A receipt passed by the owner of the house to his tenant for the advance money and a letter addressed to the Engineer to arrange water connection in the name of the tenant, held did not satisfy the requirements of S. 53-A.)
1958 Mad 576 (577, 578) [AIR V 45 C 201] : ILR (1959) Mad 69 (DB).
1958 Pat 133 (140, 141) [AIR V 45 C 55] (DB).
1957 Cal 625 (626) [AIR V 44 C 162] : I L R (1957) 3 Cal 636. (An oral lease reserving a yearly rent — Transfer building permanent structures relying on such invalid lease—Transferee has no defence to the suit for ejectment.)
1956 Andhra 209 (212) [AIR V 43 C 59] (DB). (The absence of a written contract would take the case out of the purview of S. 53-A.)
ILR (1955) 2 Cal 214 (223) (DB).
('54) Madh B L J 1954 H C R 1450 (1453, 1454).
1953 Ajmer 47 (47) [AIR V 40 C 50]. (Para 1 of S. 53-A envisages the execution of some contract.)
1952 Nag 246 (248) [AIR V 39] : ILR (1951) Nag 334.
1951 Nag 171 (174) [AIR V 38 C 34] : ILR (1950) Nag 618.
1950 Assam 107 (110) [AIR V 37 C 42] (DB). (Mere admission though in writing by vendor before Revenue authorities in mutation proceedings that land had been sold to vendee cannot be regarded as a written contract between the parties.)
1948 Nag 67 (68) [AIR V 35 C 24] : ILR (1947) Nag 449. (Unregistered sale-deed—Wrong field number given—Delivery of possession of correct property—S. 53-A does not apply as there is no contract to transfer in writing the correct property.)
1947 Nag 188 (191) [AIR V 34 C 56] : ILR (1946) Nag 991.
1944 Oudh 212 (220) [AIR V 31] : 19 Luck 565 (DB). (There should be a writing signed by the promisor.)
1943 Bom 406 (407) [AIR V 30].
1940 Oudh 409 (410) [AIR V 27] (DB).
† 1937 Nag 402 (406) [AIR V 24].
1936 Nag 282 (282) [AIR V 23] : ILR (1937) Nag 242

2. 1967 Andh W R 2 (7).
1962 Cal 502 (503) [AIR V 49 C 108]. (Patta for 25 years executed by transferor in favour of

It, is, however, not necessary that every minute detail of the contract should emerge from the writings signed by the parties. It is quite enough if the essential terms of the contract are capable of ascertainment with reasonable certainty from the writings brought into existence by the parties concerned. In other words, the section is attracted not only in a case where the terms are ascertained but also in a case where the terms are ascertainable with reasonable certainty.(2aa) Where it is established that there was a document of the description envisaged in S. 53-A, the existence of the contents of the document can be established by secondary evidence.(2aaa) In the undermentioned case(2a) a letter relinquishing right to immovable property did not recite the passing of consideration. It was held that the only term necessary to constitute the contract being explicitly stated in it the passing of consideration could be proved by oral evidence and that therefore this section applied to the case.

A document merely referring to a previous oral agreement to transfer and its terms is not a "contract in writing" such as is required by the section, though a document which reduces to writing the terms of a previous oral agreement would be.(3) In the undermentioned decision of the Rangoon High Court(4) a document styled a receipt and reciting a previous agreement to sell was held not to be a contract in writing sufficient for the purposes of this section, though from it, the terms necessary to constitute a transfer could be ascertained. The same view was expressed in a later case of the same High Court(5) and also in the undermentioned cases(6) of the High

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transferee — Patta not signed by transferee — Transferee took possession and effected improvements in terms of patta – Patta, held, though not a lease, was a writing within the meaning of S. 53-A and the terms necessary to constitute the transfer could be ascertained from it with reasonable certainty.)

1960 Cal 609 (618) [AIR V 47 C 167] (DB).

1951 Nag 285 (286, 287) [AIR V 38 C 81] : ILR (1950) Nag 799 (DB). (Draft lease deed prepared to avoid any changes of the terms agreed to orally between the parties — All the necessary terms deducible from the draft — Draft, held, was sufficient to attract the section.)

1950 Assam 107 (110) [AIR V 37 C 42]. (DB). (Admission in writing by the vendor in mutation proceedings that he had sold the property in question to the vendee was held not to be a contract within S. 53-A especially since it did not contain all the terms of transfer.)

1944 Oudh 212 (220) [AIR V 31] (DB).

1937 All 36 (38) [AIR V 24] (DB).

† 1933 Bom 381 (384) [AIR 20].

2aa. ILR (1960) 2 All 71 (88, 89) (DB).

2aaa. 1959 Andh Pra 568 (570) [A I R V 46 C 163] (DB).

1956 Mad 693 (694) [AIR V 43 C 226]. (Agreement to lease suppressed by plaintiff — Oral evidence can be adduced.)

2a. 1946 Mad 452 (453) [AIR V 33 C 230].

3. (1967) 2 Andh W R 2 (7).

✠('54) Madh B L J 1954 H C R 1450 (1453, 1454). (What is required to be written and signed is the contract to transfer and not any other paper wherein a reference to such a contract is made.)

1938 Rang 356 (357) [AIR V 25] : 1938 Rang L R 692 (DB). (Confirming AIR 1938 Rang 49.)

[*See* 1962 Punj 475 (476) [AIR V 49 C 130]. (A reference to an oral sale in a mutation recorded by a Patwari cannot be equated with a writing of the transaction itself.)

1951 Nag 285 (286) [AIR V 38 C 81] : ILR (1950) Nag 799 (DB). (When the terms of an oral contract or disposition of property are reduced to the form of a document the document takes the place of the oral contract or agreement and thus there comes into existence a contract or agreement in writing.)

4. 1938 Rang 356 (357) [AIR V 25].

1939 Rang 206 (207) [AIR V 26] : 1939 Rang L R 575 (DB). (By merely mentioning the period to pay the balance of purchase-money, document could not be termed as an agreement contemplated by S. 53A.)

5. 1944 Bom 105 (107) [A I R V 31] : 212 Ind Cas 543 (DB). Hormasji Jamshedji v. Manekkal Mansukhbhai. (A Government resolution, containing a summary of an arrangement to grant a lease to a person at a certain rate, and sanctioning the proposal of a settlement officer the arrangement to be gathered from correspondence referred to cannot be regarded as secondary evidence of a contract of lease or as proof of the contract itself wfthin the meaning of this section. AIR 1938 Rang 356 : 1938 Rang L R 692, Relied on.)

6. ILR (1952) Madh-Bha 410 (414, 415) (DB). (Application of the parties for getting the requisite sanction from the Revenue authorities for sale of property is not sufficient to satisfy the requirements of S. 53A, AIR 1943 Bom 406, Rel. on.)

1943 Bom 406 (407) [AIR V 30]. (An application by plaintiff to have defendant's name entered in

Courts of Bombay and Madhya Bharat. In the undermentioned cases,(7) on the other hand, a document styled a receipt but which, in essence, contained all the essential terms of the contract to transfer, was held to be sufficient for purposes of this section. The first view must be held to be no longer good law in view of the decision of the Supreme Court in the undermentioned case(8) wherein it has been held that the terms of a lease could be gathered from a Government resolution containing a summary of arrangement to grant lease to the defendant.

9a. "Writing signed by him or on his behalf" — This section requires that the contract relied on by the defendant in a suit for possession must be in writing(1) signed by the transferor claiming to recover possession, or on his behalf, presumably by some one who has authority to bind or represent him.(1a)

There is a difference of opinion on the question of the applicability of the section where a contract is signed by a Hindu father or manager of a Hindu joint family. It has been held in the undermentioned decisions(2) that the sons or the other members of the family answer the description of the word 'transferor' as used in this section; and the sons or the other members of the family are debarred from instituting a suit for recovery of possession from the transferee. A contrary view that the transferee cannot avail of this section against the sons or other members of the family has been taken in the following case.(3)

Where the contract is signed by the transferor, it is not necessary that the contract should have been signed by the transferee also.(4) Thus it is a sufficient compliance with the provisions of this section that an instrument of lease is signed by the lessor alone though under S. 107 a lease is required to be executed by both the lessor and the lessee.(5) Nor is it sufficient that the contract is signed by the transferee alone when it is not signed by the transferor.(6) Thus a kabuliyat signed by the lessee alone will not attract this section.(7)

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mutation register in respect of certain land on ground that it had been sold to him orally — Application stating terms of sale —Held, document was not sufficient to satisfy requirements of this section as it contained only a recital of past event and not the contract of sale.)

7. 1944 Oudh 212 (220) [AIR V 31] : 19 Luck 565 (DB). (Affirming AIR 1940 Oudh 1, on appeal.)
1934 Rang 304 (306) [AIR V 21] : 13 Rang 17.

8. 1950 S C 1 (4, 5) [AIR V 37 C 1] : 1950 S C R 75. (AIR 1944 Bom 105, Reversed.)

Section 53A — Note 9a

1. 1950 S C 1 (5) [AIR V 37 C 1]: 1950 S C R 75.
1959 Assam 60 (61) [AIR V 46 C 14] : ILR (1958) 9 Assam 50 (DB).
1959 Madh Pra 221 (222) [AIR V 46 C 70].
1956 Andhra 209 (212) [AIR V 43 C 59] (DB).
1956 Punj 181 (184, 185) [AIR V 43 C 69] : ILR (1956) Punj 1279 (DB).
('54) 20 Cut L Tim 614 (620, 621).
1947 Nag 188 (191) [A I R V 34 C 56] : I L R (1946) Nag 991.

1a. 1948 P C 95 (96) [AIR V 35 C 27] : I L R (1949) Mad 141. (Contract for sale by mother guardian on behalf of minor son — Contract within competence of guardian and for benefit of minor—Minor is 'transferor' within meaning of the section —AIR 1944 Mad 337, Reversed.)
1956 Punj 181 (184, 185) [AIR V 43 C 69] : I L R (1956) Punj 1279 (DB).
1941 Bom 346 (348) [AIR V 28].

2. 1967 Andh-Pra 237 (243) [A I R V 54 C 67] (FB). (AIR 1948 P C 95, Followed; A I R 1948 Mad 526 Dissent.; A I R 1959 Andh Pra 539, Overruled.)
1963 Mad 310 (314) [A I R V 50 C 113] : I L R (1963) Mad 722 (DB). (A I R 1948 Mad 526 and S. A. No. 2695 of 1949 (Mad), Overruled.)
1961 Bom 215 (217) [AIR V 48 C 50] : ILR (1961) Bom 824 (DB). (AIR 1948 Mad 526 and A I R 1959 Andh Pra 534, Dissented.)
1948 Mad 526 (527) [AIR V 35 C 263].

3. 1959 Mys 173 (175, 176) [AIR V 46 C 73]: ILR (1957) Mys 108.

4. 1949 Nag 389 (393, 394) [AIR V 36 C 158]: ILR (1949) Nag 849 (DB).

5. 1962 Cal 502 (503) [AIR V 49 C 108].
1951 Nag 285 (286, 287) [AIR V 38 C 81] : I L R (1950) Nag 799 (DB).

6. 1960 Cal 40 (42) [AIR V 47 C 11].

7. 1966 Patna 93 (95) [AIR V 53 C 19]. (Kirayanama signed only by the lessee.)
1962 Cal 502 (503) [AIR V 49 C 108].
1960 Cal 40 (42) [AIR V 47 C 11].

In the undermentioned case(8) *A* and *B* were the owners of certain premises. *B* was also a member of a partnership with other persons. By a registered lease deed *A* and *B* leased out the premises to the partnership. Subsequently the partnership contracted to transfer, by an agreement, their lease-hold interest to a company. There was, however, no registered deed. It was held that the company might, under this section, claim to remain in possession of the leasehold premises as against the partners of the firm but not against *B* in his capacity as an owner of the property nor against *A* who was not a party to the agreement at all.

10. Acts of part performance under the section — Under the English law, as seen in Note 1, the act of part performance must be not only unequivocally referable to a contract, but must have so changed the position of a party as would make it fraudulent on the part of the other party to claim that the contract was not valid for want of writing. Under the present section,

(1) the transferee must have 'taken' possession,(1) or,

(2) if he was already in possession, must have continued in possession 'and' must have further done some act in furtherance of the contract.(2) Where an act is merely preparatory or introductory to the contract

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1957 Pat 24 (29) [AIR V 44 C 8]. (Section inapplicable to kabuliyat.)
1954 Cal 207 (208) [AIR V 41 C 75] (DB).
[*See also* ('59) 63 Cal W N 535 (538, 539) (Lease for five years — Expiry of term of tenancy — S. 53A would not apply.)

8. 1963 Cal 198 (202) [AIR V 50 C 40] (DB). (Lease of property by A and B to a partnership of which B was also partner — Agreement by partnership to transfer their leasehold interest to a company — Company could not take advantage of S. 53-A as against at all and as against B in his capacity as owner of property.)

Section 53-A — Note 10

1. 1950 F C 1 (7) [AIR V 37 C 1] : 1949 F C R 484. (Pending redemption suit mortgagor executing agreement to sell mortgaged property to mortgagee — Suit dropped — No sale deed executed — Mortgagee never in possession of mortgaged property either actual or constructive — No possession "in pursuance of the agreement" — S. 53-A held had no application.)
1959 Madh-Pra 221 (222) [AIR V 46 C 70].
1957 Bom 236 (238) [AIR V 44 C 80] : ILR (1957) Bom 769. (Vendee in possession of properties under a Sauda Chitti — Transaction is only a contract — Vendee entitled to avail of S. 53-A.)
1955 Pat 126 (130) [AIR V 42 C 25] (DB). (When it is found that the defendant is not in possession of the suit land, there is no question of protecting his possession under S. 53-A.)
1950 Assam 129 (131) [AIR V 37 C 49] (DB). (Per Ram Labhaya J. — Transferee not in possession — It is not necessary to consider whether any other such act has been done.)
('36) 162 Ind Cas 881 (882) (Nag). (Where no possession is given or intended to be given to the transferee no reference to the question of retaining it under S. 53-A can arise.)
('33) 17 R D 201 (202).

2. 1962 Cal 502 (503) [AIR V 49 C 108]. (Patta for 25 years executed by *A* in favour of *B* on monthly rental — Patta not signed by *B* — *B* going into possession and effecting improvements in terms of patta — Suit for arrears of rent and eviction of *B* before expiry of patta — There is no implied tenancy from month to month — Doctrine of part performance held applied.)
1955 Madh B 93 (95) [AIR V 42 C 29]. (The filing of a suit for specific performance of a contract is an act for enforcing the contract and not one done in furtherance of the contract and cannot, therefore, be an act of part performance.)
1955 Hyd 101 (103) [AIR V 42 C 25] : ILR (1954) Hyd 822.
1954 Ajmer 70 (71) [AIR V 41 C 70]. (Usufructuary mortgagee getting rent note executed in respect of house mortgaged to him — It is in assertion of his rights in pursuance of the mortgage.)
1954 Madh Bha 128 (129) [AIR V 41 C 59]. (In case of usufructuary mortgage interest transferable by the mortgagor not being identical with the property, mortgagee pleading part performance pursuant to sale of equity of redemption in his favour must show some distinct overt act besides his possession.)
1953 Hyd 114 (116) [AIR V 40 C 42] : ILR (1952) Hyd 449 (DB).
1951 Nag 285 (287) [AIR V 38 C 81] : ILR (1950) Nag 799 (DB). (Paying Nazul rent and municipal taxes and spending for repairs by a lessee who is already in possession are acts done in furtherance of the contract within the meaning of the section.)
1944 Oudh 212 (218) [AIR V 31] : 19 Luck 565. (DB). (Section does not require that the contract must contain a direct covenant regarding transference of possession.)
1943 Bom 406 (406) [AIR V 30].

and no connection is established between the act and the contract, it is not an act done in furtherance of the contract.(2a)

The contract itself, contemplated by the section, being in writing from which "the terms necessary to constitute the transfer can be ascertained with reasonable certainty," it is conceived that the "act in furtherance of the contract" referred to in the second paragraph need not be construed as having the same meaning and limitations as the act of part performance in England. It need not, of itself, unequivocally have reference to the contract. It may be shown by evidence to be in furtherance of the contract though, of itself. it may be equivocal, e.g., the payment of money.(3)

The possession taken or continued must have been *in pursuance of the contract to transfer*.(4) The possession may be either actual or construc-

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2a. 1965 Madh Pra 275 (281, 282) [AIR V 52 C 75] (DB).
1955 Hyd 101 (103) [AIR V 42 C 25] : ILR (1954) Hyd 822.
1955 Madh Bha 93 (94) [AIR V 42 C 29.]

3. (1967) 2 Andh W R 2 (7). (Oral agreement subsequently reduced into writing—Amount paid after the oral agreement appropriated towards part payment of consideration for agreement to sell—Part payment is an act in furtherance of the contract to sell.)
1967 Bom 34 (36) [AIR V 54 C 6] : ILR (1966) Bom 291.
1967 R L W 413 (414). (Payment of balance of sale consideration.)
ILR (1965) Guj 490 (494).:
1965 Madh Pra 275 (281, 282) [AIR V 52 C 75] (DB). (Payment of money can be an act in furtherance of the contract. The payment would be an unequivocal act referable to and in furtherance of the alleged contract, if connection is established by evidence between the payment and the contract.)
ILR (1957) 7 Raj 101 (110).
1955 Madh Bha 49 (55) [AIR V 42 C 14] : I L R (1954) M B 237 (DB). (If a connection is established by evidence between the payment and the contract, then the payment would be an unequivocal act referable to and in furtherance of the alleged contract.)
1955 Mys 38 (40) [AIR V 42 C 15] : I L R (1955) Mys 234. (If a mortgagee purchaser under an unregistered deed of sale has paid either the whole or part of the consideration, the same can be said to be in pursuance of the contract of sale.)
1954 Ajmer 70 (71) [AIR V 41 C 70]. (View of Thadani C. J. to the contrary in AIR 1950 Assam 129, not followed.)
1953 Mad 925 (926) [AIR V 40 C 363].
1952 Raj 141 (142) [AIR V 39] : ILR (1951) 1 Raj 918.
1941 Oudh 41 (43) [AIR V 28] : 16 Luck 99 (DB). (Payment of consideration and mutation are acts in furtherance of contract.)
†1934 Rang 304 (306) [AIR V 21] : 13 Rang 17. (Payment of part of purchase price is act in furtherance of contract of sale by the mortgagee already in possession.)
[*See also* 1950 Assam 129 (131) [AIR V 37 C 49] (DB). (On question whether payment of consideration was an act done in furtherance of contract, Thadani, C. J., was of opinion that it was not, while Ram Labhaya J., expressed his opinion that it was.)]

4. 1950 F C 1 (7) [AIR V 37 C 1] : 1949 F C R 484.
(1967) 2 Andh W R 2 (6).
1967 Raj L W 413 (414).
(1964) 2 Andh L T 159 (163) (DB). (Agent's possession of the property of his principal prior and subsequent to the principal's agreement of sale of the property in favour of another person benami for the agent cannot be said to be in part performance of the contract as it was neither in pursuance of the contract, nor with the consent of the transferor.)
1963 Pat 62 (66) [A I R V 50 C 15] : ILR 42 Pat 763 (DB). (Certain compromise between defendant and other persons not registered — Court holding such compromise not binding on plaintiff — Held, possession of defendant under the compromise could not be held to be in part performance of the compromise.)
(1962) 64 Pun L R 731 (733).
1960 Pat 354 (356) [A I R V 47 C 123]. (The statute does not require that over and above taking possession of the property, it must further be established that the transferee has built constructions upon the property transferred.)
ILR (1959) Bom 35 (38).
1955 Madh Bha 49 (53, 55) [A I R V 42 C 14] : I L R (1954) Madh Bha 237 (DB). (Possession transferred to mortgagee under previous mortgage deeds — Subsequent unregistered mortgage deeds in respect of same property not amounting to usufructuary mortgages — Benefit of section cannot be given to mortgagee in respect of the subsequent mortgages because continuance in possession is not in pursuance of such subsequent mortgages.)
('54) 20 Cut L T 614 (619, 620).
('54) 20 Cut L Tim 532 (535, 536).
1953 Hyd 114 (116) [A I R V 40 C 42] : I L R (1952) Hyd 449 (DB). (Plaintiffs who had no right in the property mortgaging the property with N and D—Defendants, the owners paying up the mortgage debts to avoid the trouble of litigation — Plaintiffs executing 'Ekrarnamas'

tive.(4a) Where possession is not taken under the contract, but *de hors* the contract, as where the promisee takes possession by trespass, he cannot, in a suit for ejectment plead part performance.(5) It is not necessary that the transferee should be in possession on the date when the transferor seeks to enforce his right against the property. Once transferee takes possession in pursuance of the agreement subsequent loss of possession does not bar him from invoking the benefit under the section.(5a) But it has been held that possession taken at a time when the contract has become incapable of specific performance by efflux of time is not one in part performance of the contract.(5b)

See also the undermentioned case.(5c)

The Chief Court of Oudh has held in the undermentioned case(6) that the section does not require any concurrent act or any specific consent on the part of the transferor to the taking or the continuance of possession by the transferee in pursuance of the contract. Thus *A* let a house to *B* as a tenant. *C*, *B*'s wife agreed to purchase the house from *A*, paid consideration, got the house required, paid municipal taxes, and

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in favour of defendants relinquishing their alleged rights — Defendants taking possession and effecting necessary mutation — Possession of the defendants being in pursuance of the contract S. 53A is attracted.)

1952 Orissa 118 (119) [A I R V 39] : I L R (1950) Cut 143 (DB). (Defendant has to establish that there was delivery of possession in pursuance of the contract.)

1952 Raj 141 (142) [A I R V 39] : I L R (1951) 1 Raj 918. (Transferees already in possession as mortgagees only registration of deed is necessary to convey absolute title—Transferees paying certain amount towards consideration — Transferor mentioning in deed that he is making the sale by executing it — Held that there was part performance of contract and possession of mortgagees was in pursuance of the contract and mortgagor's suit for redemption is therefore not maintainable.)

1951 Nag 285 (287) [AIR V 38 C 81] : ILR (1950) Nag 799 (DB). (Transferee taking possession on the basis of oral agreement to lease — Oral agreement merging into the draft agreement — Possession subsequent to such draft is in pursuance of such written agreement — Transferee paying Nazul rent and Municipal taxes and spending on repairs are further acts done in furtherance of the agreement.)

1951 Nag 171 (174) [AIR V 38 C 34] : ILR (1950) Nag 618. (Mortgagee coming into possession through foreclosure through a Court upon mortgagor's default — Possession is not one in pursuance of the mortgage.)

('37) I L R (1937) 1 Cal 65 (67). (Possession of Court through its Receiver appointed at the instance of decree-holder is not an act in part performance of contract.)

† 1936 Pat 372 (378) [A I R V 23] : 15 Pat 460 (DB). (Doctrine of part performance cannot be invoked unless possession is in pursuance of a completed agreement — Reversed on anothor point in AIR 1938 P C 20.)

1934 Cal 235 (237) [AIR V 21] : 60 Cal 1372 (DB). (Lessee in possession under an existing lease — Subsequent agreement to renew lease — Continuation in possession after the expiration of the old lease is only referable to the agreement and therefore an act of part performance of the contract.)

1932 Sind 42(45) [AIR V 19] : 25 Sind LR 433(DB).

('36) 40 Cal W N 1176 (1179) (DB).

[*See also* ('56) I L R (1956) Nag 400 (403) (DB). (Transfer of occupancy holding accompanied by possession — Transferee cannot be regarded as trespasser as S. 12, C. P. Tenancy Act permits transfer by tenant — Transferee can have resort to plea of part performance.)]

4a. 1950 FC 1(7) [AIR V 37 C 1] : 1949 FCR 484.

1957 Bom 138 (140) [A I R V 44 C 46] : I L R (1958) Bom 556 (DB).

5. (1962) 64 Pun L R 731 (733).

1956 Pat 308 (311) [AIR V 43 C 79] (DB).

1932 Sind 42 (45) [A I R V 19] : 25 Sind L R 433 (DB).

[*See also* 1956 Cal 350 (352) [A I R V 43 C 108] (DB). (Held, the plaintiffs' possession could not be treated as strictly legal or at all relevant or sufficient for purposes of S. 53A.]

5a. 1957 Andh Pra 854 (858) [AIR V 44 C 260] : ILR (1956) Andh Pra 1019 (DB).

5b. 1956 Pat 308 (311) [A I R V 43 C 79] (DB). (In order to have the protection of S. 53A, possession must be taken in part performance of the contract before the enforcement of the contract is barred by time.)

5c. (1967) 2 Andh W R 2 (7). (Agreement providing that before registration permission under S. 47, Hyderabad Tenancy and Agricultural Lands Act will be taken by the parties— Application made by the vendor and vendee for such permission constitutes an act in furtherance of the contract for sale.)

6. 1944 Oudh 212 (215, 218) [A I R V 31] : 19 Luck 565 (DB). (Part performance must be the act of the person seeking to avail himself of the equity and the acts of the person sought to be charged are of no avail. Affirming A I R 1940 Oudh 1 on appeal.)

lived in the house with her husband *B* without payment of rent to *A*. It was held that *C* took possession of the house in pursuance of the contract, and that the fact that *A* did not tell *C* that she should take possession was immaterial. This view has, however, been dissented from in the following decision of the Andhra Pradesh High Court(7) where it has been held that consent of the transferor is a primary condition for the taking or continuance of such possession.

Where a person in whose favour a document of sale is written is already in possession of the property, though as a tenant, or a licensee or a mortgagee, or otherwise under permission of the vendor it is not necessary that the vendee should be dispossessed and then re-put in possession for the applicability of S. 53A. All that is necessary to show is that the nature of the possession was changed after the execution of the sale-deed. This can be shown either by the document itself or from other evidence.(8)

11. Third paragraph – Transferee's willingness to perform his part.— This is an essential condition before the transferor is debarred from enforcing his rights to the property against the transferee.(1) "He who seeks equity must do equity." The section being based on equitable principles, the transferee, if he wishes to take advantage of it, must also be prepared to do his part. The third paragraph is based on this principle. The words "has performed" and "or is willing to perform" mean *complete* performance or *complete* willingness. It is not a sufficient compliance with the section that the transferee would have performed his part of the contract to some extent.(2) The defendant relying on part performance must specifically plead and prove his readiness and willingness to perform his part of the contract.(2a) But where

7. (1964) 2 Andh W R 5 : (1964) 2 Andh L T 159 (163) (DB). (Plaintiff was the owner of certain lands. Defendant 1 was plaintiff's agent to look after the lands. Plaintiff had extended a contract of sale of the lands in favour of defendant 2. The sale was found to be benami for defendant 1. It was held that the possession of defendant 1 as the agent of the plaintiff could not be said to be in part performance of the contract.)

8. ILR (1958) 8 Raj 839 (841).

Section 53A — Note 11

1. (1962) 75 Mad L W 746 (747) (DB). (Party failing to perform his part nor showing willingness to do so — Doctrine of part performance cannot be availed of by him.)

1957 Andh Pra 58 (59) [AIR V 44 C 26].

('54) 20 Cut L T 614 (618). (Where the defendants were not willing at any time to do their part of the contract, they are not entitled to the protection under S. 53A.)

1952 Nag 246 (248) [AIR V 39] : ILR (1951) Nag 334.

1947 Nag 188 (191) [AIR V 34 C 56] : ILR (1946) Nag 991. (Party relying on section must plead his readiness and willingness to fulfil his part, otherwise section would not apply.)

1943 Bom 406 (406) [AIR V 30].

('41) 45 Cal W N 132 (136) (DB).

[*See also* (1962) 64 Pun L R 731 (733). (Suit for possession by transferor—Transferee pleading that transferor was entitled to market price which was much below contracted price—Held, transferee was not entitled to benefit of S. 53A, his conduct being mala fide.)

1952 Nag 244 (245) [AIR V 39] : ILR (1949) Nag 959. (Making a false plea that a certain obligation under the contract has been discharged shows an unwillingness on the part of the transferee to abide strictly by the contract entered into between him and the transferor.)]

2. ILR (1952) Madh Bha 410 (415) (DB).

1941 Bom 346 (348) [AIR V 28] : ILR (1941) Bom 529 (DB). (AIR 1933 Bom 381, Dissented from.)

[*See also* 1966 Assam 46 (48) [AIR V 53 C 7] : ILR (1964) 16 Assam 493 (DB). (Contract for re-sale of property purchased by plaintiff on payment of sale consideration within fixed period — Defendant intimating his intention to take property and offering certain amount —No evidence to show that he was willing to pay entire sale consideration — Held, one of the essential elements of S. 53A not complied with.)]

2a. 1965 Madh Pra 275 (283) [AIR V 52 C 75] (DB). (Defendant relying on part performance —Defendant's readiness to perform remaining part of contract must be specifically pleaded and proved.)

1961 Madh Pra 237 (239) [AIR V 48 C 75] : ILR (1962) M P 443.

though the plea has not been raised by the defendant in his pleadings, it has been fully gone into at the hearing, the defendant is entitled to avail himself of the provisions of the section.(2b) It has been held that the condition as to willingness must subsist upto the date of hearing of the matter i.e. even upto the date of the hearing of the second appeal.(3) (See also Note 20)

12. Section applies only if the contract or transfer is invalid for want of completion in the prescribed manner. — The section has no application where the contract to transfer or the instrument of transfer is invalid on any ground other than that it was not completed in the *manner* prescribed by the law for the time being in force, Where the flaw in the transferee's position is not a defect of *form* or the absence of some formality, normally necessary, but is one which apart from form, renders the transaction unenforceable, the equitable doctrine of part performance is not applicable.(1) Thus, the doctrine of part performance does not apply to the following cases :

(1) An agreement to transfer land to a legal practitioner which is void under S. 28 of the Legal Practitioners Act.(2)

(2) Transfer of *spes successionis* void under S. 6 (a).(3)

(3) Contract infringing S. 114 (1) read with S. 115 of the Cantonments Act (1924).(3a)

(4) Transfer in violation of the provisions of local Tenancy laws.(3aa)

('54) 20 Cut L T 532 (536). (Contract for sale — Transferee not proving that he was willing to perform his part of contract — Requirement of S. 53A held was not satisfied.)

1947 Nag 188 (191) [AIR V 34 C 56] : ILR (1946) Nag 991.

[But see 1956 Mad 693 (695) [AIR V 43 C 226]. (Absence of averment as to readiness and willingness to perform the unperformed portion of the obligation in the written statement is not fatal to the defence — Such readiness and willingness must, however, be proved by evidence. (1947 Nag 188, Dissented from.)]

2b. 1959 Mys 173 (175) [AIR V 46 C 73] : ILR (1957) Mys 108.

3. 1959 Mys 173 (175) [AIR V 46 C 73] : ILR (1957) Mys 108.

Section 53A — Note 12

1. ('54) Madh B L Jour 1954 H C R 1450 (1454). (There being no sanction of Subha for sale as required by Land Revenue and Tenancy Act.)

ILR (1954) Mad 537 (564) (DB). (Two out of three trustees selling property — There is no valid contract, the foundation upon which the doctrine of part performance could be rested.)

ILR (1954) Madh Bha 162 (166) (DB). (Transfer by sale of agricultural holding effected without Subha's sanction is null and void under S. 45(2), Indore Land Revenue and Tenancy Act (1931)— S. 53A cannot apply.)

1947 Nag 188 (191) [AIR V 34 C 56] : ILR (1946) Nag 991. (Section 53A predicates a valid contract — a contract of a type which could be specifically enforced. As a contract by a guardian to sell a minor's immovable property is one which the law does not recognise, the section cannot apply to such a contract.)

1933 Mad 364 (366) [AIR V 20]. (A contract against a minor.)

1929 Rang 181 (181) [AIR V 16] (DB).

†1927 Nag 177 (179) [AIR V 14].

[*See also* 1956 Punj 181 (185) [AIR V 43 C 69] : ILR (1956) Punj 1279 (DB). (Contract statutorily barred—Section not applicable.)

1954 Pat 41 (42) [AIR V 41 C 16]. (Where the instrument of transfer is a registered one and there is no defect in it according to the law in force at the time of its execution, the section has no application.)]

2. 1930 Pat 61 (62) [AIR V 17] (DB).

3. 1933 Pat 165 (172) [AIR V 20] (DB).

3a. 1957 Andh Pra 859 (861) [AIR V 44 C 261] (DB).

3aa. ('63) (1963) 2 Mys L J 146 (147). (Where agricultural land is sold in contravention of S. 47 (1) of the Hyderabad Tenancy and Agricultural Lands Act which requires previous sanction of the Collector, the purchaser cannot invoke the provisions of S. 53A of the Transfer of Property Act to defeat the claim for possession of land by a person claiming proprietary rights therein.)

ILR (1959) 9 Raj 271 (274) (DB). (Case under Bundi State Tenancy Act, S. 20.)

(5) Agreement in violation of S. 47 (2) of the Punjab Municipal Act (3 of 1911).(3ab)

In the undermentioned case,(3b) it has been held that a defendant can defend his possession of agricultural lands by availing of the provisions of this section by showing that he was placed in possession by the plaintiff himself; and although such a person cannot claim title in view of the prohibition of alienation under S. 47 of the Hyderabad Tenancy and Agricultural Lands Act, he can nonetheless use the contract of sale in support of plea of estoppel which is not denied by reason of S. 47 of the said Act.

See also the undermentioned cases.(4)

13. Transferor debarred from enforcing his right to the property.— It has been seen in Note 1 that under the English law, a transferee under a parol contract which has been partly performed, can either as *plaintiff* or as a *defendant* claim relief on the basis of a valid transfer. The right conferred by this section is a right on the part of the *transferee* to plead *in defence* that the transferor is debarred from enforcing any right in respect of the property transferred.(1a) As was observed by the Privy Council in *Probodh Kumar* v. *Dantmara Tea Co.*(1) the right conferred by the section is one available only to the defendant to protect his possession.(2) The

('54) I L R (1954) Madh B 162 (166) (DB). (Transfer by sale of agricultural holding effected without Subha's sanction as required under S. 42, Indore Land Revenue and Tenancy Act (1931) is null and void.)

1949 Pat 464 (465) [AIR V 36 C 135] : 28 Pat 351. (Case under Bihar Tenancy Act (8 of (1885), S. 26A).

3ab. 1959 Punj 220 (221) [AIR V 46 C 71] : ILR (1958) Punj 210.

1956 Punj 181 (183) [AIR V 43 C 69] : ILR (1956) Punj 1279 (DB).

3b. 1963 Andh Pra 232 (234) [AIR V 50 C 73].

4. 1967 Cal 423 (428) [AIR V 54 C 91]. (Lease on annual rent of Rs. 3,200 executed by only the chairman who is one of the Commissioners of the Municipality and not bearing their common seal — Transaction is no transfer at all since it contravenes the mandatory provisions of S. 103 of the Bengal Municipal Act—Transaction is, therefore, not saved by S. 53A.)

1956 Cal 18 (22) [AIR V 43 C 5]. (Contract with Corporation—Statutory provisions, viz., Ss. 67 and 68, Calcutta Municipal Act (3 of 1923), regarding agreement not complied with—Agreement is invalid and not binding on either party notwithstanding that there has been part performance of the contract.)

1951 Hyd 42 (44) [AIR V 38 C 6] (DB). (Sale of immovable property, of a value less than one hundred rupees, is complete by delivery of the property, in spite of there being an unregistered deed of sale. Where, therefore, the transferee's claim is that he has become the owner of such a property which he claims for himself by virtue of a contract of sale and delivery of property S. 53A, has no application.)

1930 Mad 298 (301) [AIR V 17] (DB). (The doctrine cannot be used to complete a transaction against an idol of a temple or a cestui que trust or a minor against whom it cannot be regarded as operative.)

1929 Rang 335 (338) [AIR V 16] (DB).

('34) 18 R D 654 (655). (Landlord and tenant—Suit in ejectment—Compromise—Tenant paying nazarana and landlord promising never to eject tenant — Omission to register or record compromise — Doctrine of part performance applies.)

Section 53A — Note 13

1a. 1954 Mad 702 (703) [AIR V 41 C 23].
[*See also* 1957 Bom 31 (33) [AIR V 44 C 15] : I L R (1956) Bom 594. (Agreement to sell by A in favour of B accompanied by delivery of possession—Price received by A towards such agreement is not debt — A cannot, under guise of application for adjustment of debts under S. 24, Bombay Agricultural Debtors Relief Act, claim to recover possession contrary to provisions of S. 53A, T. P. Act.)]

1. 1940 P C 1 (2) : [AIR V 27] I L R (1940) 1 Cal 250 : I L R (1940) Kar (P C) 11 : 66 Ind App 293. (On appeal from 41 Cal W N 54.)

2. *See also the following cases:*
1967 Bom 34 (36) [AIR V 54 C 6] : I L R (1966) Bom 291.
1960 M P L J (Notes) 137.
1959 Andh Pra 568 (570) [AIR V 46 C 163] (DB).
1959 Mad 354 (355) [AIR V 46 C 107] : I L R (1959) Mad 796. (After the introduction of S. 53-A a defendant in a suit for ejectment is entitled to rely upon his contract for transfer provided the conditions of the section are fulfilled.)
1957 Bom 138 (141) [AIR V 44 C 46] : I L R (1958) Bom 556. (DB).
1956 Punj 181 :(185) [AIR V 43 C 69] : ILR (1956) Punj 1279 (DB).
1955 Nag 306 (310) [AIR V 42 C 82] : I L R (1956) Nag 10 (DB). (The protection given by this section to the defendant in possession can.

section imposes a statutory bar on the transferor and does not confer any active title or right of action on the transferee. Thus, it is not possible for a person who is entitled to the benefit of the section to bring a suit as plaintiff for the purpose of enforcing his right to the property.(3) As observed by the learned Judges of the Chief

not by analogy be extended to the transferor.)
1955 Punj 22 (24) [A I R V 42 C 7] : I L R (1955) Punj 122 (DB).
1955 Punj 252 (253) [AIR V 42 C 96] : I L R (1955) Punj 1242.
I L R (1953) Madh Bha 303 (312). (Mortgagee in possession under an invalid mortgage can retain possession until the mortgage debt is paid off.)
1950 Cal 23 (27) [AIR V 37 C 6] : I L R (1950) 2 Cal 443 (DB). (Transferee's possession is protected against any challenge to it by the transferor contrary to tenor of the contract or the instrument of transfer.)
1940 Nag 113 (116) [AIR V 27]: I L R (1949) Nag 386 (DB). (Section 53-A does not entitle a person to sue; it only enables him to defend his rights to possession.)
1945 All 422 (423) [AIR V 32] : I L R (1945) All 910 (DB). (Section 53A can be used as shield, not as offensive weapon—Plaintifi cannot avail of Section 53A.)
1939 Cal 163 (165, 166) [AIR V 26] : I L R (1938) 2 Cal 328 (DB). (Section 53A applies to a contract to transfer occupancy holdings which has not been completed In the manner prescribed by S. 26C of the Bengal Tenancy Act.)
1938 Mad 746 (748) [AIR V 25]. (Only in exceptional cases as a suit for specific performance doctrine of part performance can be invoked by plaintiff.)
1937 Mad 638 (639) [AIR V 24].
1937 Pesh 58 (60) [AIR V 24] (DB). (A Mahomedan executed a dower deed in favour of his wife—Deed was not registered—Wife brought a suit for a declaration of ownership of property on the basis of the dower deed, against the mortgagee of the property, the mortgage being executed by her husband — *Held* that if the mortgagee be considered as the representative of the mortgagor he was not enforcing any right against the wife, but was only defending his right against the suit brought by her—On the other hand if the mortgagee was not claiming under the mortgagor, he was protected by the proviso to Section 53A.)
[*See also* 1966 Madh Pra 307 (311) [AIR V 53 C 77] (DB). (Transferee of a person who in his turn has got title by part performanec protected by S. 53A.)
1966 Mysore 86 (89) [AIR V 53 C 25] : I L R (1963) Mys 1109. (Contract to sell — Payment of earnest money and vendee put in possession — Contract falling through for nonpayment of price — Suit for possession by vendor — Concurrent finding that defendant was always willing to perform his part of contract—Finding being one of fact cannot be challenged in second appeal—Absence of specific plea of part performance in written statement — S. 53A can be availed of in second appeal.)
1957 Manipur 32 (33) [AIR V 44 C 12]. (Where facts constituting the defence of part performance have been pleaded without specific reference to the benefit under S. 53-A of T. P. Act, the plea has to be entertained.)
1955 Madh Bha 49 (52)) [AIR V 42 C 14] (DB). (Written statement stating facts necessary to entitle plea of defence of part performance—Absence of express reference to S. 53A in taking the plea—Relief under the section cannot be denied.)
1955 Madh Bha 93 (95) [AIR V 42 C 29]. (The defendant claiming the benefit of the doctrine of part performauce must raise the plea in his written statement.)
1952 Nag 244 (245) [A1R V 39] : I L R (1949) Nag 959. (Upon the enforceability of the contract. Whether a contract is specifically enforceable or not is not a matter which must be taken into consideration for granting relief under the section.)]

3. 1966 S C 1438 (1440) [AIR V 53 C 282] : (1966) 3 S C R 214.
1964 Raj 11 (12) [AIR V 51 C 4] : ILR (1963) 13 Raj 832.
1964 Cal 235 (238) [AIR V 51 C 45] (DB).
1961 Punj 378 (383) [AIR V 48 C 111] : ILR (1961) 2 Punj 293 (DB). (In a suit brought by the buyer for the return of the price paid by him to the seller who has agreed to sell his house to the buyer and put the buyer in possession of the house, the doctrine of part performance cannot be availed of by the seller as it does not furnish a cause of action for the claim by him to obtain the full price of the house agreed to be paid to him. AIR 1940 P C 1 and AIR 1956 Punj 181, Rel. on.)
1960 M P L J 673 (675). (Unregistered sale by *A* in favour of *B*—Gift by *B* in favour of *C*—Suit by *C* against *A* for possession on allegation of dispossession—*C* being plaintiff cannot advance plea of part performance under S. 53-A, but can succeed only if he can prove oral sale accompanied by delivery of possession in favour of *B*.)
1957 Hyd 37 (40) [AIR V 44 C 19] : ILR (1956) Hyd 733 (DB). (When the right to remain on the property can be defended against the true owner, a mere trespasser by show of force cannot defeat such a right.)
1956 Punj 181 (185) [AIR V 43 C 69] : ILR (1956) Punj 1279 (DB). (Tenant cannot apply for fixation of fair rent.)
1955 Nag 306 (311) [A I R V 42 C 82] : ILR (1956) Nag 10 (DB).
1954 Mad 702 (703) [AIR V 41 C 233].
1954 Pepsu 42 (43) [AIR V 41 C 21] : ILR (1953) Patiala 319. (Doctrine of part performance does

Court of Oudh, in the undermentioned case(4)

> "the section cannot be used as a weapon of attack—it confers upon the transferee the privilege of invoking the doctrine embodied therein only as a shield against any invasion of his rights by the transferor or persons claiming under him."(4a)

It has been held that in land acquisition proceedings the role of the Government which is acquiring the land is that of a plaintiff and the role of the claimant who is in possession of the land is that of a defendant and the claimant can therefore rely on this section.(4aa)

The defendant who is protected under this section does not lose the protection merely because he obtains a registered transfer from the transferor subsequently.(4b)

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not enable a person who has lost possession to sue for recovery of it.)

1951 Pat 160 (164) [AIR V 38 C 24] (DB). (Section 53A gives no right to the plaintiff to come to court as a plaintiff either to maintain his possession, or to recover possession if dispossessed. AIR 1939 All 611, Diss.)

1949 Pat 464 (465) [AIR V 36 C 135] : 28 Pat 351 (DB). (Provisions of S. 53-A, T. P. Act cannot be availed of by the plaintiff who has to prove his title in a suit for ejectment.)

1949 Nag 389 (394) [AIR V 36 C 158] : ILR (1949) Nag 849 (DB).

1949 Assam 8 (10) [AIR V 36 C 7] : ILR (1949) 1 Assam 29 (DB). (Section does not create title—It only bars plaintiff asserting title.)

1948 Cal 147 (149) [AIR V 35 C 70]. (A transferee in possession under a contract of sale cannot avail himself of the provisions of S. 53A in a suit for specific performance of the contract.)

1947 Pat 424 (426) [AIR V 34 C 140] : 25 Pat 764 (DB). (The section does not confer any title on the transferee. It can be used not for attack but only in defence and that too in defence only against the transferor or any person claiming under him.)

1946 All 476 (480) [AIR V 33 C 124] (DB). (Unregistered partition deed acted upon — It is doubtful whether a party can file suit on basis of it for declaration that he has become the owner of the property. (Quaere).

1945 All 422 (423) [AIR V 32] : ILR (1945) All 910 (DB).

1945 Pat 124 (125) [AIR V 32] : 23 Pat 645 (DB). (Sale of occupancy holding—Sale-deed not registered — Vendee subsequently dispossessed—Vendee cannot maintain a suit for ejectment as he has no title deed in his favour.)

1942 Nag L J 353 (354). (Section 53-A confers no title but merely raises defence. Hence a plaintiff claiming possession will fail unless she can pray in aid S. 41 of the Act.)

1942 Mad 125 (127) [AIR V 29]. (He cannot sue for possession.)

1940 Oudh 409 (410) [AIR V 27] : 16 Luck 191 (DB).

1940 Nag 113 (116) [AIR V 27] : ILR (1941) Nag 386 (DB).

1939 All 504 (507) [AIR V 26].

1937 Nag 74 (76) [AIR V 24] : ILR (1936) Nag 115 (DB). (Distinction between S. 53A, T. P. Act and S. 27A, Specific Relief Act, Discussed.)

†1936 Pat 372 (378) [AIR V 23] : 15 Pat 460 (DB). (Part performance does not convey title to transferee — Reversed on another point in AIR 1938 P C 20.)

('41) 45 Cal W N 132 (136) (DB). (Title can only be transferred in the manner provided by the T. P. Act read with the Registration Act, because S. 53A only gives a right of defence to the defendant in possession in part performance of the contract.)

[*See also* 1957 Bom 236 (238) [AIR V 44 C 80] : ILR (1957) Bom 769. (Vendee in possession entitled to rights conferred by S. 53A — That does not make him transferee of property.)

1954 Pepsu 133 (135) [AIR V 41 C 55] : ILR (1953) Patiala 508 (DB). (Part performance not proof of factum of sale.)

1951 Nag 403 (406) [AIR V 38 C 126] : ILR (1950) Nag 25. (Mere fact that agreement along with fact of possession can be availed of for resisting dispossession does not bring into existence a transfer.)]

[But see 1949 Nag 410 (414) [AIR V 36 C 165] : ILR (1949) Nag 534. (Section 53-A gives part-performer right to resist dispossession, and if in point of fact, he is forcibly ejected, he has his remedy.)

1934 Rang 284 (286) [AIR V 21]. (*V* transferred property to *L* and put him in possession — There was no registered deed—*L* transferred his right to *P* — *P* being unable to obtain possession sued *D* who was a purchaser by oral agreement from *V* — Held that *P* was entitled to sue—Submitted not correct.)]

4. 1944 Oudh 212 (218) [A I R V 31] : 19 Luck 565 (DB). (Affirming AIR 1940 Oudh 1.)

4a. 1959 Andh-Pra 534 (536) [AIR V 46 C 154] : ILR (1959) Andh Pra 547 (DB).

1956 Ajmer 22 (23) [A I R V 43 C 17]. (S. 53A can be used only as a shield and not as a sword.)

1955 Nag 302 (304) [AIR V 42] : ILR (1955) Nag 833 (FB).

(1952) 2 Cal 135 (136) (DB).

1949 Kutch 13 (14, 15) [AIR V 36 C 12]. (It cannot be used as a weapon of offence to recover possession even from the contractor, still less can it be used to recover possession from a person who does not claim from the contractor.)

4aa. ILR (1960) 2 All 71 (90) (DB).

4b. 1951 Pat 613 (617) [A I R V 38 C 174] (DB). (Unregistered agreement by A to grant lease

Suppose a transferee under a contract of transfer takes possession of the property in part performance of the contract. The property is sought to be taken in execution of a decree for ejectment previously obtained by the transferor against a third person. The transferee raises objections in the execution proceedings but does not succeed and is deprived of possession. Then he sues under O. 21, R. 103 of the Civil Procedure Code for getting rid of the order in execution proceedings and recovering back possession of the property. Is he entitled to succeed, relying on the provisions of this section? It has been held by the Chief Court of Oudh in the undermentioned case(5) that the transferee can rely on this section in such a case because he is only *defending* his possession. The decision proceeds on the ground that the words of the section do not warrant a conclusion that the plaintiff *as such* is necessarily debarred from the benefit of the rule. It was observed :

> "Where by the nature of the case, as disclosed by the pleadings or otherwise, it is apparent that the transferee comes to Court to defend his possession against the invasion of it by the transferor he is entitled to invoke the equitable doctrine therein embodied. The present suit under O. 21, R. 103, Civil Procedure Code, is of that nature, being, in our opinion, practically a continuation of the proceedings before the execution Court, wherein the transferor and his representative succeeded in ejecting Mt. Firdaus Jahan from possession which she had originally taken in pursunce of the contract of purchase."

The trend of remarks in the judgment of the Oudh Chief Court referred to above seems to imply that a transferee may come to Court to defend his possession against acts of aggression on the part of the transferor or his representative whatever form such aggression may take. Thus, the decision of the Allahabad High Court in *Ram Chandar* v. *Maharaj Kunwar*(6) is referred to apparently with approval. In that case, the transferor's acts of aggression were not in the form of any legal proceedings. The transferor was trying to disturb the transferee's possession otherwise than in due course of law and the transferee brought a suit for an injunction restraining him from interfering with his possession. It was held that the suit was but a form of defence by the transferee to the invasion of his rights by the transferor and as such was competent under this section. Again, in distinguishing the Privy Council decision in *Probodh Kumar Das* v. *Dantmara Tea Company*,(7) already referred to, the Court points out that there had been no "obstruction" to the transferee in the enjoyment of his rights under the transfer.

The Oudh and Allahabad view has been followed in the following cases.(7a)

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to B—D entering into possession — C who had notice of agreement taking lease of same property — C suing A for specific performance and obtaining decree—Subsequently A executing registered lease in favour of B — B filing suit against C for injunction restraining C from executing decree against him.)

5. ✝1944 Oudh 212 (218, 219) [AIR V 31] : 19 Luck 565 (DB). (Affirming A I R 1940 Oudh 1 : 15 Luck 43.)

6. 1939 All 611 (613) [AIR V 26] : ILR (1939) All 809 (DB).

7. 1940 P C 1 (2) [AIR V 27] : ILR (1940) 1 Cal 250 : ILR (1940) Kar (P C) 11 : 66 Ind App 293.

7a. 1967 Bom 34 (37) [AIR V 54 C 6]: ILR (1966) Bom 291 : (AIR 1952 Orissa 143 and A I R 1943 Mad 706, Diss. from.)

ILR (1960) 2 All 71 (90) (DB). (Even assuming that the claimant in land acquisition proceedings is in the position of a plaintiff he would still be entitled to fall back on S. 53A. AIR 1944 Oudh 212, Relied on.)

1957 A P 859 (860, 861) [A I R V 44 C 261] (DB). (Protection is available to the transferee both as a plaintiff and as a defendant so long as he uses it as a shield A I R 1957 A P 854, Followed.)

1957 Andh-Pra 854 (855, 858) [AIR V 44 C 260] : ILR (1956) Andh 1019 (DB). (S. 53A can be invoked by the transferee both as a defendant and as a plaintiff)

1956 Ajmer 22 (24) [AIR V 43 C 17].

1956 Cal 350 (352) [AIR V 43 C 108] (DB).

1954 Mad 702 (703) [AIR V 41 C 233]. (In cases under Rules 63 and 103 of Or. 21 of Civil P. C. the plaintiff transferee comes to court to defend his possession against the invasion of it by the transferor.)

1953 Ajmer 19 (21) [AIR V 40 C 20]. (The word "defendant" means a person who pleads S. 53A for defending his possession against the trans-

but has been dissented from in the undermentioned decisions.(7b)

It is submitted with respect that a transferee cannot rely on this section in order to vindicate his right to possession *whenever* such right is invaded or threatened to be invaded by the transferor. The transferee's right under the section arises only on the transferor or his representative seeking to 'enforce' any right in respect of the property. Where the transferor does not seek to 'enforce' any right in respect of the property, the transferee has no right under the section to go to Court on his own initiative. It is conceived that the 'enforcement' contemplated by the section is enforcement by process of law. The object of the section is to provide that when the transferor seeks the assistance of the legal establishments of the Government to enforce his right to the property taking advantage of the incompleteness of the transfer under which the transferee claims possession, the latter must be in a position to defeat his attempt by invoking the special provisions of this section. In other words, the section seems to contemplate that in the proceedings started by the transferor, the provisions of this section would be an effective defence. This means, *firstly*, that the proceedings are legal proceedings and *secondly*, that the defence is to be raised in the very proceedings in which the transferee's rights are sought to be interfered with and not by proceedings *aliunde*. If the transferor takes the law into his own hands and tries to oust the transferee from possession by force, the transferee will not be entitled under this section to file a suit for injunction restraining the transferor from interfering with his possession. In this view, the decision of the Allahabad High Court above referred to, must be regarded as not correct. But in cases under the Civil Procedure Code, O. 21, R. 63 or R. 103, the suits would, in reality, be part of the same proceedings as those in which the transferee's rights are attacked and so may be held to be maintainable under this section.

The words "other than a right expressly provided by the terms of the contract" show that the transferor is not debarred from enforcing rights expressly provided by the terms of the contract.(8) Thus, he can, where the transfer is by way of a lease, sue for damages for breach of an agreement as provided by the terms of the lease,(9) or sue for the rent due,(10) or enforce the terms of the lease entitling him to re-enter if there is default in payment of rent.(10a) A contrary view has been held in the undermentioned cases,(11) where the transferor was held debarred from suing to enforce

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feror and hence a plaintiff can invoke the aid of S. 53A.)
1953 Ajmer 47 (48) [AIR V 40 C 50].

7b 1964 Raj 11 (13) [AIR V 51 C 4]: ILR (1963) 13 Raj 832.
1952 Orissa 143 (145) [AIR V 39] : ILR (1949) 1 Cut 705 (DB).

8. 1962 Cal 502 (503) [AIR V 49 C 108]. (Patta providing that transferee should not be disturbed till expiry of patta—Suit for eviction before expiry of patta—Transferee can avail of S. 53A — But after expiry of patta, transferor can enforce his right.)
1953 Cal 349 (352) [AIR V 40 C 130].
1941 Bom 346 (349) [AIR V 28] : ILR (1941) Bom 529 (DB). (A suit for damages cannot be founded on S. 53A, Transfer of Property Act, for breach of contract. Note : This view of Broomfield J. was dissented from by P. N. Mitra J. in AIR 1950 Cal 23 (28) (DB).)

9. 1950 Cal 23 (28) [AIR V 37 C 6] : ILR (1950) 2 Cal 443 (DB). (Suit for damages simpliciter for breach of contract need not be rested on S. 53A, T. P. Act at all. AIR 1941 Bom 346, Dissented from.)
†1933 Bom 381 (384) [AIR V 20].

10. 1942 Oudh 231 (236) [AIR V 29] (DB). (AIR 1933 Bom 381, Followed.)

10a. 1953 Cal 349 (352) [AIR V 40 C 130].

11. 1954 Mad 702 (704) [AIR V 41 C 233]. (The unregistered instrument will not be admissible in evidence in a case where the transferor sues to recover from the transferee arrears of rent at the enhanced rate reserved under such instrument, especially when the transferee's possession is referable to an earlier Kychit.)
1945 Nag 69 (71) [AIR V 32] : ILR (1944) Nag 704 (DB). (Neither under S. 53-A, T. P. Act, nor under S. 49 (amended) Registration Act, can a landlord recover rent from a person in possession under an unregistered lease. Part performance must be the act of the person seek-

merely rights given by the contract of transfer. The expression "other than a right expressly provided by the terms of the contract" has not been adverted to in the said decisions. It is submitted that the said view is not correct.

The section has no operation against *third* persons. In *S. N. Banerji* v. *Kuchwar Lime & Stone Co. Ltd*.(12) *A* leased property to *B* with the condition that if *B* transferred his interest, the lease would be forfeited. *B* transferred his interest to *C* but without a registered instrument and gave him possession of the properties. Thereupon *A* purpoted to forfeit the lease to *B* and granted a fresh lease to *D* who sued *C* for ejectment. It was held that the transfer by *B* to *C* was invalid for want of registered instrument, that the lease to *B* therefore subsisted, that *D* could not invoke the aid of S. 53A and claim that by reason of that section *B's* transfer to *C* was valid and that he was entitled to claim possession from *C*. Their Lordships observed as follows :

> "The section does not operate to create a form of transfer of property which is exempt from registration. It creates no real right. It merely creates rights of estoppel between the proposed transferee and transferor, which have no operation against third persons not claiming under those persons.

See also the undermentioned cases to the same effect.(13)

Where a guardian contracts to transfer immovable property belonging to the minor and the transfer if completed would be binding on the minor this section will preclude the minor from enforcing his rights in respect of the property as he would be 'a transferor' within the meaning of this section.(14)

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ing to avail himself of the equity and acts of the person sought to be charged are of no avail.)
1940 Bom 281 (282) [AIR V 27] : ILR (1940) Bom 480. (Suit for rent on unregistered lease partly performed, held not to lie.)
1940 All 340 (341) [AIR V 27]. (Transfer by way of unregistered lease — Transferor cannot sue for rent.)
1939 Rang 188 (189) [AIR V 26]. (Transferee under unregistered usufructuary mortgage put in possession—Transferor sued for redemption—Held that he could not sue.)
1936 Nag 174 (175) [AIR V 23]. (Unregistered lease partly performed—Lessor suing for possession, on expiry of lease. Held, he cannot sue.)
1936 Cal 628 (629) [AIR V 23] : 62 Cal 294. (Lessor cannot claim rent from the lessee under S. 53A if the lease deed is unregistered.)
[*See also* 1955 Nag 306 (310) [A I R V 42 C 82]: ILR (1956) Nag 10 (DB). (The protection given by this section to the defendant in possession cannot by analogy be extended to the transferor.)]

12. 1941 P C 128 (130) [AIR V 28] : ILR (1941) Kar (PC) 150 : 21 Pat 243.

13. 1959 Andh Pra 534 (536) [A I R V 46 C 154] : ILR (1959) Andh Pra 547 (DB). (Section is based on the rule of estoppel, and hence the disability attaches to a contracting party and not to any other person.)
1955 Hyd 101 (102) [AIR V 42 C 25] : ILR (1954) Hyd 822. (The advantage of S. 53A could be availed of only by the transferee or a person claiming under him.)
1954 Pepsu 133 (135) [AIR V 41 C 55]: ILR (1953) Patiala 508 (DB). (Transferee from a Hindu widow cannot avail of the doctrine against her reversioners since they are not successors-in-interest of the transferor.)
1952 Orissa 143 (149) [AIR V 39] : ILR (1949) 1 Cut 705 (DB). (Transferee cannot invoke S. 53-A as against an attaching creditor of the transferor in a case where the creditor cannot be said to derive any right from the judgment-debtor (transferee).]
✠('50) 1950 All W R 447 (449). (Dispute about lease between lessee and third person — Section 53-A does not apply.)
1940 Oudh 409 (410) [AIR V 27] : 16 Luck 191 (DB). (Section 53A is not available in litigation between transferee and third persons.)
('38) 1938 Nag L Jour 123 (124).
1936 All 621 (623) [AIR V 23]. (Family litigation compromised — Maintenance made charge on property — Compromise embodied in decree —Charge not registered —Person not party to compromise cannot enforce charge— Doctrine of part performance as embodied in S. 53-A does not apply to such a case.)
1927 Oudh 482 (483) [AIR V 14] : 3 Luck 107 (DB). (The doctrine of part performance is one of equitable estoppel and a third party not being privy to the transaction on which the estoppel rests can take no advantage of it. The sale, even in the absence of registered deed to evidence it may be an effective sale by reason of the estoppel as a transaction between the vendor and the vendee, but there the estoppel ends.)

14. 1948 P C 95 (97) [AIR V 35 C 27] : 75 Ind App 115 : ILR (1949) Mad 141. (Contract for

In the case of a benami transfer the real transferee can claim the benefit of the section.(15)

14. "Any person claiming under him." — A person claims under another person when he is either an assignee from that person or his legal representative.(1) This is the ordinary meaning of the expression "person claiming under." A person claiming under the transferor is obviously a person who claims under a title derived subsequently to the date of the transfer and not anterier to that date.(1a) A reversioner of a Hindu widow is not a person claiming under the widow for the purpose of this section. He is therefore not debarred from enforcing his rights against the transferee from the Hindu widow by virtue of the provisions of this section.(2) In the undermentioned cases,(3-4) however, it was held that a reversioner would be a person "claiming under the widow" where the alienation is for purposes binding on the estate. It has been held in the undermentioned Madras case(5) that a judgment-creditor, who has attached the property of his judgment-debtor in execution of his decree is a person claiming under the judgment-debtor, within the meaning of this section. The High Court of Madhya Bharat has also taken a similar view.(5a) But a contrary view has been taken by the High Court of Orissa(5aa). Following the Orissa view the Bombay High Court has held that an auction purchaser is not a person claiming under the judgment-debtor.(5ab). See also the undermentioned cases.(6)

See also Note 9a.

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sale by mother guardian on behalf of minor son —Contract within competence of guardian and for benefit of minor — Minor is "transferor" within meaning of section —He cannot get back possession of property from transferee who is let into it in pursuance of contract and who has performed his part of contract : A I R 1944 Mad 337, Reversed.)
1951 Nag 403 (405) [AIR V 38 C 126] : ILR (1950) Nag 25.
1950 Orissa 217 (218) [AIR V 37 C 39] : ILR (1950) Cut 107 (DB).

15. 1955 Hyd 101 (102) [AIR V 42 C 25] : ILR (1954) Hyd 822.

Section 53A — Note 14

1. 1966 Madh-Pra 307 (310) [AIR V 53 C 77] (DB).
1956 Pat 308 (311) [AIR V 43 C 79] (DB). (Where the plaintiffs have not acquired any interest in the land from or through the transferor, but rather in spite of him and they remained in possession without title adversely to the lessor until their title became perfect they cannot be said to be persons claiming under the lessor.)]
1943 Cal 344 (345) [AIR V 30] : ILR (1943) 1 Cal 56 (DB).

1a. 1953 S C 503 (505) [AIR V 40 C 124].

2. 1954 Pepsu 133 (135) [A I R V 41 C 55] : ILR (1953) Patiala 508 (DB). (The collaterals of a deceased Hindu who desire to set aside a sale by the widow on her death as not binding on them cannot be regarded as her representatives in-interest.)
1943 Cal 344 (345) [AIR V 30] : ILR (1943) 1 Cal 56 (DB). (Affirming in Letters Patent Appeal AIR 1941 Cal 287.)
1939 Lah 57 (57) [AIR V 26].

3-4. 1960 Orissa 170 (171) [AIR V 47 C 56] ILR (1959) Cut 453. (The reversioners though they do not claim through the widow, are her successors in title of the estate after the widow's death under the Hindu law in the sense that the extent of the estate which would devolve on them would always depend on the exercise by her of her undoubted right of disposal of the estate for a legal necessity.)
1959 Andh Pra 568 (570) [AIR V 46 C 163] (DB).
1954 Bom 153 (155) [AIR V 41 C 41] : ILR (1954) Bom 194 (DB). (AIR 1940 Nag 396, Relied on: AIR 1943 Cal 344. Dissented from.)
1940 Nag 396 (399) [AIR V 27].

5. 1943 Mad 706 (707) [AIR V 30]. (It is only because of his connection with the judgment-debtor that he is able to take attachment proceedings at all. When the whole basis of the claim of the creditor is the fact that the judgment-debtor owed him money and has not been able to pay it and is now bound by a decree, he is claiming "under" the judgment-debtor.)

5a. ('54) Madh-B L Jour 1954 H C R 803 (806).

5aa. 1952 Orissa 143 (149) [A I R V 39] : I L R (1949) 1 Cut 705 (DB). (AIR 1943 Mad 706, Diss. from.)

5ab. 1967 Bom 34 (38, 39) [AIR V 54 C 6] : ILR (1966) Bom 291. (A I R 1943 Mad 706, Diss. from.)

6. 1967 All 405 (411) [AIR V 54 C 120] (DB). (R granting permanent lease of plot to company and subsequently selling this right to X, who in turn selling it to P — Company going in liquidation and liquidator transferring leasehold rights to a creditor-bank, by document which proved invalid — Creditor-bank also goingin

14a. "Any right in respect of the property." — The transferor or a person claiming under him will be debarred from enforcing not only a right to recover 'possession' from the transferee, but 'any' right. Thus a person claiming as an heir under the transferor cannot even obtain a declaration' that the transfer is not binding on him.(1)

15. Proviso to the section. — The proviso saves the rights of transferees without notice of the contract or of the part performance thereof.(1) But it does not enlarge the content of the defence of equity in favour of the prior transferee. If title had passed to the subsequent transferee despite his knowledge of the earlier contract, the prior transferee cannot non-suit the subsequent transferee merely on the ground of the latter's knowledge of the earlier contract. The prior transferee can non-suit the subsequent transferee only if the former has complied with the conditions laid down under the section.(1a) When actually the subsequent transferee has notice of the earlier contract the informality of the manner in which he acquired that notice is not material. So long as it is credible information, which a person of ordinary prudence will take notice of, he will be bound by it.(1b) Explanation II to S. 3 provides that possession of a person is notice of the *title* of the person in possession.

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liquidation and Official Liquidator transferring leasehold rights to defendant — Plaintiff as preemptor filing suit for possession of plot on ground that lease-hold rights in favour of com. pany had come to an end on its dissolution and lease-hold rights reverted to lessor — Held suit was not barred by Section 53A as plaintiff was not the successor-in-interest of the lessor who was ousted by exercising his right of pre-emption or of the lessee company so as to be bound by the act of the liquidator.)

1947 Pat 424 (427) [A I R V 34 C 140] : 25 Pat 764 (DB). (Sale of occupancy holding by some members of joint Hindu family—Sale-deed not registered — Suit by other members of family against vendors and vendees for possession on ground that sale was void — S. 53A is a bar to their suit and they cannot be granted even declaratory relief as they claim under the tenant as his heirs. Case governed by S. 11 of the C. P. Tenancy Act, 1920.)

1946 Mad 310 (311) [AIR V 33 C 162]. (Contract for transfer by father of Hindu joint family — Suit by sons, after father's death, for possession against transferee — Latter cannot rely on this section - Contract cannot be held to be one signed by the father on behalf of the sons, when the contract on the face of it is only one by the father.)

Section 53A — Note 14a

1. 1947 Pat 424 (427) [AIR V 34 C 140] : 25 Pat 764 (DB).

Section 53A — Note 15

1. 1953 S C 503 (505) [AIR V 40 C 124]. (Defendant held, was not a transferee for value who had paid money in good faith.)

1957 Andhra Pradesh 58 (59) [AIR V 44 C 26].

1952 Nag 244 (245) [AIR V 39] : ILR (1949) Nag 959.

† 1938 Nag 377 (383) [A I R V 25] : ILR (1939) Nag 432 (DB).

1937 Pesh 58 (60) [AIR V 24] (DB).

[*See* 1954 Trav-Co 10 (17) [AIR V 41 C 5] (DB). (Property in possession of lessee in furtherance of the terms of an unregistered lease — Lessee performing his part under the contract and such performance acquiesced in by the transferor — Fact that lessee was in possession on strength of lease-deed known to subsequent purchaser even before he entered into agreement for sale —Held, the lessee and his assignee were entitled to resist attempt to recover possession by a person having a subsequent contract for sale in his favour by the transferor.)]

[*See also* 1964 Cal 235 (233) [AIR V 51 C 45] (DB). (The proviso to the section means that the right of the transferee to hold tha transferor to the terms of the trausfer is a personal and equitable right and is available against the transferor and all those who claim under him, except a transferee for consideration without notice.)

1951 Pat 613 (617) [A I R V 38 C 174] (DB). (Subsequent transferee having notice of earlier contract — Held prior transferee can interpose the shield of S. 53A.)]

1a. 1960 Cal 541 (542) [AIR V 47 C 144] : I L R (1961) 1 Cal 30 (DB).

1957 Andh-Pra 58 (59, 60) [AIR V 44 C 26].

[*See also* 1965 Madh-Pra 275 (286) [A I R V 52 C 75] (DB). (Unregistered sale deed by mortgagor in favour of possessory mortgagee —Subsequent sale by mortgaeor in favour of another who had notice of prior sale —Suit for redemption Mortgagee can rely on part performance as against mortgagor and his transferee.)]

1b. 1953 Mad 925 (926) [AIR V 40 C 363].

The *onus* is on the person claiming part performance to show that the transferee had notice of the contract or of the part performance thereof.(2) The Court would expect that those who allege that the subsequent transferee had notice of the prior contract or of possession thereunder, would make it out, not by evidence of any casual conversation but by proof that the mind of the subsequent transferee had in some way been brought to an intelligent apprehension of the nature of the transaction in respect of the property so that a reasonable man, or an ordinary man of business would act upon the information and would regulate his conduct by it.(3) Explanation II to S. 3 provides that possession of a person is notice of the *title* of the person in possession. The High Court of Patna has held that although S. 53A does not confer full title to the property, it is nevertheless an interest sufficient to attract the provisions of Explanation II to S. 3. The subsequent transferee will therefore be deemed to have notice of the title of the prior transferee and consequently it will be the duty of the subsequent transferee to make diligent enquiries regarding the nature of the equitable interest of the prior transferee in possession.(4) It is somewhat difficult to see what cases are contemplated by the Proviso. For the applicability of the Proviso it must bo assumed that the *title* referred to in the said Explanation does not include the right of the transferee under a contract which has been partly performed.

16. Contract to transfer — Proof. — The doctrine of part performance as provided in S. 53.A forms part of the substantive law. As to how far the writing referred to therein is :to be proved :is a question to be decided by procedural law.(1a)

An agreement in writing of a lease of immovable property from year to year, or for any term exceeding one year or reserving a yearly rent must, under S. 17 of the Registration Act, be registered. But a contract for sale of immovable property is not compulsorily registrable. For a valid sale of immovable property of the value of one hundred rupees and upwards, there must under S. 54 of this Act, be a registered sale deed.

Section 49 of the Registration Act now provides(1) that no document required by S. 17 of the Registration Act or by any provision of the Transfer of Property Act, 1882, to be registered shall be received as evidence of any transaction affecting, such property, unless it has been registered : *provided* that an unregistered document affecting immovable property and required either by the Registration Act or by the Transfer of Property Act to be registered may be received as evidence of a *contract* —

(a) in a suit for specific performance under Chapter II of the Specific Relief Act, 1877,(2) or

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2. 1962 Orissa 86 (89) [AIR V 49 C 32]. (Monthly tenant continuing in possession — Character of possession changing from that of a tenant to that of a vendee — Mere continuance cf possession is not sufficient to change the subsequent transferee with knowledge of prior transfer.)

1955 Madh-Bha 93 (95) [AIR V 42 C 29).

1954 Madh-Bha 128 (129) [AIR V 41 C 59].

1952 Orissa 163 (164) [AIR V 39](DB). (Mere continuance in possession by the defendant is not enough to charge the plaintiff (subsequent transferee) with nctice.)

1935 Rang 12 (13) [A I R V 22]. (Under S. 27, Specific Relief Act, it is equally so.).

[But see 1965 Pat 467 (469) [AIR V 52 C 132] : ILR 44 Pat 596 (DB). (A I R 1935 Rang 12, Diss. from.)]

3. (1959) 1 Orissa J D 362 (365 and 367) (DB).

4. 1965 Pat 467 (469) [A I R V 52 C 132] : I L R 44 Pat 596 (DB).

Section 53-A — Note 16

1. The section is not retrospective. see 1932 Mad 734 (736) [AIR V 19] : 56 Mad 169 (DB).

1a. 1958 Pat 133 (138) [AIR V 45 C 55] (DB).

2. ('87) 1887 All W N 15 (15) (DB). (Case before the amendment of S. 49, Registration Act.)
('85) 1885 All W N 329 (330) (DB). (Do.)

(b) as evidence of part performance of a contract for the purposes of S. 53-A of the Transfer of Property Act,(3) or

(c) as evidence of any collateral transaction not required to be effected by registered instrument.(4)

It follows that the contract to transfer may be proved for the purpose of S. 53-A by the production of the written contract ifself where there is one, whether such written contract is required to be registered or not. Where there is no separate contract for transfer, the *unregistered instrument of transfer* is itself admissible in evidence in proof of such contract and part performance.(5) The principle underlying this, and recognised in numerous cases, is that every transfer is preceded by and implies a contract to transfer and that a party to a transfer which cannot take effect as a transfer for want of registration can fall upon the contract for sale implied in the instrument of transfer. Where the original document though in possession of the transferor is not produced by him in spite of a notice to produce it, secondary evidence of the same can be adduced by the transferee in support of his defence of part performance.(5a) See Note 23 on S. 54.

It has been held that a document which must be regarded as unregistered on account of fraud on registration committed by the parties cannot be looked at for purposes of giving effect to a plea under S. 53A.(6)

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3. ILR (1965) Guj 490 (494).
1965 Madh Pra 275 (280) [AIR V 52 C 75] (DB).
1964 Cal 235 (237) [AIR V 51 C 45] (DB). (Agreement to lease for more than 5 years.)
1963 All W R (HC) 734 (739). (1958 S C 199 [AIR V 45], Disting; 1961 Pat 79 [AIR V 48, Dissented from.)
1963 Him Pra 49 (51) [AIR V 50 C 17].
1960 Cal 609 (618) [AIR V 47 C 167] (DB). (Unregistered:and unilateral lease for ten years.)
1955 Madh Bha 49 (53) [AIR V 42 C 14] : I L R (1954) Madh Bha 237 (DB).
1953 Cal 349 (351) [AIR V 40 C 130]. (Unregistered lease for five years.)
1953 Hyd 97 (97) [AIR V 40 C 37] : ILR (1953) Hyd 110.
1951 Pat 277(283)[AIR V 31 C 56]:29 Pat 628 (DB).
1951 Nag 286 (287) [AIR V 38 C 81] : ILR (1950) Nag 799 (DB).
1950 Cal 23 (28) [AIR V 37 C 6] : ILR (1950) 2 Cal 443 (DB). (Agreement to lease for five years.)
1938 Lah 721 (723) [AIR V 25] (DB).
('33) 17 R D 201 (202).
[*See also* 1961 Pat 79 (89) [AIR V 48 C 18]. (Compromise—Registration—Compromise itself creating title requires registration— Defect of non-registration cannot be cured by rule of equitable estoppel or part performance.)
('55) 8 Sau L R 378 (381).]

4. 1963 Him Pra 49 (51) [AIR V 50 C 17].
(1957) 1 Andh W R 366 (368).
1936 Lah 366 (366) [AIR V 23]. (Where a document purporting to be a sale deed of a house should have been registered but is not registered such document, if the person is put in possession of the property, can be admitted into evidence for a collateral purpose.)

5. 1950 S C 1 (5) [AIR V 37 C 1] : 1950 SCR 75. (An agreement of lease creating a present demise.)
1962 Cal 502 (503) [AIR V 49 C 108]. (Patta for 25 years executed by *A* in favour of *B* on monthly rental — Patta not signed by *B*—*B* going into possession and effecting improvement in terms of patta—Patta can be received in evidence as proof of the contract.)
ILR (1960) 10 Raj 948 (950) (DB).
1957 Bom 138 (140) [AIR V 44 C 46] : ILR (1958) Bom 556 (DB). (AIR 1943 Bom 431, Overruled.)
1956 Cal 350 (352) [AIR V 43 C 108] (DB).
Madh B L J 1954 H C R 803 (805).
1952 Orissa 143 (148) [AIR V 39] : ILR (1949) 1 Cut 705 (DB).
1952 Assam 28 (30) [AIR V 39] (DB). (Usufructuary mortgage—Unregistered endorsement on mortgage by mortgagor relinquishing his interest in mortgaged land in favour of mortgagee for a sum below Rs. 100 — Registration — Mortgagee continuing in possession in part performance of contract can claim benefit of S. 53-A to resist suit for redemption.)
1942 Oudh 231 (236) [AIR V 29] (DB). (A lease deed which does not comply with the provisions of S. 107 is admissible as evidence of the agreement contained therein and for determining the rights and liabilities of the parties.)
1933 Bom 381 (385) [AIR V 20]. (Unregistered lease is admissible also to prove that plaintiff can enforce his right to claim damages for breach of agreement under one of its terms.)
[*See also* 1955 Vind Pra 15 (16) [AIR V 42 C 7]. (Under the existing law governing procedure in the State of Vindhya Pradesh there is no provision which makes the unregistered document inadmissible in evidenee for purposes of proving part performance).]

5a. 1950 SC 1(4,5) [AIR V 37 C 1]:1950 SCR 75.
1956 Mad 693 (694) [AIR V 43 C 226].

6. 1945 Oudh 120 (121) [AIR V 32] (DB).

Even in a case where the Court comes to the conclusion that there has been part performance of a contract of sale, it cannot use that finding as a proof of the factum of sale in favour of the transferee in possession.(7)

16a. Fraud on registration—Effect.—See Note 16.

17. This section and section 27A of the Specific Relief Act (1877), compared.—Section 27A of the Specific Relief Act, 1877, ran as follows :

"Subject to the provisions of this Chapter, where a contract to lease immovable property is made in writing signed by the parties thereto or on their behalf, either party may, notwithstanding that the contract, though required to be registered, has not been registered, sue the other for specific performance of the contract if,

(a) where specific performance is claimed by the lessor, he has delivered possession of the property to the lessee in part performance of the contract; and

(b) where specific performance is claimed by the lessee, he has, in part performance of the contract, taken possession of the property or, being already in possession, continues in possession, in part performance of the contract, and has done some act in furtherance of the contract :

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof.

This section applies to contracts to lease executed after the first day of April, 1930."

The above section applied only to *contracts to lease immovable property* and enabled *either party* to the contract to *sue for specific performance* of the contract if it had been partly performed.(1) Section 27A of the Specific Relief Act, 1877 in fact created a *ground of claim*, whereas S. 53A of this Act creates merely a right of *defence*.(2) But S. 27A of the Specific Relief Act did not prevent a lessee from claiming the benefit of S. 53A if the case fell within that section. Thus the defence under S. 53A is available to a person who has an agreement of lease in his favour, though no formal lease has been executed and registered.(2a)

Section 27-A of the Specific Relief Act of 1877 has now been omitted in the Specific Relief Act of 1963 on the recommendations of the Law Commission. The Law Commission in their Report on the Specific Relief Act (9th Report) observe as follows :—"In our report on the Registration Act, we have recommended the exclusion of *agreement to lease* from the definition of lease in section 2 and the omission of clause (c) from section 49. The result of those changes will be that an agreement to lease, even if in writing, will not require registration: and, even an unregistered deed of lease will be admissible in evidence to prove an agreement to lease.

In the result, a person will be entitled to enforce specific performance of an agreement to lease even if it has to be gathered from an unregistered lease deed. Hence, section 27-A of the Specific Relief Act will be unnecessary; whether it is

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7. 1954 Pepsu 133 (135) [AIR V 41 C 55] : ILR (1953) Patiala 508 (DB).

Section 53-A — Note 17

1. 1952 Orissa 143 (148) [AIR V 39] : I L R (1949) 1 Cut 705 (DB).
1937 Nag 74 (76) [AIR V 24] : ILR (1936) Nag 115 (DB). (Lessor and the lessee may enforce specifically a contract to grant a lease by compelling registration, where there is part performance.)

2. 1950 S C 1 (4) [AIR V 37 C 1].
1960 Andh Pra 83 (89) [AIR V 47 C 29] : I L R (1959) Andh Pra 1107 (FB).
1952 Orissa 116 (117) [AIR V 39] (DB).
1952 Nag 115 (117) [AIR V 39] : ILR (1952) Nag 604 (DB).
1937 Nag 74 (77) [AIR V 24] : ILR (1936) Nag 115 (DB).

2a. 1950 SC 1 (4) [AIR V 37 C 1]: 1950 S C R 75.
1953 Hyd 97 (97) [AIR V 40 C 37] : I L R (1953) Hyd 110. (AIR 1950 S C 1, Foll.)

interpreted to be applicable to an unregistered agreement for lease or unregistered deed of lease.

We therefore recommend that section 27-A be omitted."

18. Law in States to which this Act does not apply. — The principles of this section which is based on equity, are applicable even in the States to which this Act does not apply(1). Even before this section was introduced into this Act, the English doctrine of part performance had been applied in those States as being in conformity with justice, equity and good conscience.(2) It was, however, observed by Beckett, J., of the Lahore High Court in the undermentioned Full Bench case(3) that unless the section can be taken as embodying some general rule of equity which would prevail in India, apart from the provisions of the Act, it can have no force in the erstwhile State of Punjab, and that in any case stress cannot be laid upon the wording of the section but that the rule will have to be applied on general grounds. In a later case(4) it has been held by the same High Court that the section cannot be taken as embodying any general rule of equity prevailing throughout India and hence the principle underlying this section does not apply in the Punjab. In a Full Bench decision(5) of five Judges of the same High Court it has been held, overruling the above mentioned two decisions, that this section being based on the equitable principles which were previously applicable in the whole of India including the Punjab, the principles embodied therein are applicable to the Punjab even after the enactment of that section and that therefore the position in the Punjab in respect of defence of part performance is exactly the same as in the States where the Transfer of Property Act is in force.

The Judicial Commissioner's Court at Kutch has held that principles of S. 53-A would not apply in the erstwhile State of Kutch since the Kutch law prohibited the use of an unregistered document by the defendant to defend his possession against the vendor and had expressly rendered such document inoperative in a Court in Kutch.(6)

Section 53-A — Note 18

1. 1957 Manipur 32 (33) [AIR V 44 C 12]. (Though provisions of T. P. Act have not been extended to Manipur State, the principles of that Act including those of part performance were followed and given effect to in that State ever since 1947.)

1955 Vind Pra 15 (16) [AIR V 42 C 7]. (The defence of part performance was open in State of Vindhya Pradesh even before the application of Transfer of Property Act, exactly in the same manner as it is open now.)

('55) 8 Sau L R 1 (2).

1954 Madh Bha 128 (129) [AIR V 41 C 59].

1939 Lah 57 (57, 58) [AIR V 26].

† 1937 Pesh 58 (60) AIR V 24] (DB).

1936 Lah 5 (5) [AIR V 23].

1935 Lah 955 (955) [AIR V 22] (DB).

2. 1936 Lah 366 (366) [AIR V 23]. (AIR 1934 Lah 751, Followed.)

1934 Lah 751 (752) [AIR V 21] (DB).

1929 Lah 721 (728, 729) [AIR V 16] (DB).

† ('28) 10 Ind Cas 193 (194) (Lah).

('21) 63 Ind Cas 22 (23) (DB) (Lah).

[*See also* 1934 Pesh 17 (18) [AIR V 21]. (Doctrine of part performance applies to N. W. F. Province but not as to override statutory provision of S. 49 of the Indian Registration Act.)

1927 Lah 90 (91) [AIR V 14]. (An unregistered deed of exchange affecting immovable property of more than Rs. 100 cannot be referred to for purposes of title by the application of the equitable doctrine of part performance where the circumstances of the parties have not altered and there is not a series of acts on the part of the parties extending over a considerable time such as would justify the Courts in basing their decree not upon the contract but upon those acts—The law of registration can be ignored only when the equities on the other side are very clear.)]

3. 1941 Lah 407 (410) [AIR V 28] : ILR (1942) Lah 79 (FB).

4. 1944 Lah 179 (180) [AIR V 31] (DB).

5 1947 Lah 1 (5, 6) [AIR V 34 C 1] : I L R (1947) Lah 449 (FB). (47 P L R 128, Reversed. Per Full Bench, Cornelius J., Contra—AIR 1941 Lah 407 (FB) and AIR 1944 Lah 179, Overruled.)

6. 1950 Kutch 64 (65) [AIR V 37 C 53]. (AIR 1931 PC 79 and AIR 1934 P C 235, Rel. on.)

So also in the erstwhile State of Patiala where the Transfer of Property (Amendment) Supplementary Act, 1929, did not apply, the principle of part performance embodied in S. 53-A of the Transfer of Property Act had not been applied.(7).

19. Limitation. — Under the well-known principle that the law of limitation does not apply to a defence, a defence raised under this section is not subject to any rule of limitation.(1)

20. Plea of part performance. — Plea of part performance involving questions of fact cannot be raised for the first time in second appeal.(1) If, however, the defendant has stated in his written statement, all the facts on which he bases his defence under S. 53-A without deducing his legal position properly from the facts, his plea cannot be rejected merely because he has not properly appreciated the law bearing on such facts.(2)

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7. 1950 Pepsu 34 (35, 36) [AIR V 37 C 12] (DB). (AIR 1931 P C 79, Rel. on.)

Section 53-A — Note 19

1. 1967 Bom 34 (35) [AIR V 54 C 6] : I L R (1966) Bom 291.
(1967) 2 Andh W R 2 (5).
1957 Bom 138 (141) [AIR V 44 C 46] : I L R (1958) Bom 556 (DB).
1955 Hyd 101 (104) [AIR V 43 C 25] : I L R (1954) Hyd 822.
1951 Nag 403 (405) [AIR V 38 C 126]: ILR (1950) Nag 25.
1949 Assam 8 (10) [AIR V 36 C 7] : ILR (1949) 1 Assam 29 (DB). (Where this section applies, it is immaterial that the defendant could not have sued for specific performance of the contract for sale, on account of the expiry of limitation.)
1939 Cal 163 (165, 166) [AIR V 26] : ILR (1938) 2 Cal 328 (DB). (Bengal Tenancy Act does not exclude a defence provided for under S. 53A of T. P. Act.)
[*See also* 1952 Nag 244 (245) [AIR V 39] : I L R (1949) Nag 959. (Whether a contract is specifically enforceable or not is not a matter which must be taken into consideration for granting relief under S. 53A.)]

Section 53-A — Note 20

1. 1966 Ker 96 (97) [AIR V 53 C 22] (FB).
1965 Punj 117 (118) [AIR V 52 C 38].
1964 Pat 288 (289) [AIR V 51 C 78] (DB).
1964 All 300 (301) [AIR V 51 C 85].
('54) 20 Cut L Tim 532 (535).
1951 Pat 502 (503) [AIR V 38 C 139] (DB).
30 P L T 388 (392) (DB).
1941 Cal 33 (37) [AIR V 28].
[*See also* 1955 Madh Bha 93 (95) [AIR V 42 C 29]. (Defence of part performance involving questions of fact—Defendant must raise plea in written statement — Plea not allowed in revision.)
2. (1967) 2 Andh W R 2 (5).
1966 Mysore 86 (89) [AIR V 53 C 25] : I L R (1963) Mys 1109. (Contract to sell—Payment of earnest money and vendee put in possession — Contract falling through for non-payment of price—Suit for possession by vendor — Concurrent finding that defendant was always willing to perform his part of contract — Finding being one of fact cannot be challenged in second appeal—Absence of specific plea of part performance in written statement — S. 53A can be availed of in second appeal.)
1957 Manipur 32 (33) [AIR V 44 C 12]. (Facts constituting the defence of part performance pleaded—Absence of specific plea of the benefit of the doctrine as embodied in S. 53-A, T. P. Act—Plea entertained.)
1955 Madh Bha 49 (52) [AIR V 42 C 14] : I L R (1954) Madh Bha 237 (DB).
[*See also* 1959 Mys 173 (175) [AIR V 46 C 73] : I L R (1957) Mys 108. (Plea under S. 53-A not raised in pleading—Plea, however, entertained by the trial and lower appellate Courts — Plea cannot be denied in second appeal on the technical ground as to absence of such plea in pleadings.)]

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A. I. R. Commentaries Judicially Appreciated

A I.R. 1948 Patna 460 (462) (Pr. 9) [V 35 C 161] (D.B.)—Per *Meredith J.*—"I will make two quotations from Chitaley and Annaji Rao's annotated edition of the Civil Procedure Code, 4th Edn. Vol. III, because those learned commentators have, in my opinion, correctly summed up the position in language which cannot be bettered."

CONSTITUTION OF INDIA.

1961 Manipur 1 (4) (Pr. 11) [A.I.R. V 48 C 1]—*Tirumalpad J. C.*—"What is prohibited (in Art. 23 (1)) is begar and other similar forms of forced labour. The A. I. R. Commentaries on the Constitution of India at page 635 define 'begar' as a system under which persons are pressed to carry burdens for individuals or public or to perform other forms of menial service under compulsion".

1961 M.P. 216 (219) (Pr. 11) [A.I.R. V 48 C 70]—*Shrivastava J.*—"In this connection, we may refer to the following passage from the Constitution of India by Chitaley (Vol. 3), Art. 254, Note 17 (d), Pt. 5 : . . . . . ."

1961 All. 341 (345) (Pr. 33) [(S) A.I.R. V 43 C 126] (DB).—*Desai J.*—"Shri Jagdish Sahal could not cite any authority in support of his contention that the right given to the Court to draw an adverse inference is equal to compelling the accused to be a witness against himself. We notice that Chitaley in his Commentary on Constitution, Vol. I, pp. 497-498, does not see any conflict between the provisions of Art. 20 (3) and those of S. 342, Cr. P. C."

1956 J. & K. 1 (10) (Pr. 34) [(S) A.I.R. V 43 C 1] (F.B.)—*Kilam J.*—"The learned author Chitaley in his luminous commentary on the Constitution has, after discussing almost the whole case law on the subject, enunciated some principles which I might give more or less in his own language. According to the learned author . . . ." (Points from Note 8 (g) under Art. 21, p. 533 quoted.)

CIVIL PROCEDURE CODE, 1908.

1953 S.C. 23 (27) [A.I.R. V 40 C 7]—[Touching the revisional jurisdiction of the High Court set out in S. 115, Civil P. C.] "A large number of cases have been collected in Edn. 4 of Chitaley & Rao's Code of Civil Procedure (Vol. I) which only serve to show that the High Courts have not always appreciated the limits of the jurisdiction conferred by this section."

P. L. D. 1965 (W. P.) Lahore 590 (594, 595) (DB). — *Sajjad Ahmad J.*—"There has been a conflict of judicial opinion on the question of the applicability of this section to decrees in appeals under the Letters Patent. The High Courts of Bombay, Punjab, Madhya Pradesh and Madras have held that the section applies. The High Court of Patna took a contrary view (*See* Chitaley's Commentary on S. 114 of the Civil P. C.—headnote 1, at page 1507, Vol. II, 1963, Edition.) In a recent Full Bench decision reported in *Jwala Prasad* v. *Jwala Bank Ltd.*, A. I. R. 1961 All. 381, the Allahabad High Court has held that . . . . and has overruled an earlier decision to the contrary given by another Full Bench of the same Court reported in *Mst. Abhilakhi* v. *Sada Nand*, A. I. R. 1931 All. 244."

1965 All. 527 (531) (Pr. 28) [A. I. R. V 52 C 148] — *Oak J.* — "Mr. Brij Lal Gupta pointed out that the Court dealing with the matter in April 1947 was a Munsif. The present suit was tried by a Civil Judge. The valuation of the suit was Rs. 35,000. The Munsif had no jurisdiction to try the present suit. Under S. 11, C. P. C., the Court trying the former suit should have been competent to try the subsequent suit itself. (See Chitaley's Commentary on the Code of Civil Procedure Volume I, Page 415). (Now see 1963 (7th Edn.) pp. 379 380)."

1965 Punj. 494 (496) [A.I.R. V 52 C 157 Pr. 7]—*Shamsher Bahadur J.*—"The words 'for any other substantial cause' (in O. 41, R. 27 (b)) must be read with the word 'requires' in the beginning of the sentence and need not be construed in the narrow sense suggested by the doctrine of ejusdem generis . . . . . Reference may be made to Chitaley's Commentary on the Code of Civil Procedure, Vol. IV, at page 4319".

1965 Punj. 166 (168) (Pr. 7) [A. I. R. V 52 C 55]— *Shamsher Bahadur J.*— "Mr. S. L. Puri has further contended that O. 21, R. 15 is not concerned with disputes inter-se the decree-holders and has relied on a passage in Chitaley's Code of Civil Procedure Vol. III, 7th edition, at page 2820. It is thus stated that . . . . . ." (Contention accepted.)

1965 Kerala 104 (105) (Pr. 3) — *S. Velu Pillai J.* — "The rights inter se of rival purchasers in sales in execution of decrees on mortgages have been the subject of consideration in several decided cases. The result of [illegible] has been summarised as follows in A. I. R Commentaries on Civil Procedure Code, Vol. 3, 1957 (6th) Edn., pp. 3791 and 3792. (Now see 1963 (7th Edn.), pp. 3807, 3808, O. 34, R. 1, N. 39, Pts. 26 to 34) . . . . . ."

('64) I. L. R. (1964) 1 Ker. 320 (322) — *Madhavan Nair J.* — "The A. I. R. Commentaries on the Code of Civil Procedure in Note No. 4 to O. 34, R. 7 put the position succinctly thus . . . . . ."

1963 Rajasthan 4 (5) (Pr. 3) [A.I.R. V 50 C 3]—*Jagat Narayan J.*—"There is conflict of opinion on the question whether an appeal lies against an order staying or refusing to stay an execution proceeding. The different views have been classified as follows by Chitaley in Note 44 to S. 47, Code of Civil Procedure :"

COURT-FEES ACT, 1870 & SUITS VALUATION ACT, 1887.

1965 Punj. 1 (11) (Pr. 25) [A. I. R. V 52 C 1] (FB) — *P. C. Pandit J.* — "With regard to this definition (of 'consequential relief'), Chitaley in his Commentaries on the 'Court-fees Act and the Suits Valuation Act (Second Edition)', on page 135 has observed thus—".

1956 Madras 593 (595) (Pr. 8) [A.I.R. V 43 C 187]—*Ramaswami J.*—"The permutations and combinations which arise in regard to the procedure to be followed has been comprehensively and accurately summarised in the well-known A. I. R. Commentaries on the Court-Fees Act and Suits Valuation Act (2nd Edn.) at page 871 as follows:—" [Quoted and relied upon].

CRIMINAL PROCEDURE CODE, 1898.

('62) 1962 (1) Cr. L. J. 96 (98) (Pr. 13)—*T. N. R. Tirumalpad J. C.*—"This is the view which I find has been accepted as correct in the A. I. R. Commentaries to the Code of Criminal Procedure at Pages 830 and 831. It is seen from the said Commentaries that there is a conflict of decisions on the question . . . . . The Commentators are of the opinion that the view expressed in the Calcutta Case is not the correct view. I certainly agree with the A. I. R. Commentaries on this point."

1958 All. 439 (442) (Pr. 14) [A I.R. V 45 C 109] (DB) *James J.*—"I would also refer to the opinion of the learned authors of the A.I.R. Commentary on the Code of Criminal Procedure, Vol. IV, 5th Edn., appended under S. 540 : . . . ."

LIMITATION ACT, 1908.

1963 Punj. 457 (459) (Pr. 7) [A. I R. V 50 C 127] - *Grover J.* — "As stated in Chitaley's Limitation Act, (3rd Edition) Volume 1, Page 524, the words 'Stayed by an injunction or order' have reference to an order of a Court and not to a disability to sue or to apply arising from other causes."

1961 Pat. 134 (137) (Pr. 18) [A.I.R. V 48 C 36] *Raj Kishore Prasad J.*— "The question under consideration has been thoroughly and clearly dealt with in A.I.R. Commentaries on the Indian Limitation Act, 3rd Edition, Vol. I, Note 11, page 595, Note 18, pages 601-604 and Note 32, page 638."

1960 Kerala 306 (308) (Pr. 17) (A.I.R. V 47 C 144]—*M. S. Menon and T. K. Joseph JJ.* — "As pointed out by Chitaley : 'Where no time is fixed for delivery, if the correspondence between the parties shows that the matter was being enquired into and that there was no refusal to deliver up to well within a year of the suit, this article (Art. 31) cannot be pleaded as a bar . . . . . .' (Limitation Act, Vol. 2, Page 1137)."

Advocate High Court Srinagar

1959 Mad. 26 (27, 28) (Pr. 10) [A. I. R. V 46 C 6]—*Ramaswami J.*—"This conflict of opinion has been settled by a Bench decision of this Court in *Kamppanna Gounder* v. *Ponnuthayee*, 1955-2 Mad. L. J. (N. R. C.) 62=(A. I. R. 1956 Mad. 198). . . . . In this connection it is interesting to note that in the A. I. R. Commentaries on the Limitation Act, the view expressed in this Bench decision is submitted to be the correct view (Vol. I page 568)."

REGISTRATION ACT, 1908.

1960 Madh. Pra. 3 (Pr. 8) [A. I. R. V 47 C 2] — *Dixit J.*—"The principle laid down in I. L. R. 4 Bom. 126 has been followed in many cases which have been noted in Chitaley's Registration Act (Second Edition) at page 367. . . . . ."

1960 Mad. 244 (Pr 9) [A I.R. V 47 C 77] — *Ramaswami J.*—"It is interesting in this connection to note that the A. I. R. Commentaries on the Registration Act (Second Edition) at pages 526 to 530, after an elaborate discussion of the entire case-law and the principles of S. 77 of the Registration Act, mention at p. 530 that the view expressed by Abdur Rahman J. is correct."

STAMP ACT, 1899.

1967 Him. Pra. 29 (31) (Pr. 11) [A. I. R. V 54 C 9]—*Om Prakash J. C.*—"From the language, used in the document, it is capable of falling within the definition of a bond, as defined in sub-s. (5) (b) of S. 2, Stamp Act, and also within the definition of a promissory note, under sub-s. (22) of that section. The maxim being, specialia generalibus derogant an instrument which satisfies the definition under sub-s. (5) (b) must be held to be taken out of the more general definition in sub-s. (22), vide A. I. R. Commentaries on the Stamp Act, p. 70."

TRANSFER OF PROPERTY ACT, 1882.

1964 Punj. 210 (211) (Pr. 4) [A.I.R. V 51 C 52]—*S. S. Dulat Actg. C. J. and D. K. Mahajan J.* — "It is significant that the provisions of this section (S. 111, T. P. Act) have never been applied as a rule of equity, justice or good conscience by any of the High Courts in the territories to which this provision is not made applicable under S. 1 of the T. P. Act, where as a number of cases will be found at page 173, Note 4, of Chitaley's Transfer of Property Act, Vol. I, where principles underlying the provisions of the Transfer of Property Act have been so applied . . . . . ."

1961 Mad. 28 (30) (Pr 7) [A. I. R. V 48 C 7] — *Ramaswami J.* — "In this connection the learned District Munsif has pertinently pointed out the implications of the decision in *Gopal Chandra Das* v. *Harendra Nath Datta*, 63 Ind. Cas. 483 (Cal.) . . . . This decision has been cited with approval in the well-known commentaries on the Transfer of Property Act by Chitaley and Annaji Rao, Third Edition (1950) page 1861".

1957 Jammu and Kashmir 16 (Pr. 2) [A.I.R. V 44 C 13]— *Shahmiri J.*—"In this connection reference may also be invited to Note 9 under S. 114 of Chitaley's Transfer of Property Act, 3rd Edition at page 1898 which read as follows :— . . . . ."

A. I. R. MANUAL (2ND EDN.) JUDICIALLY APPRECIATED

P. N. RAMASWAMI J. : — "A person who is in occupation of grazing land is its occupier within the meaning of this section, (S. 20 of the Cattle Trespass Act, 1871) and he is entitled to seize cattle within the meaning of this section, and he is entitled to seize cattle trespassing on such land and doing damage thereon. For an exhaustive citation of the relevant cases see the most welcome 2nd (1960) Edn. of the A. I. R. Manual Vol. I referring to A. I. R. 1947 Pat. 172 = 47 Cri. L. J. 986 ; A. I. R. 1943 Sind 152 = 44 Cri. L. J. 761 ; A. I. R. 1916 Lah. 281=17 Cri. L. J. 63 ; A. I. R. 1919 Cal. 93=20 Cri. L. J. 398."—*A. I. R. 1960 Mad. 331 (332)=1960 Cri. L. J. 932 (933)*

—*See also A. I. R. 1960 Mad. 443 (446) = 1960 Cri. L. J. 1340 (1344)*

[Vol. 4 of the A. I. R. Manual (2nd Edn.) referred to.]